

***Knowing Me, Knowing You:***  
**Drafting Agreements and Consent Orders that**  
**Provide for Review or Variation of Spousal Support**

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Most family law practitioners are familiar with that point in a file when *almost* everything has been settled and yet the things that have not been settled threaten the delicate balance that has been created. In files that involve ongoing spousal support, the circumstances in which spousal support will be adjusted or even terminated are often one of the things that are most difficult to resolve. Frequently, the challenges in resolving this issue are smoothed over by using ambiguous and vague language which gives little direction about what the parties actually intended to happen with respect to spousal support in the future.

For these reasons, spousal support often inhabits a kind of limbo within separation agreements and consent orders, unlike provisions regarding parenting or child support, which are clearly subject to variation in certain circumstances, or provisions regarding property division, which are subject to being varied or set aside only in very limited circumstances. And too often, the limbo in which spousal support is left becomes a kind of purgatory, where the parties end up having to confront the issues that were left unresolved at the time that they entered into their original settlement. For example, the agreement or order may not specify the basis on which the recipient is entitled to support, the purpose of a review of spousal support or whether the payor's retirement was intended to be a change in circumstances that would trigger a variation of spousal support.

In this paper, I will start by setting out the current law with respect to review or variation of agreements and consent orders regarding spousal support. In particular, I will discuss:

- (a) separation agreements that provide for review and/or variation of spousal support,
- (b) consent orders that provide for review and/or variation of spousal support, and
- (c) consent orders regarding spousal support where there is an underlying agreement that provides for variation of spousal support.

I will then attempt to set out a practical framework for drafting settlements that more clearly set out the basis for future adjustments to spousal support. If we are able to resist the urge to smooth over the challenges that may arise on a future adjustment to spousal support and clarify the parties' intentions with respect to that future adjustment, I believe that agreements and consent orders that are based on "*Knowing Me, Knowing You*"<sup>1</sup> will prevent the future review or variation of spousal support from becoming a "*Waterloo*"<sup>2</sup> for the parties involved.

This paper will not focus on orders made after an application or trial that provide for review or variation because they are prepared based on the court's reasons for judgment and the parties and/or the court will have the benefit of those Reasons for Judgment on a future application for review or variation. However, some of the suggestions regarding the framework for drafting settlements may be of assistance when considering submissions to the Court regarding a future review or variation.

### **"*The Name of the Game*"<sup>3</sup>: The Law regarding Review and Variation**

For the purposes of this paper, I will primarily consider review or variation of spousal support pursuant to the *Divorce Act*,<sup>4</sup> rather than provincial legislation. I will also focus on provisions regarding review or variation that are reached by agreement, whether through negotiation, mediation or a collaborative family law process. Typically, these kind of provisions form part of an initial agreement or consent order dealing with spousal support, but they may also be included in an agreement or consent order that arises from a review or variation provided for by an earlier agreement or order.

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<sup>1</sup> ABBA, "Knowing Me, Knowing You." By Benny Andersson and Björn Ulvaeus. *Arrival*, Polar Records, Vinyl recording.

<sup>2</sup> ABBA, "Waterloo." By Benny Andersson, Björn Ulvaeus and Stig Anderson. *Waterloo*, Polar Music, Vinyl recording.

<sup>3</sup> ABBA, "The Name of the Game." By Benny Andersson, Björn Ulvaeus and Stig Anderson. *ABBA: The Album*, Polar Music, Vinyl recording.

<sup>4</sup> *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)

The first issue to be determined in drafting provisions regarding review or variation is whether the settlement should provide for review, variation or both. In order for counsel to determine which option is most appropriate for their client's particular circumstances, it is important to consider how provisions for review or variation may be analyzed on a future application to change spousal support.

### Orders and Agreements that Provide for Review

Although the terms are sometimes intermixed (for example, "Either party may apply for a review of spousal support on a material change in circumstances), review and variation are separate and distinct concepts. The right to a review of a support order is not set out in the *Divorce Act* and must be created as a term or condition of an agreement or court order. In *Leskun v. Leskun*, a 2006 decision of the Supreme Court of Canada, Justice Binnie, writing for the Court, described a review provision as "a condition [attached to a s. 15.2 order] pursuant to s. 15.2(3) of the *Divorce Act*, that entitles one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order."<sup>5</sup>

*Leskun* also provides that:

- A review order "will properly occur where the judge does not think it appropriate that at the subsequent hearing one or other of the parties need show that a change in the condition, means, needs or other circumstances of either former spouse has occurred, as required by s. 17(4.1) of the *Divorce Act*."<sup>6</sup>
- "Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances.... Otherwise...the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there has been no material change in circumstances."<sup>7</sup>

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<sup>5</sup> *Leskun v. Leskun*, 2006 SCC 25 at para. 36.

<sup>6</sup> *Leskun* at para. 36.

<sup>7</sup> *Leskun* at para. 37.

- “[A] trial court should resist making temporary orders (or orders subject to “review”) under s. 15.2. ...Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change in circumstances.”<sup>8</sup>
- “If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order.”<sup>9</sup>

The principles in *Leskun*, although articulated in the context of an order made by a trial court, should apply equally to reviews provided for as the term of an agreement or consent order. Where the review of spousal support is provided by an agreement alone, and there is a subsequent application to court for review of support, then once the court has determined that the conditions precedent to a review have been satisfied, “the next step [is] for the court to apply s. 15.2 of the [*Divorce*] Act, taking into account the Agreement as one of the relevant considerations under that provision.”<sup>10</sup>

In British Columbia, the *Family Law Act*,<sup>11</sup> which came into force in March 2013, specifically provides for the review of spousal support as follows:

- 168 (1)** An agreement or order respecting spousal support may provide for a review of spousal support, and for this purpose may provide for
- (a) the review to occur on or after a specified date, after a specified period of time or after a specified event has occurred,
  - (b) the type of family dispute resolution by which the review will take place,
  - (c) the grounds on which a review will be permitted, and
  - (d) the matters to be considered for the purposes of a review.

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<sup>8</sup> *Leskun* at para. 39

<sup>9</sup> *Leskun* at para. 39.

<sup>10</sup> *McEachern v. McEachern*, 2006 BCCA 508 at para. 32.

<sup>11</sup> *Family Law Act*, S.B.C. 2011, c. 25.

- (2) On review, a court, on application, may do one or more of the following:
  - (a) confirm an agreement or order respecting spousal support;
  - (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
  - (c) make an order under section 165 [*orders respecting spousal support*].
  
- (3) In making an order under this section, the court is not required to consider any of the matters referred to in sections 164 [*setting aside agreements respecting spousal support*] and 167 (2) [*changing, suspending or terminating orders respecting spousal support*].

To date, I believe that this type of provision is unique among provincial legislation but it may provide a helpful framework for review provisions even where the *Family Law Act* is not applicable.

#### Orders and Agreements that Provide for Variation

Unlike review provisions, variation is specifically provided for under the *Divorce Act*, and the right to apply for a variation of a support order exists independent of the provisions of an order or agreement. Section 17(4.1) of the *Divorce Act* provides that:

- (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

The nature of the change in circumstances referred to in section 17(4.1) was first described in *Willick v. Willick* as follows:

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.<sup>12</sup>

*Willick* was decided in the context of an application to vary a child support order but the same reasoning was subsequently applied to an application to vary a spousal support in *L.G. v. G.B.*<sup>13</sup>

*L.M.P. v. L.S.*, a 2011 decision of the Supreme Court of Canada, established that an application to vary an order that incorporates an agreement is subject to the same threshold question as an application to vary an order made after application or trial, that is, “Has a material change in circumstances occurred since the making of the order?”<sup>14</sup> The Court went on to say that, “[the] examination of the change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement as for one that does.”<sup>15</sup> This was a departure from previous authorities, which had analyzed consent orders differently from orders made after application or trial.<sup>16</sup> With respect to the analysis to be followed where an order incorporates an agreement, *L.M.P.* provides that

- “Where...the agreement is embodied in the judgment of the court, it is necessary to consider what additional effect is to be accorded to this fact.”<sup>17</sup>
- “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.”<sup>18</sup>

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<sup>12</sup> *Willick v. Willick*, [1994] 3 S.C.R. 670, [1994] S.C.J. No. 94 at para. 49.

<sup>13</sup> *L.G. v. G.B.*, [1995] 3 S.C.R. 367, [1994] S.C.J. No. 114.

<sup>14</sup> *L.M.P. v. L.S.*, 2011 SCC 64 at para. 36.

<sup>15</sup> *L.M.P.* at para. 46.

<sup>16</sup> For example, see *Turpin v. Clark*, 2009 BCCA 530.

<sup>17</sup> *L.M.P.* at para 37, citing Sopinka J. in *Willick*.

<sup>18</sup> *L.M.P.* at para. 38.



- “Parties may either contemplate that a specific type of change will or will not give rise to variation. ...Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order.”
- “The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances.”<sup>19</sup>
- “Alternatively, an agreement incorporated into an order may include a general provision stating it is subject to variation upon a material change in circumstances... In such a case, the agreement incorporated into the s. 15.2 order does not expressly give the court any additional information as to whether a particular change would have resulted in different terms if known at the time of that order. The presence of such a provision will require a court to examine the terms of the s. 15.2 order and the circumstances of the parties at the time that order was entered into to determine what amounts to a material change.”<sup>20</sup>
- “If the s. 17 threshold for variation of a spousal support order has been met, a court must determine what variation of the order needs to be made in light of the change in circumstances. The court then takes into account the material change, and should limit itself to making the variation which is appropriate in light of the change.”<sup>21</sup>

Based on the analysis set out in *L.M.P.*<sup>22</sup>, parties who enter into a consent order regarding spousal support that provides for variation will be required to meet a higher threshold on an application to change spousal support than those who have entered into an agreement alone. Given this, counsel should give careful consideration to the terms of a consent order regarding spousal support.

Where the parties have entered into an agreement that is not incorporated into a consent order, then the analysis on an application to change spousal support would be similar to where a review is provided for by agreement alone. The Court should follow the terms of the agreement to determine whether there is a basis to make an order inconsistent with it. For example, if the agreement

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<sup>19</sup> *L.M.P.* at para. 39.

<sup>20</sup> *L.M.P.* at para. 40.

<sup>21</sup> *L.M.P.* at para. 47.

<sup>22</sup> For a more detailed analysis of both *L.M.P.* and the options of variation and review, please see Rollie Thompson, “To Vary, To Review, Perchance to Change: Changing Spousal Support” (2012) 31 Can. Family L.Q. 355.

provides that a party may seek to vary spousal support on a material change in circumstances, the court should review the circumstances of the parties in order to determine whether there has been a material change in circumstances. “If a material change is found, [the court] will exercise [its] discretion to make an order which both gives due weight to the parties’ agreement and to the other considerations required...by the wording of section 15.2.”<sup>23</sup>

### Why *Miglin* Does Not Apply

Where an application to review or vary spousal support payable under a separation agreement is made as an initial application pursuant to s. 15.2 of the *Divorce Act*, the question of whether *Miglin v. Miglin*<sup>24</sup> applies may arise. Although the issue before the court in *Miglin* was whether the court could interfere with an agreement that was final with respect to spousal support, Justices Abella and Basterache, writing for the majority, stated:

In broader terms, the appeal raises the question of the proper weight to be given to any type of spousal support agreement that one of the parties subsequently wishes to have modified through an initial application in court for such support. In that sense, the matter is not restricted to spousal support agreements that contain a time-limited support arrangement or to agreements which contain a full and final release from support obligations by one or both parties. [Emphasis added.]<sup>25</sup>

Subsequent to *Miglin*, there was significant confusion about whether the *Miglin* test applied to all applications for spousal support where there was a pre-existing agreement regarding spousal support, including agreements which provided for review or variation of the support obligations.<sup>26</sup> In his paper “To Vary, To Review, Perchance to Change: Changing Spousal Support”, Professor Rollie Thompson addressed this confusion as follows:

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<sup>23</sup> *Van Steinberg v. Van Steinberg*, 2012 BCSC 1772 at para. 30, following *Henteleff v. Henteleff*, 2005 MBCA 50.

<sup>24</sup> *Miglin v. Miglin*, 2003 SCC 24.

<sup>25</sup> *Miglin* at para. 2.

<sup>26</sup> For a thorough and insightful analysis of the application (and misapplication) of *Miglin*, see Carol Rogerson, “Spousal Support Agreements and the Legacy of *Miglin*” (2012) 31 Can. Family L.Q. 21.

...The full force of *Miglin* is only intended to apply to “final agreements”, i.e. agreements in which spousal support is waived or time limited. ...

To be obvious, if the agreement contains a variation clause (or a review clause), then the agreement is not “final” in the *Miglin* sense. The parties themselves have specifically recognized their ability, or that of the courts, to change spousal support. If the agreement is then incorporated in a court order, which is the focus here, the ordinary law of variation (or review) applies. On the variation, the material change test applies.”<sup>27</sup>

Using similar reasoning to that set out in Professor Thompson’s article, the courts have said that *Miglin* does not apply to agreements that include a variation clause in *Gibb v. Gibb*, [2004] O.J. No. 1752 (S.C.), *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40 (C.A.), *Henteleff v. Henteleff*, 2005 MBCA 50 and *Van Steinberg v. Van Steinberg*, 2012 BCSC 1772.

In addition to the confusion about the types of spousal support agreements to which *Miglin* applies, there was confusion about how the *Miglin* test applied to a consent order, including where the consent order incorporated the terms of a separation agreement. This confusion was addressed by the Supreme Court of Canada in *L.M.P.* as follows:

We recognize that some confusion has arisen with respect to the treatment of support agreements under s. 17 based on the majority's suggestion at para. 91 of *Miglin* in *obiter* that

it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17.

In our respectful view, the reference to consistency between orders under ss. 15.2 and 17 referred to at para. 91 of *Miglin* is best understood by the explanation given at para. 62 of *Miglin*:

As we shall explain below, consistency between treatment of consensual agreements incorporated into orders and those that are not is achieved another way. It is achieved

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<sup>27</sup> Rollie Thompson at 361.

when judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order.

Where the parties entered into a mutually acceptable agreement, the agreement is not ignored under either s. 15.2 or s. 17. However, its treatment will be different because of the different purposes of each provision.

The approach developed in *Miglin*, then, was responsive to the specific statutory directions of s. 15.2 of the *Divorce Act* and should not be imported into the analysis under s. 17. [Emphasis added.]<sup>28</sup>

In summary, the test set out in *Miglin* regarding when an agreement regarding spousal support may be set aside should not be applied to an agreement that provides for review or variation or to a consent order. Given this, counsel drafting an agreement should be clear about whether they intend to draft a final agreement with respect to spousal support that will be subject to the *Miglin* test, or a non-final agreement that provides for a review and/or variation. In particular, counsel should avoid inconsistent drafting that leads to confusion about whether or not the agreement is intended to be final. For example, an agreement that states that it is final settlement of spousal support but provides that spousal support may be varied on a material change in circumstances.

#### Impact of the Form in Which the Settlement is Documented

Given that the form in which the settlement is documented will determine the analysis that the court will follow on a future application to change spousal support, it is also important for counsel to consider how the settlement will be documented. If the initial settlement is documented through a separation agreement, then an application to review or vary spousal support will be an initial application pursuant to s. 15.2 of the *Divorce Act*. On this application, once the court has determined that the conditions for a review have been met or a material

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<sup>28</sup> *L.M.P.* at paras. 26-28.

change in circumstances has occurred, the agreement will be a factor to be considered under s. 15.2(4). However, if the initial settlement was documented through a consent order, then an application to vary that order will be made pursuant to s. 17 of the *Divorce Act*, whether or not the consent order incorporates a separation agreement. If the initial settlement is documented through a consent order that provides for a review, then the review will be conducted in accordance with the conditions set out in the consent order.

### ***“I Have a Dream”*<sup>29</sup>: Drafting to Provide for Review or Variation**

In considering what kinds of provisions should be included in an agreement or consent order that provides for review or variation of spousal support, I have conducted a selective and in no way exhaustive survey of recent cases where the court has considered review or variation provisions on an application to change spousal support. In surveying review cases, I focused on cases that had referred to the principles with respect to review that are set out in *Leskun*. In surveying variation cases, I concentrated on cases involving agreements and/or consent orders that referred to the principles set out in *L.M.P.* The results of this survey are set out in the table of cases that is attached to this paper. I have drawn the recommendations for drafting set out in the remainder of this paper from these cases.

#### Drafting that Applies to Review and Variation

1. *Consider the form in which the settlement is documented.*

As set out above, the form in which the settlement is documented will determine the analysis that the court will follow on a future application to change spousal support. Whether the settlement is documented in an agreement or a consent

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<sup>29</sup> ABBA, “I have a Dream.” By Benny Andersson and Björn Ulvaeus. *Voulez-Vous*, Polar Music, Vinyl recording.

order will determine whether an application to change spousal support is an initial application under s. 15.2 or a variation application under s. 17. For example, if the parties only wish for spousal support to be adjusted on a material change in circumstances, then a consent order will offer greater assurance that a subsequent application will be conducted on this basis.

2. *Recognize that any settlement will be subject to the Divorce Act.*

If the parties document their settlement through a separation agreement, they cannot avoid the jurisdiction of the court to hear an initial application for spousal support under s. 15.2 of the *Divorce Act*. Similarly, if the parties enter into a consent order, they cannot avoid the jurisdiction of the court to hear an application to vary that order under s. 17 of the Act, even if the consent order provides for a review. For example, in *Dodman v. Chiola*<sup>30</sup>, parties entered into a an agreement and consent order that provided that support would be reviewed on or after October 1, 2013. On application by the payor in 2012, the court found that

The Agreement makes no reference to altering the application of section 17 to the payment of spousal support and, since a review and variation are very different sorts of proceedings, I conclude that the availability of a review does not replace the statutory entitlement to seek a variation.<sup>31</sup>

However, through specific drafting, the parties may be able to document their intentions on a future application to change spousal support. For example, including a “material change” clause in a separation agreement may be read “to demonstrate the parties’ intention to establish a threshold for the parties to meet before applying to the courts on a s. 15.2 application.”<sup>32</sup>

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<sup>30</sup> *Dodman v. Chiola*, 2012 NSSC 272.

<sup>31</sup> *Dodman* at para. 11.

<sup>32</sup> *Van Steinberg* at para. 28.

3. *Use consistent terminology.*

While this may seem obvious, it is surprising how often the term “review” is used in a variation clause. For example, in *Jordan v. Jordan*, a 2011 case of the BC Court of Appeal, the parties’ separation agreement and consent order provided that:

The spousal maintenance, both as to duration and quantum, may be reviewed upon a material change in circumstances. The payment of the sum of \$250,000 by the Husband to the Wife ... shall entitle the Husband to a review of the spousal maintenance obligation to the Wife.<sup>33</sup> [Emphasis added.]

On an application to change spousal support pursuant to the terms of the consent order, the Court of Appeal observed that, “...para. 5 of the Divorce Order provides another example of an imprecise provision that has created confusion for the litigants in how to frame subsequent applications.”<sup>34</sup>

4. *Articulate the basis for entitlement to support.*

The parties’ separation agreement or consent order should articulate whether the basis for the recipient’s entitlement to spousal support is compensatory, non-compensatory or contractual. The basis for entitlement may have an impact on a future application to change spousal support because, for example, a non-compensatory award is more likely to be affected by the recipient’s remarriage than a compensatory award. If the settlement does not state the basis on which spousal support is payable then, on a subsequent application, the court will be “...left to ascertain from the available evidence, including the Order, which model of spousal support underlies the spousal support award.”<sup>35</sup>

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<sup>33</sup> *Jordan v. Jordan*, 2011 BCCA 518 at para. 9.

<sup>34</sup> *Jordan* at para. 35.

<sup>35</sup> *Morigeau v. Moorey*, 2013 BCSC 1923 at para. 34.

5. *Articulate basis on which terms of support were determined.*

The settlement should set out the basis on which the quantum and/or duration of support were determined by reference to the *Spousal Support Advisory Guidelines*<sup>36</sup>, or other method of analysis. This will be particularly important where, on a review or variation, the parties intend that support will only be adjusted in to take into account a particular circumstance or change. For example, in *Knowlan-Manley v. Manley*<sup>37</sup>, the parties' consent order provided that spousal support could only be varied on a material change in circumstances. On the basis of this provision, the court found that it was restricted to considering the impact of the change in the Respondent's circumstances since the time of order, observing that:

The difficult question is to determine the basis on which the parties reached their agreement and the factors applied to set the support obligation at \$1,550 per month. The evidence required to complete the analysis mandated by *L.M.P.* is lacking in detail.<sup>38</sup>

6. *Acknowledge uncertainty or disagreement*

If the parties can't agree about the basis on which the recipient is entitled to support, or another issue, then it is best to say so in the order or agreement. While this may not resolve an issue for the purposes of a subsequent application, it will at least avoid each party stating that the settlement was made on a certain basis, only to be contradicted by the other party.

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<sup>36</sup> Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines*, (Ottawa; Department of Justice, 2008).

<sup>37</sup> *Knowlan-Manley v. Manley*, 2013 BCSC 1508.

<sup>38</sup> *Knowlan-Manley* at para. 93.



7. *Specify which features of the support are subject to review or variation.*

The settlement should specify which of features of support (entitlement, quantum or duration) are subject to review or variation. For example, in *C.J.T. v. G.A.T.*<sup>39</sup>, the parties' consent order provided that the Husband would pay the Wife support of \$1,302.00 per month for a term of 10 years on the following conditions:

Prior to March 15th, 2016, if there is a material change in circumstances, either party may apply to vary the quantum of the spousal support (increase or decrease) or the duration of the spousal support (decrease only). Regardless of any change in the material circumstance of either party the spousal support shall not continue past March 15th, 2016.<sup>40</sup>

On a subsequent application to vary spousal support, the court found that there had been a material change in circumstances and reduced the amount of spousal support but preserved the duration of support set out in the consent order.

8. *Set out the process by which the review or variation will be conducted.*

Ideally, the provision for review or variation should set out the mechanics of the review or variation process, including:

- (a) what type of notice is required,
- (b) what financial information should be exchanged prior to the review or variation taking place and a time frame for providing the financial information,
- (c) what dispute resolution process(es) will be used if the parties are not able to reach an agreement through negotiation, and
- (d) when the adjusted amount of support will be effective.

With respect to when the adjusted amount of support will be effective, on a review, it may generally be appropriate for the adjusted amount to be effective

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<sup>39</sup> *C.J.T. v. G.A.T.*, 2012 ABQB 193.

<sup>40</sup> *C.J.T.* at para. 5.

once the review has been concluded. On a variation, it may be more appropriate for the adjusted amount to be retroactive to the date on which a party gave notice (or should have given notice) of a material change in circumstances.

### Drafting for Review

1. *Specify the date or event that will trigger a review.*

The dates that trigger a review are expressed in a variety of ways; for example, “on August 1, 2014”, “by August 1, 2014”, “no earlier than August 1, 2014”, or “anytime after August 1, 2014”. For reviews that are to be conducted on or by a certain date, it would be helpful to clarify whether the parties intend the process to be commenced or completed by the specified date. For reviews that are to be conducted no earlier than or after a specified date, the review provision should specify how one party is to notify the other that he or she wishes to commence the review process. If a review can be triggered by more than one date or event, the Agreement should specify that it is the first to occur of the listed dates or events.

It would be wise to advise parties that reviews should occur in a timely basis. In *Acker v. Acker*,<sup>41</sup> the Consent Order provided that spousal support would be reviewed on or after October 1, 2007, with a view to determining the outcome of the wife’s efforts to obtain employment. The Court noted that the review was not initiated until five years after the right to do so arose and found that to terminate support when the wife was 60 (she would have been 55 at the time that the review was intended to occur) because of her failure to diligently pursue retraining or employment would be to “unduly emphasize one of the factors the court must consider, that of self sufficiency”.<sup>42</sup>

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<sup>41</sup> *Acker v. Acker*, 2014 NSSC 5.

<sup>42</sup> *Acker* at para. 156.

2. *Specify the purpose of the review and which aspect(s) of support are to be reviewed.*

A review provision should specify both the purpose of the review and what will be reviewed (entitlement, quantum and/or duration). If the purpose of the review is not specified, then the court will be left to infer the purpose of the review<sup>43</sup> or to conduct a *de novo* hearing relying on the factors set out in the *Divorce Act*<sup>44</sup>.

Ideally, the purpose of the review should be “tightly delimited”, as provided by *Leskun*. The purpose of the review could be

- (a) to address uncertainty in either party’s employment,
- (b) to consider the recipient’s efforts to retrain or obtain employment,
- (c) to consider the impact of health issues experienced by either party,  
or
- (d) to consider changes in the needs of the parties’ children (for example, the youngest child entering full-time school).

The review provision should also specify which aspects of spousal support will be reviewed. For example, if the purpose of the review is to address uncertainty in the payor’s income, then the only aspect of support to be reviewed may be quantum. However, if the purpose of the review is to evaluate the recipient’s efforts to become self-sufficient, then entitlement, quantum and duration may all be in issue. In specifying the aspects of spousal support to be reviewed, counsel should be aware that the aspects not specified will not be open to review. For example, in *More v. Shurygalo*<sup>45</sup>, the Consent Order specified that there was to be a review of both quantum and duration of spousal support. The Court found that entitlement was not part of the review because it was not specified and, as a result, that an application to terminate support would have to be made under section 17 of the *Divorce Act*.

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<sup>43</sup> For example, see *D.T.L. v. E.M.L.*, 2013 BCSC 558.

<sup>44</sup> For example, see *Brooks v. Brooks*, 2012 NBQB 401.

<sup>45</sup> *More v. Shurygalo*, 2011 SKQB 275.

3. *What happens if the review does not take place?*

The review provision should also state what will happen if the review does not take place. This is an area of support in which the form in which the parties' settlement is documented may have an impact on the options available to the parties. For example, in *Norton v. Norton*<sup>46</sup>, the parties' separation agreement provided that financial information would be exchanged and spousal support would be reviewed on an annual basis commencing in 2007. In 2009, the recipient applied to enforce the separation agreement and in 2010 the payor applied for an order for spousal support under section 15.2 of the *Divorce Act*. The court found no authority for the proposition that spousal support contractually agreed to in an Agreement could be reviewed retroactively,<sup>47</sup> and made an order for support effective January 1, 2011.

This is in contrast to the decision in *Kerman v. Kerman*<sup>48</sup>, in which the parties consented to an order for spousal support of \$1.00 per month because the payor was unemployed at the time of the consent order. The consent order also provided that the parties would exchange financial information by June 1, 2001; that spousal support would be reviewed upon application by either party on or before June 30, 2001; and that the support of \$1.00 per month would continue until the review had been concluded. The payor obtained employment in June 2001 but the recipient did not receive notice of his new employment until June 2004 and did not apply for a review until 2006. When the application was heard in 2008, the court backdated the review 38 months from the date of the judgment on the basis of the payor's non-disclosure. The court noted that,

...one very important difference remains between a backdated review and a retroactive variation. On a backdated review the payor is on notice from the time of the original order of an obligation to pay spousal support commensurate with his means. Thus a

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<sup>46</sup> *Norton v. Norton*, 2011 BCSC 1307.

<sup>47</sup> *Norton* at para. 33.

<sup>48</sup> *Kerman v. Kerman*, 2008 BCSC 500.

payor cannot be surprised if an order for a large amount of arrears is made.<sup>49</sup>

The difference between the decisions may be explained by the fact that the settlement in *Kerman* was documented through a consent order rather than a separation agreement as in *Norton*. Given these decisions, it may be prudent to advise a client who is entering into a settlement that provides for a review of spousal support that a retroactive adjustment will not be available to them under a separation agreement if the review is delayed and that they may wish to consider a consent order if they wish to be apply to apply for a retroactive adjustment.

There may also be situations in which it would be appropriate for support to be adjusted unless a review occurs. For example, if the parties expect the recipient to have obtained employment by the time of the review, it may be reasonable to provide that support will be reduced to take into account the recipient's anticipated employment income, subject to the outcome of the review. Similarly, if the parties' expect the payor's income to increase by the time of the review, then it may be reasonable to provide that support will increase to take into account the anticipated increase in the payor's income, subject to the outcome of the review.

### Drafting for Variation

1. *Specify what qualifies as a material change in circumstances.*

Many settlements simply reflect the test provided for in the *Divorce Act* and the jurisprudence by stating that either party may apply for a variation on a "material change in circumstances". However, simply setting out this test does not assist the parties or the court in assessing whether a change was foreseen at the time that the settlement was made. Ideally, a settlement that provides for variation of

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<sup>49</sup> *Kerman* at para. 60.

spousal support will set out the parties' current circumstances and set out what the parties agree will qualify as a material change in circumstances. Material changes could include

- (a) changes in either party's income,
- (b) a party retiring,
- (c) changes in parenting arrangements,
- (d) dependent children becoming independent, and
- (e) either party entering into a new marriage or marriage-like relationship.

For example, in *Grefe v. Grefe*<sup>50</sup>, the parties' separation agreement<sup>51</sup> provided for spousal support of \$2,000 per month for nine years, subject to "a review and a reduction to \$1,000 a month if the following conditions were found to exist:

- 1) the Respondent lost his job at the steel mill;
- 2) he had not reached the age of 53 years and 9 months;
- 3) that he was left with income below \$50,000 a year; and
- 4) he received no severance pay...".<sup>52</sup>

The payor (Respondent) lost his job at the steel mill four months before he reached the age of 53 years and 9 months and applied to vary spousal support based on a material change in circumstances. The recipient consented to a reduction in spousal support for the four months before the payor reached the age of 53 years and 9 months. The court declined to vary spousal support and stated that

The agreement reached by the parties contemplated the possibility of a significant reduction in the Respondent's income, and a reduced support obligation if this occurred. The threshold agreed to by the parties has not been met. A material change in circumstances, if provided for in an agreement, cannot by definition be unforeseen as required in order to compel a variation of the

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<sup>50</sup> *Grefe v. Grefe*, 2012 ONSC 858.

<sup>51</sup> Part of the parties' separation agreement was incorporated into a consent order, but the Reasons for Judgment do not specify which parts of the agreement were so incorporated.

<sup>52</sup> *Grefe* at para. 8.

agreement pursuant to *Willick* and cases subsequently decided on this issue.<sup>53</sup>

Similarly, in *Smith v. Rand*,<sup>54</sup> the parties' separation agreement, which was incorporated into a consent order, provided that:

4. Subject to paragraph 5, herein, the parties agree that there shall be no variation in the amount of spousal support payable for a period of five years from January 1, 2011, regardless of any change in circumstance by either party.
5. The Husband and the Wife agree that the Husband shall seek a variation in either or both of the amount of spousal support payable and the duration for which spousal support is payable should the Wife cohabit with another as "husband and wife" irrespective of whether the Wife should marry.<sup>55</sup>

The payor applied to vary spousal support approximately 2.5 years after the separation agreement was made, based on a reduction in his income. After considering the terms of the separation agreement, the court found that

In this case, the agreement specifically says that there is to be no variation of spousal support for a period of five years regardless of any change in circumstance for either party. At the end of the five years, the spousal support automatically drops by ten percent each year until it ceases at the end of 2021. The agreement provides an exception so that Mr. Smith can seek variation in the event that Ms. Rand co-habits with another as husband and wife. I am certain that the negotiation of these spousal support terms involved concessions on both sides. The agreement gives each a high degree of predictability about support payments, particularly in the five years following their divorce.

The clear language of the agreement is that for the first five years variation is not permitted simply because of a change in the income of either Ms. Rand or Mr. Smith. ...<sup>56</sup>

In the result, the Court found that the payor had not met the burden of showing a material change in circumstances and declined to order a different amount of support.

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<sup>53</sup> *Grefe* at para. 23.

<sup>54</sup> *Smith v. Rand*, 2013 NSSC 369.

<sup>55</sup> *Smith* at para. 5.

<sup>56</sup> *Smith* at paras. 26 – 27.

In both these cases, the parties were able to specify what they considered to be a material change in circumstances and the terms specified by the parties were accepted by the court, despite the payors' subsequent attempts to avoid the terms of the agreement.

2. *Specify which aspect(s) of support may be varied.*

As with a review provision, a variation provision should specify which aspects of support may be varied (entitlement, quantum and/or duration). If the original settlement provides for indefinite support then all three aspects of support may be subject to variation. If the original settlement provides for time-limited support then only quantum may be open to variation, as was the case in both *Grefe v. Grefe* and *C.J.T. v. G.A.T.* In *Van Steinberg v. Van Steinberg*, the minutes of settlement between the parties provided that:

- f) From May 1, 2015 until and including December 1, 2016 (when the Plaintiff reaches the age of 65), if the Defendant's gross income exceeds the Plaintiff's income by more than \$300.00 per month, the Defendant will pay to the Plaintiff as spousal support an amount equivalent to one-half of the amount by which his income exceeds her income. After December 1, 2016, it is anticipated that the parties incomes will be similar and no support shall be paid by either party to the other.
- g) Either party may seek to vary spousal support if there is a material change in circumstances that affects the financial needs or abilities of either party.<sup>57</sup>

On an application by the payor to vary spousal support, the court found that there had been a material change in circumstances as provided for in the minutes of settlement and made an order for support in a amount different from the minutes of settlement but limited to the remainder of the term set out in the minutes of settlement.

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<sup>57</sup> *Van Steinberg* at para. 9.



### **“When All is Said and Done”<sup>58</sup>: Conclusion**

Settlements that involve an ongoing obligation to pay spousal support are often among the most difficult ones to negotiate and document. It may never be possible to draft a settlement regarding review or variation of spousal support that provides for all of the issues that may arise on a subsequent application to adjust spousal support. As the Manitoba Court of Queen’s Bench acknowledged in *Cleven v. Cleven*<sup>59</sup>, there is a benefit to settlement even if the parties cannot address all of the issues that may arise on a subsequent review (or variation). In that case, the court noted that:

...For the parties to settle their litigation at the time was a good thing. I suspect then (as now) each recognized there was a spousal support obligation. Neither could likely agree on the basis for entitlement or on duration, but given the length of their relationship, the degree of dependency, and the incomes as they then were, they were able to agree that base support with an upward adjustment for "additional income" was a wiser husbanding of resources for a three year period pending review than litigating the issue then with a host of latent possibilities for future variation on the horizon. The more indeterminate and contentious issues were therefore parked pending that further review, if either chose to initiate one. If not, the peace might endure.<sup>60</sup>

There will always be situations in which an imperfect settlement is better than no settlement. In fact, most settlements are imperfect and yet most settlements are preferable to continuing with litigation. That being said, I believe that counsel should make their best efforts to assist the parties in reaching an agreement on the review or variation process and, where the parties are able to reach an agreement on some aspects of the process, those agreements should be carefully documented, with an eye to how they will be interpreted by the court on a future application. While a subsequent application to adjust spousal support may never be as upbeat as an ABBA song, agreements or consent orders that

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<sup>58</sup> ABBA, “When All is Said and Done.” By Benny Andersson and Björn Ulvaeus. *The Visitors*, Polar Music, Vinyl recording.

<sup>59</sup> *Cleven v. Cleven*, 2010 MBQB 279 .

<sup>60</sup> *Cleven* at para. 214.

are based on “Knowing Me, Knowing You” may, to paraphrase the song, be the best that we can do.

***Knowing Me, Knowing You: Drafting Agreements and  
Consent Orders that Provide for Review or Variation of Spousal Support***

**A Selective Survey of Review and Variation Cases**

<b>Case Citation</b>	<b>Type of Provision</b>	<b>Settlement Document(s)</b>	<b>Terms re: Review or Variation</b>	<b>Findings on Review or Variation</b>
<b>AB</b>				
<i>Locke v. Ledrew</i> 2006 ABQB 452	Review	Consent Order	CO – "...the Plaintiff, Anthony Paul Locke shall pay to the Defendant, Olive Elizabeth Locke, spousal support in the sum of \$800.00 per month, commencing on the 28th day of January, 2004 and continuing on the 28th day of each month thereafter until the issues of quantum and entitlement to spousal support are reviewed, which shall occur in January 2006, or thereafter."	<p>Court found that there was no material change in circumstances but that a material change was not required. Application was treated as a <i>de novo</i> application.</p> <p>Court reduced spousal support to \$500 per month based on wife's remarriage.</p>
<i>C.J.T. v. G.A.T.</i> 2012 ABQB 193	Variation	Separation Agreement/ Consent Order	CO – "The Husband shall pay to the Wife the sum of \$651.00 in spousal support for the period March 15th, 2006 to March 31st, 2006. Commencing April 1st, 2006 and continuing thereafter, the Husband shall pay to the Wife the sum of \$1,302.00 per month for spousal support. This support shall be paid in two equal installments per month in the amount of \$651.00 on the 1st and 15th day of each and every month to and including March 15th, 2016, at which such payments shall terminate absolutely. Prior to March 15th, 2016, if there is a material change in circumstances, either party may apply to vary the	<p>The Court found that there had been a material change in the circumstances (changes in both parties' incomes and changes in both parties' living arrangements).</p> <p>The Court reduced the spousal support to \$700.00 per month to be continued until March 15, 2016 (the same term as the Separation Agreement), "subject to a material change of circumstances". (Para. 72)</p>

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
			<p>quantum of the spousal support (increase or decrease) or the duration of the spousal support (decrease only). Regardless of any change in the material circumstance of either party the spousal support shall not continue past March 15th, 2016. Assuming that all payments have been made by the Husband pursuant to this paragraph or any subsequent court order, and that no outstanding payments or arrears exist as at March 16th 2016, the absolute waiver of spousal support by the Wife, as contained in paragraph 7.2 to 7.10 shall govern.”</p>	
<p><i>Madhoo-Persaud v. Mattson</i> 2012 ABQB 542</p>	<p>Variation</p>	<p>Separation Agreement and Consent Order</p>	<p>SA – “The Husband or Wife may make application to vary the amount of spousal support paid to the Wife if a change in the condition, meant, needs or circumstances has occurred to either former spouse since entering into this Agreement.”</p> <p>SA was incorporated into a consent order. CO does not deal with variation.</p>	<p>SA was made in 2009 but CO was not made until 2011.</p> <p>Court looked at parties’ circumstances at time that CO was made: “According to <i>L.M.P.</i>, the order is presumed to have been in compliance with the provisions of the <i>Divorce Act</i> at the time it was made. It is the time of the order, and not the time of the agreement, that is relevant for the purposes of determining the parties’ circumstances at the applicable time.” (Para. 27).</p> <p>The Court found that there had been a material change in circumstance, in particular, a decrease in the payor’s income.</p>

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
				Court ordered that spousal support should be reduced proportionate to reduction in payor's income.
<i>McCulloch v. McCulloch</i> 2013 ABQB 177	Review/ Variation	Consent Order	CO provided that spousal support was payable at \$9,000 per month "until further Order of the Court", but reviewable on Mr. McCulloch's retirement, at the option of either party.	<p>Previous judgment had found that wife's share of husband's retiring allowance was to be included in \$9,000 per month payments.</p> <p>Court found that neither party needed to show a material change but then conducted analysis under s. 17 of the DA:</p> <p>"I further conclude, contrary to Mr. McCulloch's submission before me, that I am not dealing with a <i>de novo</i> hearing. I will, rather, limit myself to making the appropriate variation of the order in question, if any. I will take into account the material change - here the bare fact of retirement - and limit myself to making only the variation justified by that change. Guided by <i>Miglin</i>, I will not Aweigh all the factors to make a fresh order unrelated to the existing one unless the circumstances require the rescission, rather than a mere variation of the order". (Para. 65)</p> <p>The husband's application was dismissed. Support continued at \$9,000 per month including wife's share of husband's retiring allowance.</p>

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
<b>BC</b>				
<i>Dawes v. Dawes</i> 2007 BCSC 316	Review	Separation agreement	SA – “The Plaintiff shall pay the Defendant spousal support in the amount of \$2000 per month commencing March 1, 2004, and continuing on the first day of each and every month thereafter until spousal support is reviewed, with a review of spousal support to occur in June, 2006, provided that the plaintiff has given the Defendant at least 60 days advance written notice. If notice is not given, there will not be a review and spousal support will continue unmodified. Either party shall have liberty to review the spousal support upon a material change of circumstance.”	SA provided for spousal support of \$2,000 per month.  Court suspended support from January to September 2007 to allow husband, who had heavy debt, to sell family residence. Application adjourned generally.  Humphries J. commented that he/she was not convinced that a review would be a fresh application under s. 15.2 of the DA.
<i>Skelly v. Skelly</i> , 2007 BCSC 810	Review	Consent order	CO – “Both parties are at liberty to review the provisions for Spousal Support after September 1, 2005 without having to demonstrate a material change in circumstances.”	Support was calculated based on a formula. Formula was adjusted on review.
<i>Wetmore v. Wetmore</i> 2007 BCSC 1177	Review	Separation agreement	SA – “The Spousal support shall be reviewed in February 2004 (prior to March 1) with the review to take into account the following: (a) the period of time that Spousal Support shall be paid; (b) [Mr. Wetmore’s] income for the year 2003; (c) any employment [Mrs. Wetmore] may then have, and (d) any other circumstances relevant to the criterial [sic] as set out in the Divorce Act.”	SA provided for spousal support of \$3,000. Amending agreement provided for spousal support of \$3,400. Court ordered support to continue at \$3,400 to be reviewed after June 2009.

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
<i>Kerman v. Kerman</i> 2008 BCSC 500	Review	Consent order	CO – “THIS COURT FURTHER ORDERS that the Respondent, Ralph Cunningham Kerman, pay spousal maintenance to the Petitioner, Laura Candice Kerman, in the sum of \$1.00 per annum effective the first day of October, 2000 until the review hereinafter provided for is concluded or in such other amounts as may be ordered by the Court prior to the conclusion of the review.  THIS COURT FURTHER ORDERS that the question of what maintenance shall be payable by the Respondent to the Petitioner shall be reviewed upon application by either party on or before the 30th day of June, 2001.”	Husband was not working at time of Consent Order. Consent Order provided for income disclosure as of June 2001.  Husband returned to work in June 2001 but did not disclose to wife.  Court ordered support of \$626 per month, backdated 38 months.  Support payable until December 2013, subject to variation under s. 17 of the <i>Divorce Act</i> .
<i>Purvis v. Purvis</i> 2009 BCSC 1794	Review	Separation Agreement and Consent Order	SA provided that entitlement to and quantum of spousal support would be reviewed in July, 2003. Parties acknowledged that purpose of spousal support was, in part, to assist Ms. Purvis to complete her education and become self-sufficient within a reasonable period.  Terms of SA incorporated into CO.	SA provided for support of \$2,228 per month.  Court found Ms. Purchase had achieved some success in moving toward self-sufficiency.  Court ordered that spousal support be reduced to \$1,485 per month, then \$743 per month, with support to terminate on March 1, 2011.
<i>Judd v. Judd</i> 2010 BCSC 153	Review	Separation agreement	SA – “Karen's entitlement to continue to receive further spousal support after August 31, 2006 shall be subject to a form of review by a Court of competent jurisdiction on or about September 1, 2006. The	SA provided for spousal support of \$2,415 per month. Husband's income increased post-separation. Support was increased to \$2,800 until further order, with a review allowed in June 2013.

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
			payments of spousal maintenance shall continue past the review date of September 1, 2006 if Peter does not fully cooperate in the review by the production of the appropriate financial information in a timely manner and by agreement to proceed to Court to adjudicate on the issue of continuing spousal maintenance failing agreement by September 1, 2006."	
<i>Norton v. Norton</i> , 2011 BCSC 1307	Review	Separation agreement	SA – "Tracy will provide James with job search information every six months commencing March 30th, 2006 and the parties will exchange income information and review spousal support on an annual basis, commencing January 30, 2007."	SA provided for support of \$2,500 per month.  Court found no authority was provided for proposition that spousal support contractually agreed to in SA could be reviewed retroactively. (Para. 33)  Court ordered support of \$5,000 per month effective January 1, 2011.
<i>Jordan v. Jordan</i> 2011 BCCA 518	Review/ Variation	Separation agreement and Consent Order	SA and CO – "The spousal maintenance, both as to duration and quantum, may be reviewed upon a material change in circumstances. The payment of the sum of \$250,000 by the Husband to the Wife ... shall entitle the Husband to a review of the spousal maintenance obligation to the Wife."	Court of Appeal found that, "para. 5 of the Divorce Order provides another example of an imprecise provision that has created confusion for the litigants in how to frame subsequent applications." (Para. 35)  Court found that paragraph provided for both variation and review.  Court of Appeal found it was



Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
				unnecessary to hear submissions on whether hearing was review or variation as primary focus of hearing was whether any changes in financial circumstances might justify change in CO. Spousal support was not changed.
<i>A.B. v. C.D.</i> 2012 BCSC 267	Review	Separation agreement and Consent Order	SA – The issue of Spousal Support shall be reviewed after 36 months, when [the Wife] is expected to have completed her two-year interior design diploma. Failing agreement, either party shall be at liberty to apply to the Court to determine the issue. Pending any agreement or court order, [the Husband] shall continue to pay [the Wife] the Spousal Support, and any adjustment shall be retroactive to February 1, 2011.”	SA and CO provided for spousal support of \$11,500 per month.  Court imputed income to wife of \$15,000 for 2012 and \$20,000 for 2013.  Court ordered Husband to pay Wife support of \$10,000 per month until further court order or agreement of the parties. Either party may apply for a review after 10 years from the date of the order.
<i>Bewza v. Bewza</i> 2012 BCSC 1736	Review	Consent Order	CO – Either party could apply for a review as of January 6, 2006	The case cited is a subsequent application to vary the Order made on a review in 2011. The Reasons for Judgment on the review were referred to in the subsequent application.  With respect to the review, the Court said  “Harvey J. discussed the parties’ intentions and found no guidance in the minutes of settlement or resulting order as to the scope of review. He compared the nature of a review and a variation application, and decided that he

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
				<p>would consider the application to be a review entailing a reconsideration of the matters of entitlement, together with the quantum and duration of support payable, if applicable, but he held in the alternative that he found that the material change test to be applied on a variation application had been met.” (Para. 5)</p> <p>On the review, the Court found that the Recipient continued to be entitled to spousal support but reduced the quantum from \$2,000 per month to \$1,000 per month based on a decrease in the Payor’s income and an increase in the Recipient’s income.</p>
<p><i>Van Steinberg v. Van Steinberg</i> 2012 BCSC 1772</p>	<p>Variation</p>	<p>Minutes of Settlement</p>	<p>MS – The Defendant was to pay the Plaintiff for her support all of the share of the Weyerhaeuser Pension that he receives, in the amount of approximately \$750 per month from January 2009 to April 2015.</p> <p>“From May 1, 2015 until and including December 1, 2016 (when the Plaintiff reaches the age of 65), if the Defendant’s gross income exceeds the Plaintiff’s income by more than \$300.00 per month, the Defendant will pay to the Plaintiff as spousal support an amount equivalent to one-half of the amount by which his income exceeds her income. After December 1, 2016, it is anticipated</p>	<p>“It is my view that, unfortunately, clause 17(g) was inserted into the Minutes of Settlement without much thought to given to its meaning. Having said that, the words of the clause bear at least two possible interpretations.</p> <p>The first is that the parties intended this clause to recognize the "material change in circumstances" threshold for making an application for <u>variation</u> of an order under s. 17. In other words, they were merely incorporating into their agreement the common law requirement of a "material change in circumstances" for a variation order under s. 17. This</p>

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
			<p>that the parties incomes will be similar and not support shall be paid by either party to the other.</p> <p>Either party may seek to vary spousal support if there is a material change in circumstances that affects the financial needs or abilities of either party.”</p>	<p>interpretation was advanced by Mrs. Van Steinburg's counsel in closing submissions.</p> <p>The other possible interpretation is that the clause was meant to be interpreted more broadly, that is, to apply to the current situation where one party is seeking an initial order to determine spousal support under s. 15.2. Under this broader interpretation, it would appear that the parties anticipated the type of application currently before the court and that 17(g) can be read to demonstrate the parties' intention to establish a threshold for the parties to meet before applying to the courts on a s. 15.2 application.</p> <p>On the whole of the evidence, I find this latter interpretation to be more plausible. While paragraph 17(g) suggests that the parties intended their agreement to be treated with significant deference, the parties must have considered, or at least their counsel must have known, that despite entering into Minutes of Settlement, it remained open to either side to seek an initial order under s. 15.2.” (Para. 26 – 29)</p> <p>The Court found that there had been a material change in circumstances as set out in the Minutes of Settlement and</p>

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
				ordered spousal support of \$430 per month from December 1, 2012, to December 1, 2016, the date that the Minutes of Settlement anticipated, and the Court expected, that the parties' income will have substantially equalized.
<i>Stanley v. Stanley</i> 2013 BCSC 371	Review /Variation	Separation Agreement	<p>SA – “Vernon's obligation to pay spousal support to Kathryn is subject to review and variation provided that there is a material, substantial and unforeseen change in the circumstances of either of the parties.</p> <p>If Vernon retires from or quits his job with Emil Anderson Maintenance Co. Ltd. prior to December 31, 2011 then that shall not be considered to be a change in Vernon's circumstances as referred to in paragraph 11 of this Agreement with respect to an application by Vernon to reduce his spousal support obligation. However, this restriction will not apply in the event that Vernon is no longer able to continue with his employment due to medical reasons as confirmed in writing by his physician.</p> <p>Kathryn will make all reasonable efforts to become financially independent and accordingly a material change in her financial</p>	SA provided for support of \$1,500 per month. Court ordered that support would reduce to \$1,200, then \$1,000, then \$500, with termination February 1, 2015.

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
			<p>status will be grounds for review of spousal support.</p> <p>The parties may agree to review Vernon's spousal support obligation from time to time and any variation that is by agreement shall be in writing and executed in the same manner as this Agreement. If the parties are not able to reach an agreement within 30 days of such a review commencing then an application to the court can be made with respect to a variation."</p>	
<p><i>D.T.L. v. E.M.L.</i> 2013 BCSC 558</p>	<p>Review</p>	<p>Consent order</p>	<p>CO – "The Claimant shall pay to the Respondent spousal maintenance in the amount of \$1,900 per month with a review date for such spousal support in two (2) years."</p>	<p>Court inferred purpose of review: "While the order of Butler J. contains no direction as to the focus of the spousal support review, it is clear from the surrounding circumstances that the review arose because of uncertainty surrounding the respondent's career path and potential earnings at the time the review was agreed to by the parties." (Para. 54)</p> <p>At the time of the CO (December 2010), the wife was enrolled in online courses to become a teacher's assistant. After CO was made, wife dropped out of online program and applied to move with children to another city to pursue a business opportunity. The wife's application to move was not</p>

Case Citation	Type of Provision	Settlement Document(s)	Terms re: Review or Variation	Findings on Review or Variation
				<p>successful. At the time of the hearing, there was evidence that wife would obtain a job as an operator at RCMP 911 centre that would allow her to become independent. Court considered evidence provided after hearing that wife had obtained a position with the RCMP.</p> <p>Court ordered that husband was to pay \$900 per month in spousal support for the next six months. He was then to pay \$500 per month for six months, after which time support would terminate.</p>
<p><i>Knowlan-Manley v. Manley</i> 2013 BCSC 1508</p>	<p>Variation</p>	<p>Consent Order</p>	<p>CO – The Respondent shall pay spousal support to the Claimant in the sum of \$1,550 per month, commencing October 15, 2010 and continuing on the 15<sup>th</sup> day of each month thereafter.</p> <p>“Neither party may seek to vary spousal support unless there is a material change in circumstances that affects the financial needs or ability of either party. A material change in circumstances includes the retirement or onset of a disability of either party”.</p>	<p>The Court followed <i>L.M.P.</i> and stated that:</p> <p>“The difficult question is to determine the basis on which the parties reached their agreement and the factors applied to set the support obligation at \$1,550 per month. The evidence required to complete the analysis mandated by <i>L.M.P.</i> is lacking in detail.” (Para. 93)</p> <p>“In the circumstances of this case, I am restricted to considering the impact of the change in the respondent's circumstances between November 2010 and the present. I am not permitted to weigh all of the factors that are engaged in considering s. 15.2 orders for support.” (Para. 99)</p>

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				<p>The Court found that there had been a material change in circumstances and reduced spousal support to \$460 per month.</p>
<p><i>Morigeau v. Moorey</i> 2013 BCSC 1923</p>	<p>Variation</p>	<p>Consent Order</p>	<p>“The Order sets the amount of spousal support for three years. The Order then contemplates adjusting Mr. Moorey's income on June 1, 2014, and every three years thereafter, by averaging his income and applying the mid-way point between the low and mid-range of spousal support, based on the <i>Spousal Support Advisory Guidelines</i>. The Order also provides that spousal support may be varied pursuant to s. 17 of the <i>Divorce Act</i>.” (Para. 6)</p>	<p>Mr. Moorey sought variation of spousal support on the basis that his income had decrease, Ms. Morigeau's income had increased and that Ms. Morigeau was residing in a common-law relationship.</p> <p>“At the hearing, the parties spent considerable time dealing with the question of whether, if there was a material change in circumstances, Mr. Moorey was entitled to either cessation or variation of the spousal support order. Those arguments focused on the basis for the original spousal support order. Although unnecessary to decide this application, I think some observations might be of assistance to the parties.” (Para. 31)</p> <p>“In this case, both following the initial exchange of affidavits and during the original court proceedings, the parties agreed to various provisions that are incorporated into the Order. The Order does not state that the</p>

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				<p>spousal support awarded is based on any particular model of spousal support. The court is therefore left to ascertain from the available evidence, including the Order, which model of spousal support underlies the spousal support award.” (Para. 34)</p> <p>The Court found that the order included both compensatory and non-compensatory elements. The Court found that the Defendant had failed to show a material change in circumstances and dismissed the application to vary support.</p>
<b>MB</b>				
<p><i>Cleven v. Cleven</i> 2010 MBQB 279</p>	<p>Review</p>	<p>Consent Order</p>	<p>“The Order did provide for a time-triggered right of review of spousal support anytime after September 30, 2006, some three years post Order. The review was set for a point in time when the two children might have completed, or be within sight of completing post-secondary education. Since the review was unrestricted in its scope, issues of entitlement and quantum of spousal support prospectively from the time of Mr. Cleven's motion are squarely before me.” (Para. 75)</p>	<p>Court ordered ongoing support of \$7,500 per month until further order of the Court.</p> <p>“Because this is a review following a consent Order, there has been no prior adjudication or any finding about the nature of the spousal support entitlement, or what economic advantages or disadvantages did or did not flow from the marriage or its breakdown. What the parties essentially did was settle their case for a three year period, hoping that time and circumstances might make resolution of the issues in</p>



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				<p>the future easier, or establish clearer parameters within which resolution might occur.</p> <p>We are reminded in <i>Leskun v. Leskun</i>, 2006 SCC 25 (Paragraphs 36 - 39) that review Orders "have a useful but very limited role". They are justified by genuine and material uncertainty at the time of the original trial (or in this case the parties' consent Order), but a "failure to tightly circumscribe the issues [for future review] will inevitably be seen by one or the other of the parties as an indication simply to reargue their case". (Para. 39.)</p> <p>While, to some extent, that is what has happened here, it is not something warranting criticism, merely recognition. For the parties to settle their litigation at the time was a good thing. I suspect then (as now) each recognized there was a spousal support obligation. Neither could likely agree on the basis for entitlement or on duration, but given the length of their relationship, the degree of dependency, and the incomes as they then were, they were able to agree that base support with an upward adjustment for "additional income" was a wiser husbanding of resources for a three year period pending review than litigating the</p>

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				<p>issue then with a host of latent possibilities for future variation on the horizon. The more indeterminate and contentious issues were therefore parked pending that further review, if either chose to initiate one. If not, the peace might endure.</p> <p>What the parties did made sense at the time, even if they were unable to delimit the current review more tightly. The consequence, while not a <u>re</u>litigation of their case, means that a good deal of what might have needed to be called the first time had they not settled, is relevant or is potentially so now. Without that kind of evidence I am unable to determine whether Ms. Cleven's support claim is compensatory or non-compensatory. If it is or was compensatory, evidence of the extent of economic disadvantages or hardship consequent upon the marriage breakdown and in the lead up to the consent Final Order is relevant, if I am asked to find that a claim once compensatory has now been satisfied, or has only been minimally eroded.”</p> <p>(Paras. 212 – 215)</p>
<b>ON</b>				
<i>Cassaday v. Krpan</i> [2009] O. J. No. 651 (S.C.)	Review	Consent order and Separation Agreement	CO - THIS COURT ORDERS AND ADJUDGES that	Application for review brought in 2005 but not heard until 2008.

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			<p>commencing on the first day of December 2001, and on the first day of each subsequent month, the Petitioner shall pay to the Respondent the sum of \$2,250.00 per month for her support. The payments shall continue until December 1, 2004, at which time the issue of spousal support shall be reviewed in accordance with paragraph 21 of this Divorce Judgment. The life insurance provisions of this Divorce Judgment, shall also be reviewed at the same time.</p> <p>THIS COURT ORDERS AND ADJUDGES that on or before August 1, 2004, the parties shall exchange all requisite financial disclosure to determine the issue of spousal support. If the parties have been unable to reach an agreement by September 15, 2004, on the quantum of support, if any, to be paid to the Respondent as of December 1, 2004, either party shall be at liberty to commence an application for a determination of the issue by a Court of competent jurisdiction for a determination of the issue and the Court shall have the jurisdiction to make an interim Order.</p>	<p>Court ordered continuation of support from December 2004 to December 2007 and ordered termination of support after that date.</p> <p>With respect to review, Court said: "I find this issue to be more problematic. Clearly, the parties and the lawyers at the time of the Agreement put off the "fight" and final resolution of this issue that would one day have to be determined. Further, both parties have a very different view of what was to happen after December 1, 2004. The father saw this as a stop date with the onus on the mother presumably to show why she should receive any more spousal support. The mother saw this date simply as one when a new amount of spousal support would be negotiated. Paragraph 22 of the Divorce Judgment attempts to appease both parties, but gives little guidance to the "reviewing" court as to what the court should consider." (Para. 38)</p> <p>"The parties did not delineate in the separation agreement what was to happen between 2001 and 2004 and therefore what a court would consider at the time of the review. The two live issues however seem apparent - the wife's ability to become self-</p>

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			<p>THIS COURT ORDERS AND ADJUDGES that the parties specifically agree that there is no acknowledgement by the Petitioner that the Respondent's current employment is <i>bona fide</i>, nor is there any acknowledgement by the Petitioner that the Respondent has made reasonable efforts to promote her own economic self-sufficiency within a reasonable time insofar as practicable. The review of spousal support as mentioned in paragraphs 20 and 21 herein shall be without prejudice to the Petitioner's right to assert the terms of this paragraph and the Respondent's right to assert upon such review that the support she has received is insufficient or that it represents the Petitioner's ability to pay.</p>	<p>sufficient and the husband's income." (Para. 44)</p>
<p><i>Pollitt v. Pollitt</i> 2010 ONSC 1617</p>	<p>Review and Variation</p>	<p>Consent order and Separation agreement</p>	<p>SA and CO - "The amount of support payable will be reviewed when Ms. Pollitt receives her fourth installment of the equalization payment, as provided in this agreement.</p> <p>SA – Only the custody and access, child and spousal support terms of this agreement may be varied by a written and witnessed agreement signed by both parties or by Court application if there is a material change in the circumstances of the</p>	<p>SA provided for review, variation and indexed support binding the estate of the payor.</p> <p>CO provided for support of \$7,000.00 per month.</p> <p>Support was not reviewed when fourth installment of equalization payment was made.</p> <p>Court found material change in circumstances under s. 17 of <i>Divorce Act</i> "and as contemplated</p>

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			parties or the children, foreseeable or not.	<p>by parties in their agreement.” (Para. 220)</p> <p>Husband’s income had increased, obligations to children had decreased.</p> <p>Support increased to \$15,000 on interim basis. Prospective lump sum payment of \$1,019,000 ordered.</p>
<i>Grefe v. Grefe</i> 2012 ONSC 858	Review	Separation Agreement and Consent Order	<p>SA – Spousal support of \$2,000 per month for 9 years, to be reviewed and reduced to \$1,000 per month if</p> <p>a) the Respondent lost his job at the steel mill;</p> <p>b) he had not reached the age of 53 years and 9 months;</p> <p>c) he was left with income below \$50,000 a year; and</p> <p>d) he received no severance pay.</p>	<p>Payor lost his job at the steel mill and applied to vary spousal support on basis of a material change in circumstances.</p> <p>Court found that the current circumstances were specifically contemplated by the Agreement: “The agreement reached by the parties contemplated the possibility of a significant reduction in the Respondent’s income, and a reduced support obligation if this occurred. The threshold agreed to by the parties has not been met. A material change in circumstances, if provided for in an agreement, cannot by definition be unforeseen as required in order to compel a variation of the agreement pursuant to <i>Willick</i> and cases subsequently decided on this issue.</p> <p>The agreement was an efficient and effective method by which the parties could settle their financial</p>

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				<p>differences after 25 years of marriage without the delays, stress and cost associated with litigation, and placed both parties in a position of being able to foresee their financial future until August 2017.</p> <p>I am therefore of the view that the Respondent has not met the onus imposed upon a party seeking to vary an order on an agreement, largely on the basis of the obvious foreseeability of the change relied upon in this motion, as reflected in the agreement itself.”</p> <p>(Paras. 23 to 25)</p> <p>Court dismissed application to vary Consent Order.</p> <p>By consent, Court reduced support to \$1,000 per month pursuant to the Agreement for four months after Payor lost his job and before he reached the age of 53 years and 9 months.</p>
<p><i>Wegler v. Wegler</i> 2012 ONSC 5982</p>	<p>Review</p>	<p>Consent Order</p>	<p>CO – Spousal support of \$1,700 per month reviewable at the option of the husband (payor) any time after March 31, 2011</p>	<p>At the time of divorce, the parties had agreed that the husband was to pay the wife spousal support of \$1,200 per month reviewable at the husband’s option on or after March 1, 2005. The husband initiated at review and the parties agreed, on the eve of trial, on terms in consent order.</p> <p>Court found wife still entitled to</p>

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				spousal support but imputed full-time income to her. Court ordered continuation of support of \$1,700 per month (below SSAG ranges), with option of further review when youngest child completed high school.
<i>Mistal v. Karpynczyk</i> 2012 ONSC 6474	Variation	Consent Order	CO – Spousal support of \$1,350 per month with the provision that “Either party shall be at liberty to vary the judgment with respect to spousal support in the event of material change in circumstances which shall include but not be limited to any changes in the parties’ incomes.”	<p>“It is clear from the judgment of Wright J., which was consented to by both parties, that a material change in circumstances was to include <u>any</u> changes in the parties’ incomes. This was contemplated by the parties at the time they agreed to the consent judgment. Both parties have had a change in income since the date of the judgment as Mr. Karpynczyk’s employment income has increased approximately \$25,000 to \$27,000 while Ms. Mistal’s income (subtracting the spousal support payments) has decreased from \$5,809 to zero income at present. I therefore find that there has been a material change in circumstances.” (Para. 24)</p> <p>The Court ordered that Mr. Karpynczyk pay Ms. Mistal spousal support of \$1,950 per month subject to a material change in circumstances and further order of the court.</p>
<b>NB</b>				
<i>Brooks v. Brooks</i> 2012 NBQB 401	Review	Consent Order	CO – Either party may apply for a review of the spousal support	Court stated, “Given that the Consent Order failed to identify the

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			<p>provisions contained herein after 2 full years from the effective date of this order. There is no requirement for a material change of circumstances to occur before requesting a review pursuant to this order.</p>	<p>issue on the review, in my opinion the most that can be done is to attempt an analysis by reference to the factors and objectives contained in the <i>Divorce Act</i>, obviously without the benefit of any reasons from the judge of first instance.” (Para. 16)</p> <p>Court found that CO continued to meet the objectives of the DA.</p>
<b>NS</b>				
<p><i>Cochran v. McBean-Cochran</i> 2012 NSSC 79</p>	<p>Variation</p>	<p>Consent Order and Separation Agreement</p>	<p>SA (incorporated into Consent Order) – Husband to pay wife \$5,600 in spousal support.</p> <p>“This spousal support shall continue until varied by either the agreement of the parties or order of a court having jurisdiction over family and matrimonial matters.”</p>	<p>Parties entered into agreement in 2000 and agreed to vary it the following year. Parties agreed to vary spousal support to \$2,000 per month based on reduction in the payor’s income.</p> <p>Court found that there had been material change in circumstances since the original agreement/order.</p> <p>Court was unable to make finding re: basis on which spousal support was paid. (Para. 147)</p> <p>On 2009 application, Court made retroactive and prospective orders for support. Ordered support of \$3,000 per month commencing January 2012, subject to the right of the parties to seek a review and termination in 2014.</p>



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<i>Dodman v. Chiola</i> , 2012 NSSC 272	Variation	Consent Order and Separation Agreement	CO – “Spousal support shall be subject to review on or after October 1, 2013.”	<p>Payor applied for a variation of spousal support prior to the review date.</p> <p>Court stated that</p> <p>“The Agreement makes no reference to altering the application of section 17 to the payment of spousal support and, since a review and variation are very different sorts of proceedings, I conclude that the availability of a review does not replace the statutory entitlement to seek a variation.” (Para. 11)</p> <p>Court found that there had been a material change and reduced spousal support from \$800 per month to \$0. Support was not terminated.</p>
<i>Smith v. Rand</i> 2013 NSSC 369	Variation	Separation Agreement/ Consent Order	<p>SA –</p> <p>3. Subject to paragraphs 4, 5 and 6 herein the parties agree that commencing on January 1, 2011, and continuing every two weeks thereafter until December 31, 2021, the Husband shall pay to the Wife spousal support in the amount of \$1580.31 which amount shall paid directly into the wife's account at Royal Bank of Canada.</p> <p>4. Subject to paragraph 5, herein, the parties agree that there shall be no variation in the amount of spousal support payable for a period of five years</p>	<p>Court considered the terms of the Separation Agreement in determining whether there had been a material change in circumstances.</p> <p>“In this case, the agreement specifically says that there is to be no variation of spousal support for a period of five years regardless of any change in circumstance for either party. At the end of the five years, the spousal support automatically drops by ten percent each year until it ceases at the end of 2021.</p>

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			<p>from January 1, 2011, regardless of any change in circumstance by either party.</p> <p>5. The Husband and the Wife agree that the Husband shall seek a variation in either or both of the amount of spousal support payable and the duration for which spousal support is payable should the Wife cohabit with another as "husband and wife" irrespective of whether the Wife should marry.</p> <p>6. The parties agree that commencing on January 1, 2016, and continuing each year thereafter the monthly payment of spousal support shall be reduced annually by 10 percent of the original spousal support amount as calculated from the original spousal support provided for in paragraph 4 herein. The Husband reserves the privilege of applying for an additional reduction in spousal support should the income of the Wife exceed by a factor of two or more the non-cumulative annual amount of the reduction which shall accrue to the benefit of the Husband by virtue of this clause.</p> <p>CO provided for spousal support in the amount of \$3,160.62 per month.</p>	<p>The agreement provides an exception so that Mr. Smith can seek variation in the event that Ms. Rand co-habitats with another as husband and wife. I am certain that the negotiation of these spousal support terms involved concessions on both sides. The agreement gives each a high degree of predictability about support payments, particularly in the five years following their divorce.</p> <p>The clear language of the agreement is that for the first five years variation is not permitted simply because of a change in the income of either Ms. Rand or Mr. Smith. ...</p> <p>By including the spousal support provisions found in paragraphs 3-6 in the separation agreement, I believe that the parties intended to have Mr. Smith bear the risk of fluctuations in his income. In some years that might work to his benefit and in others to his detriment. ..." (Paras. 26 – 28)</p> <p>The Court found that the husband had not met the burden of showing a material change in circumstances. The Court also stated that, "I put significant weight on the terms of the separation agreement which</p>

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				reflected the intention of the parties that there be no variation in spousal support for five years." (Para. 29)
<i>Acker v. Acker</i> 2014 NSSC 5	Review	Consent Order	CO provided that spousal support shall be reviewed on or after October 1, 2007, with a view to determining the outcome of the wife's efforts to obtain employment.	<p>Court noted that review was not initiated until 5 years after right to do so arose. Court found that, at age 60, to terminate support because of wife's failure to diligently pursue retraining or employment would be to unduly emphasize one of factors under DA, namely self sufficiency. (Para. 156)</p> <p>Court also considered application to terminate support as a variation application.</p> <p>Court ordered decreasing support starting at \$5,000 (amount in CO) and decreasing to \$4,000, \$3,000, and then \$2,000 up to husband's retirement at which time onus is on wife to show ongoing entitlement.</p>
<b>SK</b>				
<i>Agioritis v. Agioritis</i> 2011 SKQZ 257	Review	Consent Order	CO – "Spousal support shall be reviewed by the parties on or before September 1, 2010. Then either party may apply to the Court for further directions as to spousal support thereafter."	<p>Court noted that provision for review did not set out what legal review framework as intended by the parties but proceeded on basis that "material change in circumstance" did not have to be established as neither party suggested that it did.</p> <p>Court ordered that spousal support</p>

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				remain at amount set in CO (\$2,000 per month) in the interim.
<i>More v. Shurygalo</i> 2011 SKQB 275	Review/ Variation	Consent Order	CO – “The Respondent shall pay to the Petitioner spousal support and maintenance in the sum of \$750.00 per month, commencing March 1, 2008 and payable on the 1st day of each and every month thereafter. After a period of 3 years from the commencement date of the said spousal support provisions, either the Petitioner or the Respondent may, as of right, apply to this Honourable Court (or a court of competent jurisdiction) for a review of the spousal support payable, including both as to quantum and duration.”	<p>“ It would also have been a simple enough task to use words to the effect that the purpose of the three year review was to determine if the petitioner would be <u>entitled</u> to further spousal support, or conversely, whether spousal support should terminate. (Emphasis added) No such language was employed in the 2008 consent judgment which indicates to the reader that it was in fact within the contemplation of the parties at that time, that the review would address the petitioner’s right of further entitlement to spousal support or termination thereof. To the contrary, the clear and ordinary meaning of the language used suggests the scope of the review was to focus upon quantum and duration only.” (Para. 48)</p> <p>Based on this, Court found that an application to terminate support payments must be made under s. 17 of DA.</p> <p>Court ordered that support continue at current level for further three and one-half years, after which it would terminate.</p>