



**THE SIX-MINUTE
Family Law Lawyer 2016**

What is “Material Change” Anyway?

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November 29, 2016

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“Change” and “Material Change”

Child Support

- *Child Support Guidelines*
 - Section 14(a) concerning “change of circumstances” -- the threshold is lower because we are generally less concerned with the stability of orders and relitigation in child support cases
 - Child is to benefit from a share in any increase of the payor’s income
 - *Child Support Guidelines* reduce the risk of the inconsistent exercise of discretion

Spousal Support

- *Divorce Act*
 - Section 17(1) – power to change a support order or a custody order
 - Section 17(4.1) – Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order 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.
- *Family Law Act*, and other provincial legislation

Variation vs. Review

This may seem obvious, but a “variation” is not a “review”.

- A review will permit either of the parties to examine the circumstances “*de novo*”, without demonstrating any change in circumstance, and the analysis on the quantum and duration, if any, is in line with an initial application (although this can be limited by the terms of the parties’ agreement or order, itself – See *Leskun v Leskun*, 2006 SCC 25)
- A variation requires the moving party to establish the higher threshold of a “change in circumstances” before there can be any consideration of whether the initial Order or agreement, incorporated into an Order, may be varied.

L.M.P. and L.S., 2011 SCC 64 (L.M.P.)

L.M.P. is now the leading case on the threshold test for variation in the context of spousal support whether the Order incorporates an agreement of the parties, or is an Order of the Court.

The Supreme Court in *L.M.P.* sets out a brief but useful history of the evolution of variation applications under the *Divorce Act* (starting with the 1968 Act).

The replacement of the 1968 legislation with the 1985 *Divorce Act* led the SCC to the decision in *Moge* where the “clean break” theory of support underlying the *Pelech* trilogy, was rejected.

L.M.P. - Judicial History, and Miglin

Following the replacement of the “clean break” theory under *Moge*, the SCC in *Miglin* outlined a two-stage test for final support orders:

1. The first step examines the process leading to, and the substance of, the agreement; and
2. The second requires a determination of "the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act"

Who cares?

You do, because the *Miglin* test does not apply on variations.

- See *Peel v. Peel*, 2012 ONSC 761, for a helpful decision by Justice Kruzick, setting out when a variation analysis will apply (where agreement made into a court order) as opposed to where *Miglin* analysis will still apply (where the parties have entered into a Separation Agreement, that has not been incorporated into an order, and will be treated as a application of first instance).
- Where the parties have entered into an 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](#), 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.

Variation vs. Initial Order

While the *objectives* of the variation order are virtually identical in s. 17 (variation) to those in s. 15.2 (initial application) the *factors* to be considered are significantly different.

While section 17(4.1) sets out "a change in the ... circumstances" of the parties as the **sole** factor, the factors considered in initial support orders are as follows:

15.2 ... the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

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

Spousal Support – *Divorce Act*

17 (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order 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.

Divorce Act

Section 17 of the *Divorce Act*:

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
(a) a support order or any provision thereof on application by either or both former spouses; or
(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

** Similar provisions for variation are found in provincial family law statutes**

Variation does not apply same factors as initial order

Section 15(4) – *Divorce Act*

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

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

Objectives Under s. 17(7) of the *Divorce Act*

(7) A variation order varying a spousal support order should

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

Tests are distinct

Notably, unlike on an initial application for spousal support under s. 15.2(4)(c), which specifically directs that a court consider "any order, agreement or arrangement relating to support of either spouse", s. 17(4.1) makes no reference to agreements and simply requires that a court be satisfied "that a change in the condition, means, needs or other circumstances of either former spouse has occurred" since the making of the prior order or the last variation of that order.

Because of these differences in language, it is important to keep the s. 15.2 and s. 17 analyses distinct.

What does this actually mean?

We go back in time to *Willick v. Willick*, 1994 CarswellSask 48.

According to the SCC in *L.M.P.*, the proper analysis in the context of a variation remains the test outlined in *Willick* which requires the Court:

“...to determine first whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances”

“Material” is qualitative and quantitative

Quantitative - trivial, insignificant or short-lived changes will not justify a variation.

Qualitative – in order to be “material” the change must be such that, if known at the time, it would have likely resulted in different terms.

Considering both qualitative and quantitative elements requires a careful analysis of the basis upon which the existing Order was made.

See *Menegaldo v Menegaldo* 2012 ONSC 2915

Change must be “material”

The "change of circumstances", has to be "material", meaning a change that, "if known at the time, would likely have resulted in different terms."

(As *Willick* was determined in the context of child support, the SCC confirmed later, that this threshold also applied to spousal support variations in the case of **B. (G.) c. G. (L.)** 1995 CarswellQue 23.)

Other factors:

1. It is presumed that the underlying Order is correct.
2. The change must have some degree of continuity, and not just a temporary set of circumstances.
3. The test is the same whether the order incorporates a separation agreement into the Order or whether it is based on an Order following a trial.

4. Even when the change is significant, it may not be “material” if it is specifically contemplated in the agreement/Order by the parties at the time.
5. The more specific the terms of the incorporated agreement, the more likely the terms will shape the “material change” enquiry.

Onus

The onus is on the party seeking a variation to establish such a change.

“known or taken into account” **NOT** “foreseen” or “foreseeability”

The test is not what whether the change was “foreseeable” or “foreseen” at the time of the previous order.

- As Rollie Thompson points out in his excellent paper “To Vary, To Review, Perchance to Change: Changing Spousal Support”, 2012 31 CFLQ 355, not only are these two words different from each other in their plain English meaning, they reflect very different concepts in the context of support law.
- This language of foreseeability, which is imported from *Miglin*, applies where there is a “final” order where final means a disposition of the support issue on a final basis --- by which we mean a termination after a lump sum payment or a fixed term after which spousal support will end.

Not to be confused with a “final” order meaning an order made after a trial.

Weight of Objectives

L.M.P. at para 49:

Julien D. Payne and Marilyn A. Payne observed that “[t]here is nothing in the Divorce Act to suggest that any one of the objectives [in s. 17(7)] has greater weight or importance than any other objective” (Canadian Family Law (3rd ed. 2008), at p. 253). Rather, the objectives “operate in the context of a wide judicial discretion” and “provide opportunities for a more equitable distribution of the economic consequence of divorce between the spouses”.

So, in essence, once you have established a “material change” the objectives applied, are the same objectives in applications of first instance decided under s. 15(6) of the *Divorce Act*.

So you have established a “material change”, now what?

Once a material change has been established, *the variation order should:*

1. *properly reflect the objectives set out in s. 17(7),...*
2. *take into account any of the material changes in circumstances,*
3. *and consider the existence of the separation agreement and its terms as a relevant factor* (Hickey, at para. 27).

“Easier” Scenarios

- Where payor’s income is reduced in an ongoing and significant enough way
- Child no longer eligible for child support/child support terminates
- Child changes primary residence

In these types of cases, entitlement to spousal support is often not considered and the SSAGs can be easily applied to determine the new quantum of spousal support (and child support, of course)

By the way...Application of the SSAGs

Despite the comments in *Fisher*, the SSAGs do apply to the determination of amount and variation or review, subject to concerns about entitlement.

Trickier cases – Increased income

Post-separation income increases of the payor:

- No automatic entitlement to share in post-separation increases in income
- The longer the marriage, the more likely the recipient is to share in the increase
- The stronger the compensatory claim, the greater the sharing
- Some causal connection between the increase and an entitlement to share – more likely in long term marriages with a compensatory claim
- The longer the time between the end of the marriage and the increase in income, the less likely increase will be shared

Trickier cases – Income decrease

Post-separation decrease of the recipient:

- Causes similar entitlement issues to increased income of the payor
- Case law seems to suggest a connection to the marriage is also necessary

Trickier cases – remarriage of recipient

Remarriage or re-partnering of the recipient

- More complicated
- There is no formulaic mechanism to address this issue
- When spouse is already cohabiting at the time of the previous order, likely not a “material change”
- Most common responses to remarriage/repartnering of recipient:
 - Step down orders
 - Below range amounts
 - Reduction in amount
 - Termination

Trickier cases – When is enough, enough?

‘end of entitlement’? Or ‘maximum duration’ – when is “enough, enough?”, including analysis of self-sufficiency.

The most common way of addressing ‘self sufficiency’ is to impute income to the recipient and/or to time limit support.

Trickier cases - Retirement

Post-retirement cases, including “double dipping” issues.

- Unless the order or agreement contemplates that retirement is not a material change, or the payor has alternate sources of income, retirement is almost always a material change.
- Early retirement, not so much.
- Entitlement issues arise especially if pensions were previously divided, including problems with “double dipping”.
 - How do you deal with the SSAGs where double dipping has been established?
 - Burden shifts to the recipient to demonstrate why the double recovery should be permitted, usually in cases of need.
 - Problems with the formulaic approach
 - You still need to consider *Boston v Boston* [2001] 2 SCR 413

Practically speaking...

- When you draft agreements, make sure you are agreeing to a variation and not a review (or a review and not a variation, if that is what you want to achieve)
- If you are agreeing to a variation, specifically consider what will and will not constitute a material change?
- Consider whether you want to incorporate your agreement into an Order (variation) or leave it as an agreement (application of first instance).
- If you are trying to establish a material change, make sure you bring evidence of the circumstances at the time of the initial Order

