A SHOW ABOUT NOTHING*

OR

How we Failed to Establish a General Test to Determine what Constitutes a Material Change in Circumstances in Variation Applications

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* with apologies to Jerry Seinfeld.

INTRODUCTION

In *Willick v. Willick*, the Supreme Court of Canada held that in deciding whether the conditions for a variation exist, "it is common ground that the change must be a material change of circumstances".[1] But what constitutes a material change in circumstances? We undertook to establish rules of general application to prove when a material change in circumstances occurs in the context of variation applications as to orders or agreements for child support, spousal support and custody and access. We failed.

Many great minds have pondered the nature of change. The Greek philosopher Heraclitus postulated that change alone is unchanging. The Great Buddha came to a similar conclusion, teaching that everything changes, nothing remains without change. In *Walden,* Henry David Thoreau wrote, "Things do not change; we change".[2] We therefore feel we are in good company when we are equally vague when opining on when a material change occurs. In the end, we can only conclude that what constitutes a material change of circumstances, in the context of a variation application, depends on the circumstances in each individual case, and accordingly, we have no general principles to offer you.

But we can offer a recital as to how the court has addressed the concept of analyzing change in variation applications. Part I of this paper focuses on the statutory requirement for a change of circumstances in varying an order for child support, the inception of the material change test and how it has been applied in recent years. Part II conducts a similar analysis in the context of spousal support, outlining the relevant legislative provisions, tracing the importation and modification of the material change test and its recent application. Part III addresses the variation of custody and access orders. Part IV provides a critique of the stringent application of the

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[1] *Willick v. Willick*, [1994] S.C.J. No. 94 (S.C.C.) ("*Willick*") at para. 21. This case related to issues of support, but the court in *Gordon v. Goertz*, *infra* note 109, adopted similar reasoning in custody and access matters.

[2] Henry David Thoreau, *Walden* (Boston: Ticknor and Fields, 1854) at ch. 18.

material change test. Finally, Part V will conclude with a review of the changes to which courts have referred in addressing the notion of a material change in circumstances in variation proceedings.

(a) The Context for Addressing Material Change

The context for addressing a material change in circumstances is a variation proceeding. A variation proceeding is defined at section 2(1) of the *Divorce Act* as a "proceeding in a court in which either or both former spouses seek a variation order."[3] A variation proceeding is therefore entirely dependent on the existence of a prior order or agreement.

A distinction must be made between a court's power to vary the terms of an order under section 17(1)(a) of the *Divorce Act* and a court's power to vary the support provisions of an agreement. Rule 15 of the Ontario Family Law Rules, which governs the procedure for changing orders and agreements, applies only to:

(a) final orders (with an exception under the *Child and Family Services Act*); and

(b) agreements for support filed under section 35 of the *Family Law Act*.[4]

Thus, unless an agreement has been incorporated into a court order under the applicable provincial legislation, when a court exercises its power to vary an agreement, it is making an original support order that stands apart from the agreement.

A variation proceeding must also be distinguished from a review proceeding. In a variation proceeding, the onus is on the applicant to show that a material change in circumstances has occurred since the making of the original order. In a review proceeding, a court makes a

[3] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) ("*Divorce Act*"), s. 2(1).
[4] *Family Law Rules,* Ont. Reg. 114/99, r.15.

determination on a *de novo* basis, without the requirement of proving a material change in circumstances.

In addition, a variation proceeding is separate from an automatic adjustment, for example, the indexing of support or the increase in access time, as provided for in a court order or an agreement.

(b) Jurisdiction for Variation

The following chart illustrates the sections of the federal and provincial legislation which impose a requirement for a change of circumstances in a variation proceedings in the context of child support, spousal support and custody and access:

	FEDERAL STATUTES	**PROVINCIAL STATUTES (Ontario)**
Child Support	***Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.)** **17(4) Factors for Child Support Order -** Before a court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order. ***Federal Child Support Guidelines*, SOR/97-175** **14. Circumstances for Variation -** For the purposes of subsection 17(4) of the *Act*, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order: (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof; (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the *Act*, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).	***Family Law Act*, R.S.O., 1990, c. F.3** **37(2.1) Powers of Court: Child Support -** In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines or that evidence not available on the previous hearing has become available, the court may, (a) discharge, vary or suspend a term of the order, prospectively or retroactively; (b) relieve the respondent from the payment of part or all of the arrears or any interest due on them; and (c) make any other order for the support of a child that the court could make on an application under section 33. ***Child Support Guidelines* (Ontario), O.Reg. 391/97** **14. Circumstances for Variation -** For the purposes of subsection 37(2.2) of the *Act* and subsection 17(4) of the *Divorce Act* (Canada), any one of the following constitutes a change of circumstances that gives rise to the making of a variation order: 1. in the case where the amount of child support includes a determination made in accordance with the table, any change in circumstances that would result in a different order for the support of a child or any provision thereof; 2. in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either parent or spouse or of any child who is entitled to support; 3. in the case of an order made under the *Divorce Act* (Canada) before May 1, 1997, the coming into force of section 15.1 of that Act, enacted by section 2 of chapter 1 of the Statutes of Canada; and 4. In the case of an order made under the *Act*, the coming into force of subsection 33(1) of the *Act*.

Spousal Support	***Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.)** **17(4.1) Factors for Spousal Support Order -** Before a 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, an, in the making of the variation order, the court shall take that change into consideration.	***Family Law Act*, R.S.O., 1990, c. F.3** **37(2.1) Powers of Court: Spouse and Parent Support -** In the case of an order for support of a spouse or parent, if the court is satisfied that there has been a material change in the dependant's or respondent's circumstances or that evidence not available on the previous hearing has become available, the court may, (a) discharge, vary or suspend a term of the order, prospectively or retroactively; (b) relieve the respondent from the payment of part or all of the arrears or any interest due on them; (c) make any other order under section 34 that the court considers appropriate in the circumstances referred to in section 33.
Custody and Access	***Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.)** **17(5) Factors for Custody Order -** Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.	***Children's Law Reform Act*, R.S.O. 1990, c. C.12** **29.** A court shall not make an order under this Part that varies an order in respect of custody or access made by a court in Ontario unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child.

However trite, it is worth mention that where spouses are or were married, they may seek corollary relief under the Federal *Divorce Act*. Section 5(1) of the *Divorce Act* provides that a court in a province has jurisdiction to hear and determine a variation proceeding if either former spouse is ordinarily resident in the province at the commencement of the proceeding, or both former spouses accept the jurisdiction of the court.[5]

If two variation proceedings are commenced on different days, in two different courts, between the same former spouses in respect of the same matter, the court in which a variation proceeding was first commenced has exclusive jurisdiction to hear and determine any variation proceeding then pending between the former spouses in respect of that matter, and the second variation proceeding shall be deemed to be discontinued.[6]

Where variation proceedings between the same former spouses and in respect of the same matter are pending in two courts and were commenced on the same day, but neither is discontinued

[5] *Divorce Act, supra* note 3 at s. 5(1).
[6] *Ibid* at s. 5(2).

within thirty days, exclusive jurisdiction falls to the Federal Court to hear and determine any variation proceeding then pending between the former spouses in respect of that matter.[7]

In the instance of a custody application, where a variation proceeding to a court is opposed, and the child of the marriage in respect of whom the variation order is sought is most substantially connected with another province, the court has the power to transfer the variation proceeding to a court in that other province.[8]

Unmarried spouses must avail themselves of the relief provisions of the applicable provincial legislation. In Ontario, the *Family Law Act*[9] governs variation applications for child and spousal support and the *Children's Law Reform Act*[10] deals with the variation of orders for custody and access.

It should also be noted that under section 37(3) of the *Family Law Act*, no application for variation may be made within six months after the making of the order for support or the disposition of another application for variation in respect of the same order, except for leave of the court. There is no such limitation imposed by the *Divorce Act*.[11]

I. VARIATION OF ORDERS FOR THE SUPPORT OF A CHILD

A. Statutory Framework

Under section 17(4) of *Divorce Act,* only once the court is satisfied that a change of circumstances as provided for in the applicable guidelines has occurred since the making of a child support order may a court of competent jurisdiction make an order for its variation.[12] The

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[7] *Ibid* at s. 5(3).
[8] *Ibid* at s. 6.
[9] *Family Law Act*, R.S.O. 1990, c. F.3 ("*Family Law Act*") at s. 37.
[10] *Children's Law Reform* Act, R.S.O. 1990, c. C.12 ("*Children's Law Reform Act*") at s. 29.
[11] *Family Law Act, supra* note 9 at s.37(3).
[12] *Divorce Act, supra* note 3 at s. 17(4).

Divorce Act is explicitly clear that in making a variation order in respect of a child support order, a court must do so in accordance with the applicable guidelines.[13]

For the purposes of section 17(4) of the *Divorce Act*, the "applicable guidelines" are the *Federal Child Support Guidelines*, which provide at section 14 that any of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different order or any provision thereof;
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> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
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> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the *Divorce Act*, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).[14]

Notwithstanding a court's obligation to apply the *Federal Child Support Guidelines*, section 6.2 of the *Divorce Act* permits a court to award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied:

> (a) that special provisions in an order, a judgment or a written agreement respecting the final obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of the child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.[15]

If a court determines that is appropriate to vary an order outside the boundaries of the applicable guidelines, reasons must be provided for doing so.[16]

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[13] *Ibid* at s. 17(6.1).
[14] *Federal Child Support Guidelines,* SOR/97-175 ("*Guidelines*") at s. 14.
[15] *Divorce Act, supra* note 3 at s. 17(6.2).

Additionally, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.[17] However, in determining whether reasonable arrangements have been made, the court must have regard to the applicable guidelines. The court shall not consider the arrangements for the support of a child to be unreasonable solely for the reason that the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.[18]

In Ontario, the *Family Law Act* provides that in the case of an order for the support of a child, a court may *inter alia* discharge, vary or suspend a term of an order, prospectively or retroactively, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines (or if evidence not available on the previous hearing has become available).[19]

The events constituting a change of circumstances giving rise to the making of a variation order as enumerated in the *Child Support Guidelines* (Ontario) are identical to those listed at section 14 of the *Federal Child Support Guidelines*, save for the inclusion of the coming into force of section 33(11) of the *Family Law Act* (which requires a court to make an order for the support of a child in accordance with the *Child Support Guidelines*(Ontario)).[20][21]

For ease of reference the *Federal Child Support Guidelines* and the *Child Support Guidelines* (Ontario) will be referred to collectively as the "CSGs".

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[16] *Divorce Act, supra* note 3 at s. 17(6.3).
[17] *Ibid* at s. 17 (6.4).
[18] *Ibid* at s. 17 (6.5).
[19] *Family Law Act, supra* note 9 at s. 37(2.1).
[20] *Child Support Guidelines* (Ontario), O. Reg. 391/97 at s.14.
[21] *Family Law Act, supra* note 9 at s.33(11).

B. Evolution of the Material Change Test

It is in keeping with the objectives of the *Divorce Act* and those of the provincial legislation that children should be sheltered from the economic consequences of divorce.[22] In *Richardson v. Richardson*, the Supreme Court of Canada explained the necessarily dynamic nature of an order for the support of a child as follows:

> The legal basis of child maintenance is the parents' mutual obligation to support their children according to their need. That obligation should be borne by the parents in proportion to their respective incomes and ability to pay…The court is always free to intervene and determine the appropriate level of support for the child…[23]

Thus, child support orders may be varied when the underlying circumstances change, even where the order does not provide for variation.[24] This is because the reasonable expectations of children for future support are not frozen as of the date of the parent's separation.[25] The test to meet in determining whether a child support order may be varied was articulated by the Supreme Court of Canada in the seminal decision of *Willick v. Willick*:

> In deciding whether the conditions for a variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time, it cannot be relied on as the basis for a variation.[26]

The onus is on the party seeking to vary the original order or agreement to prove a material change in circumstances has occurred.[27]

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[22] *Dickson v. Dickson*, [1987] B.C.J. No. 2491 (BCCA); *Freisen v. Freisen*, [1985] B.C.J. No. 1771 (BCCA); *Paras v. Paras* [1971] 1 O.R. 130 (ONCA).
[23] *Richardson v. Richardson*, [1987] S.C.J. No. 30 (SCC) at para. 14.
[24] *D.B.S. v. S.R.G.,* [2006] S.C.J. No. 37 (SCC) at para. 64.
[25] *Willick, supra* note 1 at para. 26
[26] *Ibid* at para. 21.
[27] *Houde v. Veenstra*, [2013] O.J. No. 4992 (Ont. S.C.J.) at para. 19.

It is significant to note that the test in *Willick* was established in relation to section 17(4) of the *Divorce Act*, as it read before the enactment of the CSGs:

> 17(4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage.

The ambiguity in the previous incarnation of section 17(4) of the *Divorce Act* required further definition to be effective as a condition for variation, and as such, *Willick* stipulated that in order to trigger a right to a variation, any change in circumstances had to be 'material'.[28]

Following the enactment of the CSGs, which came into force December 1, 1997, there was disagreement at the appellate court level concerning whether or not the court retained residual discretion *not* to vary a pre-guidelines order, in light of section 14(c) provided that the coming into force of the CSGs constituted a change in circumstances. The controversy centred around the interpretation of section 17(1) of the *Divorce Act*, which provides as follows:

> 17. ORDER FOR VARIATION, RESCISSION OR SUSPENSION – (1) A court of a competent jurisdiction <u>may</u> 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.
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> …[29] (<u>emphasis added</u>)

The appellate courts of British Columbia, New Brunswick and Alberta reasoned that the word "may" in section 17(1) of the *Divorce Act* provided a court residual discretion not to vary a pre-guidelines order and accordingly, there was no right to variation.[30] In contrast, the courts of

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[28] *Wright v. Zaver*, [2002] O.J. No. 1098 (ONCA) ("*Wright v. Zaver*") at para. 67.
[29] *Divorce Act, supra* note 3 at s.17(1).
[30] *Wang v. Wang*, [1998] B.C.J. No. 1966 (BCCA); *Parent v. Pelletier*, [1999] N.B.J. No. 391 (NBCA); *Laird v. Laird*, [2000] A.J. No. 18 (ABCA).

appeal in Saskatchewan and Nova Scotia held that no residual discretion existed, and the enactment of the CSGs created a right to variation. The Ontario Court of Appeal held in *Sherman v. Sherman,* that there was no right to a variation of a pre-guidelines child support order, but rather, that the material change test as articulated in *Willick* remained applicable.[31] In the later decision of *Bates v. Bates*, the Ontario Court of Appeal noted in *obiter*, that the enactment of the CSGs did in fact create a right to vary a prior order, and that *Sherman v. Sherman* was wrongly decided.[32]

On November 1, 2000, section 14 of the CSGs was amended to provide that "for the purposes of section 17(4) of the [*Divorce Act*]" any of the enumerated clauses were deemed to be changes in circumstance as contemplated by the language of section 17(1) of the *Divorce Act* or section 37(2.1) of the *Family Law Act*. The Regulatory Impact Analysis Statement, released at the same time, stated in regard to the s.14 amendment:

> In light of conflicting court of appeal decisions from across the country, this section is amended to properly reflect its intent. All of the circumstances for variation listed in section 14, including paragraph (c) , are changes in circumstances that a court can rely on to vary an order. Where there is such a change, for example, as listed in paragraph (c), which refers to a situation where an order is made before May 1, 1997, the intent is that the court vary the order and apply the Federal Child Support Guidelines.

In Ontario, the controversy was put to rest by the Court of Appeal in *Wright v. Zaver*, where Justice Simmons, for the majority, held that by coming into force, the CSGs constituted a material change in circumstance for the purpose of a variation:

> "I am satisfied that the enactment of the Ontario Guidelines created a right to a variation of pre-existing orders for child support."[33]

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[31] *Sherman v. Sherman*, [1999] O.J. No. 1721 (ONCA).
[32] *Bates v. Bates*, [2000] O.J. No. 2269 (ONCA).
[33] *Wright v. Zaver*, *supra* note 28 at para. 26.

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> "Taken in context, 'may' as it appears in section 37(2.1) of the Family Law Act and section 17(1) of the Divorce Act, means 'must' once the statutory pre-condition to variation has been fulfilled, and that there is no residual discretion in the court not to vary."[34]

The material change test in *Willick* continues to be routinely applied, with little to no modification in the context of child support. As at the date of writing, *Willick* has been followed 162 times, mentioned 1540 and only questioned twice. In the 2015 British Columbia Supreme Court decision of *Carten v. Carten,* the record did not disclose whether the order of which variation was sought was made in accordance with the CSG tables, and therefore it was unclear whether the test for variation was established by section 14(a) of the CSGs ("any change in circumstances that would result in a different child support order") or by section 14(b) of the CSGs ("any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support"). The court, citing *Willick*, held:

> "Either way the change in circumstances must be material."[35]

C. Recent Case Law – What Constitutes a Material Change in Circumstances?

As established above, the test to be applied by a court in considering whether to grant the variation of a child support order is whether a material change in circumstances has occurred since the date of the original order, such that, if known at the time, would likely have resulted in different terms. This test demands a fact-driven analysis, and therefore, what constitutes a material change in circumstances differs from situation to situation. Even where facts appear to be analogous, a material change of circumstances may be found in one case and not the other. The following cases represent recent treatment of the material change test in the context of the

[34] *Ibid* at para. 55.
[35] *Carten v. Carten*, [2015] B.C.J. No. 22 (BCSC) ("*Carten v. Carten"*) at para. 8.

variation of an order for child support. The cases cited are intended only as a sample of recent decisions, and do not constitute an exhaustive summary.

1. Change in Circumstances of the Child

(i) Post-secondary education

Child support was terminated in *Levandoski v. Levandoski,*[36] despite the fact that the parties conceded their 18 year old son remained a child of the marriage. The court found that the son was only enrolled at school part-time time and was capable of earning money while at school.

In *Clancy v. Hansman,*[37] however, the court gave deference to the parties' separation agreement, which provided that child support would be payable for an adult dependent child for the full table amount for her first year of university. The payor's application to vary support for that child was therefore dismissed.

(ii) Child earning or otherwise receiving an income

The mother's application for an increase in child support payable for the parties' 18 year old son was dismissed in *Hiebert v. Hiebert,*[38] as the son lived with his mother, had a monthly surplus of funds during the 8 month school term and had an obligation to contribute to his own support by working in the summer months.

In *Matheson v. Matheson*,[39] a child was severely injured and received a significant financial settlement. The father was successful in terminating his child support obligation. The court found that the settlement would provide for the child's needs for the rest of her life.

The Ontario Court of Appeal in *Senos v. Karcz*[40]*,* found the parties' son's annual receipt of $10,000.00 in Ontario Disability Program Benefits sufficient to justify the variation of the

[36] *Levandoski v. Levandoski*, [2010] M.J. No. 163 (MBCA).
[37] *Clancy v. Hansman,* [2013] O.J. No. 5345 (Ont. C.J.).
[38] *Hiebert v. Hiebert,* [2007] S.J. No. 569 (SKQB).
[39] *Matheson v. Matheson,* [2003] O.J. No. 3857 (Ont. S.C.J.).

father's child support obligation. However, it was unclear how the mother (who was acting as trustee for the son) was using the ODSP payments, and as such, a new trial was ordered on the issue of by how much the father's support obligation would be reduced.

(iii)Diagnosis of disability

In *Fleckenstein v. Hutchison*,[41] the parties' child was diagnosed as suffering from a learning disability. The Alberta Court of Appeal found this change to be material, justifying an upward variation of child support, despite the parties' agreement that neither would seek to vary their support agreement.

(iv) Change in residence or access regime

A change in the child's primary residence was found to be a material change in circumstances for the purposes of varying child support in *Greig v. Young-Greig.*[42] In this case, the father sought an interim variation of child support from the amount required under the terms the parties' separation agreement. At the time of the separation agreement, the parties' two children were primarily resident with the mother. The judge accepted the child's affidavit evidence as to when she moved to her father's home and ordered support based on that timeline.

In *Flynn v. Halleran*,[43] one of the parties' children had changed his place of residence from that of the mother to that of the father on a full-time basis. Another of their children had also decided to spend more time with the father. The court found the changes in residence to be material, and accordingly, adjusted child support.

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[40] *Senos v. Karcz,* [2014] O.J. No. 2808 (ONCA).
[41] *Fleckenstein v. Hutchison*, [2009] A.J. No. 1031 (ABCA).
[42] *Greig v. Young-Greig,* [2014] O.J. No. 464 (Ont. S.C.J.).
[43] *Flynn v. Halleran*, [2004] N.J. No. 457 (Newf. & Lab. S.C.).

However, in *Nitkin v. Nitkin,*[44] a custodial parent's move outside the jurisdiction was found not to constitute a material change in circumstances sufficient to succeed in a claim for reimbursement of the children's section 7 expenses. The court reasoned that the mother's move had benefitted her financially.

(v) No longer children of the marriage

In *Gaudet v. Mainville*,[45] the payor sought an order varying child support on the basis that the parties' five children were now between 23 and 29 years of age. The court found that the children had all withdrawn from their parents' charge and were therefore, no longer children of the marriage and no longer entitled to child support.

2. Change in Circumstances of the Payor

(i) Decrease/increase in income

In *Martin v. Ahrens,*[46] the British Columbia Court of Appeal found that the difference between the payor mother's actual and imputed income constituted a material change in circumstances sufficient to justify an downward variation of her child support obligation. More recently, a similar conclusion was reached by the Newfoundland and Labrador Supreme Court in *Paddock v. Kilfoy*,[47] where is was found that the payor never actually earned the imputed amount of $50,000.00.

In *Rickerby v. Burr*,[48] the recipient provided evidence that the payor's income was greater than at the time of the original order, this constituted a material change in circumstances and child support was varied upwards accordingly.

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[44] *Nitkin v. Nitkin,* [2006] O.J. No. 2769 (Ont. S.C.J.).
[45] *Gaudet v. Mainville*, [2014] N.B.J. No. 110 (NBQB).
[46] *Martin v. Ahrens*, [2011] B.C.J. No. 185 (BCCA).
[47] *Paddock v. Kilfoy*, [2015] N.J. No. 30 (Newf. & Lab. S.C.).
[48] *Rickerby v. Burr*, [2012] B.C.J. No. 2444 (BCSC).

The British Columbia Supreme Court in *Carten v. Carten*[49] found that the payor, who was 66 years of age and a disbarred lawyer, had less ability to earn income than when the order was originally made. Though the court found that the payor was underemployed, the underemployment was unintentional.

In *Jensen v. Lemieux*,[50] the closure of the payor's business, his increased debt and the commencement of new employment at a lower rate of remuneration constituted a material change in circumstances sufficient to reduce his child support obligation from $1,343.00 per month to $508.00 per month.

The payor's loss of stable employment was also found to be a material change in circumstances warranting the reduction of child support payable in *Quinn v. Quinn*.[51]

In *Savoia v. Santaera*,[52] though the father's bankruptcy was found by the court to be a voluntary choice designed to create hardship for the mother, the original child support order was well beyond what the father could afford, and child support was reduced to $630.00 per month from $2,238.00 per month.

Conversely, in *Brenton v. James*,[53] the payor having obtained gainful employment combined with his blameworthy disregard for the original court order constituted a material change in circumstances justifying an upward variation of child support.

However, in *Rasmussen v. Rasmussen*,[54] the court held that though an increase or decrease in annual income may qualify as a change in circumstances under s.14(a) of the CSGs, the payor

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[49] *Carten v. Carten*, *supra* note 35.
[50] *Jensen v. Lemieux*, [2013] O.J. No. 3051 (Ont. S.C.J.) ("*Jensen v. Lemieux*").
[51] *Quinn v. Quinn*, [2013] O.J. No. 3362 (Ont. C.J.) ("*Quinn v. Quinn*").
[52] *Savoia v. Santaera*, [2015] O.J. No. 112 (Ont. S.C.J.).
[53] *Brenton v. James*, [2015] N.J. No. 29 (Newf. & Lab. S.C.).

had failed to provide sufficient evidence in support of his contention that he is unable, by reason of the economic downturn, to obtain employment or earn an income that would enable him to meet his child support obligations.

In *Clarke v. Babensee*,[55] the British Columbia Court of Appeal refused an upward variation of child support despite the payor's significant increase in income, holding that the income of the payor is only one consideration under section 14(b) of the CSGs, and payor's increase in income did not significantly change her lifestyle or that of the children.

In *N.C. v. E.S.*,[56] the New Brunswick Court of Queen's Bench allowed the mother's motion for a retroactive variation of child support, but in so doing, took into consideration the father's assumption of the family debt post-separation.

(ii) Decrease/increase in time with children

In *Hoeg v. Bukler*,[57] the parties originally had shared custody of their two children, with the children spending at least 40% of their time with each parent and with no child support payable. When the children began spending a greater proportion of their time with their father, the court ordered that the mother to pay $517.00 per month in child support.

A similar result was reached in *Zubek v. Nizol*,[58] where the court found that child support should be varied to reflect the actual time the children spent with each parent, as the children's primary residence changed from the mother to the father.

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[54] *Rasmussen v. Rasmussen*, [2009] N.W.T.J. No. 53 (NWT S.C.).
[55] *Clarke v. Babensee*, [2009] B.C.J. No. 533 (BCCA).
[56] *N.C. v. E.S.,* [2014] N.B.J. No. 327 (NBQB).
[57] *Hoeg v. Bukler*, [2011] N.S.J. No. 368 (NSSC).
[58] *Zubek v. Nizol*, [2011] B.C.J. No. 1088 (BCSC).

In *Marchant v. Hendriks*,[59] the father was spending less time with the children than was expected when the child support order was originally made. This was held by the Ontario Superior Court of Justice as a material change in circumstances warranting an increase in child support.

II. VARIATION OF ORDERS FOR THE SUPPORT OF A SPOUSE

A. Statutory Framework

Before making a variation order in respect of spousal support, section 17(4.1) of the *Divorce Act* requires a court to satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse since the making of the initial, or most recent order for spousal support, and to take that change into consideration in making a variation order.[60]

Section 17(7) of the *Divorce Act* further requires that any variation order meet the following objectives:

> (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 of 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. [61]

These objectives mirror those of section 15.2(6) of the *Divorce Act*, which are the objectives of a spousal support order in first instance.[62] As noted by Professor Julien Payne, "there is nothing in

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[59] *Marchant v. Hendriks*, [2013] O.J. No. 1272 (Ont. S.C.J.).
[60] *Divorce Act, supra* note 3 at s.17(4.1).
[61] *Divorce Act, supra* note 3 at s. 17(7).
[62] Patrick D. Schmidt et al., "Spousal Support: Variation, Retroactive Claims and Income Fluctuation" online: Thompson Rogers LLP, <http://www.thomsonrogers.com/spousal-support-2011>.

the Divorce Act to suggest that any one of the objectives has greater weight or importance than any other objective."[63]

Where a spousal support order provides for support for a definite period or until a specified event occurs, a court may not, on an application instituted after the expiration of that period or the occurrence of that event, make a variation order for the purpose of resuming that support unless the court is satisfied that:

(a) a variation order is necessary to relieve economic hardship arising from the a change described in subsection (4.1) that is related to the marriage; and

(b) the changed circumstances, had they existed at the time of the making of the spousal support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order.

Section 37(2) of the *Family Law Act* provides that to vary an order for support of a spouse or a parent, the court must be satisfied that here has been a material change in the dependent's or respondent's circumstances (or that evidence not available on the previous hearing has become available).[64]

B. Evolution of the Material Change Test

Whereas there exists a prima facie entitlement to child support, in *Bracklow v. Bracklow* the Supreme Court of Canada established three conceptual bases for the entitlement to spousal support, being: compensatory (where a recipient spouse lacks the ability to support his or herself on account of having foregone career opportunities during the marriage or by reason of the functions he or she performed during the marriage), contractual, or non-compensatory (which

[63] Julien Payne and Marilyn Payne, *Canadian Family Law* 3rd ed. (Toronto: Irwin Law, 2008) at p.253.
[64] *Family Law Act, supra* note 9 at s.37(2).

attempts to adjust for the economic hardship resulting from the breakdown of the marriage, in and of itself).[65]

The exercise of judicial discretion in ordering spousal support, in the first instance or on variation, requires an examination of all four objectives of the *Divorce Act* in order to achieve equitable sharing of the economic consequences of the marriage or marriage breakdown.[66] In this regard, an application for a variation of a spousal support order is subject to a higher threshold than in the case of a variation of an order for child support.

In *L.G. v. G.B* the Supreme Court of Canada transposed the material change test as articulated in *Willick* in the context of child support to the context of a variation of an order for spousal support. A unanimous decision, it was held that before a court may vary an order for spousal support, it must be satisfied of a material change in circumstances such that, if the new circumstances had been known at the time of the original order, it "would likely have resulted in different terms."[67] As in the case of child support, the onus is on the party seeking a variation of an order for spousal support to prove the existence of a material change in circumstances.

In *Hickey v. Hickey,* the Supreme Court of Canada reaffirmed the applicability of the material change test as articulated in *Willick.* The decision of the court was delivered by Justice L'Heureux Dube, holding:

> On an application for variation of an award of spousal support, the court must first find, under s.17(4) [of the *Divorce Act*] that there has been a material change in the conditions, means, needs or circumstances of the either spouse and in making the order, the court must take into consideration that change. As with the

[65] *Bracklow v. Bracklow*, [1999] S.C.J. No. 14 (S.C.C.) at para. 49.
[66] *Moge v. Moge*, [1992] S.C.J. No. 107 (S.C.C.).
[67] *LG. v. G.B.*, [1995] S.C.J. No. 72 at para. 73.

> variation of child support orders, this change must be material and cannot be trivial or insignificant.[68]

In *Miglin v. Miglin*, the Supreme Court of Canada sought to reflect "Parliament's intention to promote negotiated settlement of all matters corollary to a divorce."[69] In order to balance the parties' intentions in their agreement with the objectives of the *Divorce Act*, the court proffered a two-stage test for initial spousal support orders. The first step requires an examination of the process leading to and the substance of the agreement. 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*."[70] The court stated in obiter:

> 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.[71]

The decision in *Miglin* spawned confusion as to the treatment of support agreements in the context of a variation. In 2011, after an empty family law docket in 2009-2010, the Supreme Court of Canada released *L.M.P. v. L.S.*[72] and *R.P. v. R.C*[73], companion appeals on the issue of the variation of spousal support agreements. In *L.M.P. v. L.S.* the Supreme Court sets out their disagreement over the appropriate weight of agreements incorporated into an order for support. In *R.P. v. RC.* the majority simply applied its approach to the facts. Although brought to the Supreme Court from Quebec, *L.M.P. v. L.S.* and *R.P. v. R.C.* were deemed "nationally relevant as both address the variation of spousal support under the *Divorce Act*. [74]

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[68] *Hickey v. Hickey,* [1999] S.C.J. No. 9 (SCC) at para. 20.
[69] *Miglin v. Miglin*, [2003] S.C.J. No. 21 (SCC) at para. 54.
[70] *Ibid* at para. 87.
[71] *Ibid* at para. 91
[72] *L.M.P. v. L.S.*, [2011] S.C.J. No. 64 (SCC) ("*L.M.P. v. L.S.*").
[73] *R.P. v. R.C.*, [2011] S.C.J. No. 65 (SCC).
[74] Robert Leckey, "Developments in Family Law: The 2010-2012 Terms," (2012) 59 S.C.L.R. (2d) 193-231 at para. 1.

L.M.P. v. L.S. is of greater relevance for the present purposes. The majority maps out the approach to be followed when a spouse applies under s.17(4.1) of the *Divorce Act* to vary a spousal support order that incorporates the terms of the an agreement on spousal support. The panel split 5-2 on the question of how much deference courts should accord to fairly negotiated agreements that substantially comply with the objectives of the *Divorce Act* and that represented the parties' expectations and intentions when the agreements were signed."[75]

Justices Abella and Rothstein authored the judgment for the majority in *L.M.P. v. L.S.*:

> In our view, the proper approach under s. 17 for the variation of existing orders is found in *Willick v. Willick* and *G.L. v. B.G.* . Like the order at issue in this case, *Willick* and *G.L* involved court orders which had incorporated provisions of separation agreements. Both cases were decided under section 17(4) of the *Divorce Act*, the predecessor provision to section 17(4.1).
>
> The threshold variation question is the same whether or not a spousal support order incorporates an agreement: Has a material change of circumstances occurred since the making of the order?[76]

The court went on to hold that as the approach developed in *Miglin* was responsive to the specific statutory directions of section 15.2 of the *Divorce Act*, it should not be imported into the analysis under section 17:[77]

> Unlike the question that confronted the court in *Miglin*, this appeal concerns an application under s.17 of the *Divorce Act* to vary an existing spousal support order where there had been a spousal support agreement prior to the section 15.2 order.
>
> While the objectives of the variation order are virtually identical in s.17 to those in s.15.2 dealing with an initial support order, the

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[75] Cristin Schmitz, "Top court maps out approach to support changes" The Lawyer's Weekly Vol. 31, No. 33 (Jan. 13, 2012).

[76] *L.M.P. v. L.S., supra* note 72 at paras. 30 and 36.

[77] James MacDonald et. al., *Law and Practice Under the Family Law Act of Ontario*, Revised Edition, loose-leaf (consulted on February 12, 2015) (Toronto: Carswell, 2015 Release) (*"Law and Practice"*) at Vol. 1, Part III, at 232.

> *factors* to be considered in ss.17(4.1) and 15.2(4) are significantly different.[78]

C. Recent Case Law – What Constitutes a Material Change in Circumstances?

In *D. (K.) v. D. (N.)*, the British Columbia Court of Appeal summarized the events which may constitute a material change in circumstances sufficient to justify a variation of an order for spousal support:

> A material change is a substantial, unforeseen and continuing change that, if known by the judge who made the prior order, would have led to a different award of support… That change may derive from sources unrelated to the parties marriage and its demise, for example, loss of job, an accident or illness, or remarriage. Medical problems that preclude a spouse from retraining or seeking work at a critical juncture in that spouse's attempt to deal with the economic consequences of marital breakdown represent a material change in his or her economic circumstances that justifies variation of a spousal support order.[79]

However, as demonstrated by the following survey of recent case law, there is no discreet set of factors which constitute a material change of circumstances sufficient to justify the variation of an order for spousal support. Again this is not intended to be an exhaustive list of decisions on the topic.

1. Termination of Child support

Pursuant to *Ferguson v. Ferguson*[80] any material reduction or termination in child support constitutes a material change of circumstances for the purposes of a variation of spousal support.

2. Decrease/Increase in income

A change in a payor's income, in and of itself is not enough to constitute a change in circumstances for the purposes of a variation. The party's circumstances must be found to have

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[78] *L.M.P. v. L.S., supra* note 72 at paras. 21 and 22.
[79] *D. (K.) v. D. (N.),* [2011] B.C.J. No. 2406 (BCCA) at paras 22 and 30.
[80] *Ferguson v. Ferguson,* [2008] O.J. No. 1140 (Ont. S.C.J.).

changed materially. In *Sasonow v. Sasonow*,[81] the payor's loss of employment was not found to be a material change, as the Ontario Superior Court of Justice found that he had the benefit of a severance package and a consulting contract.

A material change in circumstances was found by the Ontario Superior Court of Justice in *Jensen v. Lemieux,*[82] given the payor's significant increase in debt, the cancellation of his credit cards, his reliance on social assistance and his only recent employment. All existing arrears of support were discharged and rescinded.

In *Campbell v. Campbell*,[83] a material change in circumstances was made out by the payor on the basis of the termination of his employment, especially in light of the fact that the payor had been making spousal support payments from his severance package, which had since been exhausted.

The Ontario Court of Appeal in *Pustai v. Pustai*,[84] found that an unexplained improvement in the wife's financial circumstances and the decrease in the husband's salary constituted a material change in circumstances sufficient to justify the termination of spousal support, however the trial judge had failed to consider the circumstances of the parties at the time the initial order was made. Given this error, a new trial was ordered.

In *Mondino v. Mondino*,[85] however, the Ontario Superior Court of Justice rejected the payor's application for a downward variation of spousal support. While the payor had been unemployed for nine months, this situation was temporary as he subsequently regained employment. The payor failed to establish a material change in circumstances despite the fact that he was living on capital following and had suffered a sharply reduced income. On the other hand, the recipient's

[81] *Sasonow v. Sasonow*, [2000] O.J. No. 1134 (Ont. S.C.J.).
[82] *Jensen v. Lemiuex, supra* note 50.
[83] *Campbell v. Campbell*, [2012] N.S.J. No. 447 (NSCA).
[84] *Pustai v. Pustai*, [2014] O.J. No. 3624 (ONCA).
[85] *Mondino v. Mondino*, [2013] O.J. No. 5147 (Ont. S.C.J.).

increase in income from $20,000 to $40,000 in the year of the variation hearing was found to be material change in circumstances sufficient to justify a decrease in spousal support.

Despite the parties' agreement that material changes in income and employment were to constitute a material change in circumstances requiring variance of spousal support, the court in *Gallagher v. Gallagher*,[86] found the payor's 20% decrease in income did not meet the threshold of a material change. The court ordered that the minutes of settlement be varied so that spousal support would be determine based on the SSAG calculations producing equal net disposable income of the parties, subject to the direction that a maximum business expense deduction of $10,000 apply to the calculation of the payor's business income and the parties' income not include any RRSP withdrawal income.

Where, however, a payor earns less income because of personal preferences, rather than factors beyond his control, as was the case in *Hepburn v. Hepburn*,[87] no material change in circumstances will be established sufficient to vary a spousal support obligation.

In *LeBlanc v. LeBlanc*,[88] despite the fact that the payee received an inheritance of $90,000.00, spousal support was to continue. The New Brunswick Court of Appeal found that the inheritance had been spent and the recipient remained economically dependent. The quantum however, was reduced to reflect the retirement of the payor.

3. Retirement of the Payor

The New Brunswick Court of Appeal held in *Flieger v. Adams*,[89] that the retirement of the payor constituted a material change in circumstances. More recently, the British Columbia Court of

[86] *Gallagher v. Gallagher*, [2013] O.J. No. 594 (Ont. S.C.J.).
[87] *Hepburn v. Hepburn*, [2013] B.C.J. No. 1894 (BCCA).
[88] *LeBlanc v. LeBlanc*, [2013] N.B.J. No. 79 (NBCA).
[89] *Flieger v. Adams,* [2012] N.B.J. No. 137 (NBCA).

Appeal held in *Powell v. Levesque*,[90] that a payor who retired with a full pension after completing a full term of service in the Armed Forces, combined with ill health, had established a material change in circumstances sufficient to vary the payor's spousal support obligation.

In *Chase v. Chase*,[91] the Alberta Court of Appeal found that the payor who sought a downward variation of spousal support on the basis of his retirement had not established a material change in circumstances. The parties had executed a separation agreement which stipulated discreet events as constituted a material change in circumstances. As retirement was not one of the events contemplated by the parties, and the payor chose to retire early citing ill-health, but failing to provide evidence of same, the application was dismissed. Similarly in *Rideout v. Rideout*,[92] while the payor established that his retirement and health problems constituted a material change, he failed to prove that spousal support should be varied as a consequence.

In *Parker v. Parker*,[93] the payor's voluntary retirement constituted a material change in circumstances. Though elected, the retirement was not in bad faith. Spousal support was ordered in a step-down fashion, decreasing to $1.00 annually after one year.

In *Dishman v. Dishman*,[94] the payor was required to continue his spousal support payments for seven years despite his retirement. The Court found that the payor had accepted early retirement in exchange for a $125,000 incentive.

However, in *MacLanders v. MacLanders,*[95] the payor knew at the time of the original order that he planned to retire, but did not disclose this to the recipient. His retirement was therefore

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[90] *Powell v. Levesque*, [2014] B.C.J. No. 129 (BCCA).
[91] *Chase v. Chase,* [2013] A.J. No. 145 (ABCA).
[92] *Rideout v. Rideout*, [2014] N.J. No. 89 (Newf. & Lab. S.C.).
[93] *Parker v. Parker*, [2014] O.J. No. 3362 (Ont. S.C.J.).
[94] *Dishman v. Dishman*, [2010] O.J. No. 4314 (Ont. S.C.J.).
[95] *MacLanders v. MacLanders*, [2012] B.C.J. No. 2482 (BCCA).

rejected as a material change in circumstances and the application for a downward variation of spousal support was dismissed.

4. Remarriage or cohabitation (of payor and recipient)

A payor's remarriage is not a *prima facie* material change in circumstances justifying a reduction of his or her spousal support obligation. In *Jacobs v. Jacobs*,[96] it was held that such a change would only be found as material where proof of the economic effect of the remarriage was provided.

In *T.(C.J.) v. T. (G.A.)*,[97] the Alberta Court of Appeal held that the recipient's common law partner had been contributing $2,000.00 per month to her living expenses, and this constituted a material change in circumstances warranting the downward variation of spousal support.

In *Kenny v. MacDougall*,[98] the Nova Scotia Court of Appeal found that where the payor had fulfilled his support obligations toward the recipient, and both the payor and recipient were in new, committed relationships, the payor no longer had the obligation to maintain medical and dental benefits for the recipient.

However, in *Uberall v. Uberall*,[99] the payor's application to vary spousal support on the basis that the recipient was in a new relationship was dismissed. The British Columbia Supreme Court considered the parties' 19 year marriage found that the wife still entitled to support.

Where a party knows at the time of settlement that the other party was in another relationship that was likely leading to marriage, the fact of the marriage is not a material change in circumstances, as held by the Ontario Superior Court of Justice in *Bhupal v. Bhupal.*[100]

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[96] *Jacobs v. Jacobs*, [1990] O.J. No. 1857 (Ont. D.C.).
[97] *T.(C.J.) v. T. (G.A.),* [2012] A.J. No. 333 (ABCA).
[98] *Kenny v. MacDougall*, [2007] N.S.J. No. 516 (NSCA).
[99] *Uberall v. Uberall*, [2010] B.C.J. No. 340 (BCSC).

III. VARIATION OF ORDERS FOR CUSTODY AND ACCESS

A. Statutory Framework

Before granting a variation, section 17(5) of the *Divorce Act* requires a court to satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage since the making of the custody order, or the last variation order in respect of that order. A court must take into consideration only the best interests of the child as determined by reference to that change.

While section 17(5) appears to limit the court's discretion to make a variation order in respect of custody to the best interests of the child, the *Divorce Act* also directs the court to take into account the maximum contact principle, which espouses that a child of the marriage should have as much contact with each former spouse.[101] In addition, a court is not to consider the conduct of the parents unless that conduct is relevant to that party's ability to parent the child.[102] A former spouse's terminal illness is specifically deemed to be a change of circumstances to be considered in varying an access order under s. 17(2) of the Divorce Act.[103]

In her recent paper presented to the National Family Law Program, Sharon Kravetsky neatly summarized the provincial statutory frameworks:

> "Provincial legislation has similar requirements. Alberta, Saskatchewan, Ontario, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Nunavut and the Yukon all provide for variations only where there has been a material change of circumstances since the making of the last order.
>
> The Yukon, Ontario, Nunavut, the Northwest Territories, Prince Edward Island, Newfoundland and Labrador specify that the material change must be one that affects or is likely to affect the best interests of a child.

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[100] *Bhupal v. Bhupal,* (2008) 92 O.R. (3d) 211(Ont. S.C.J.).
[101] *Divorce Act, supra* note 3 at s. 17(9) and 16(10).
[102] *Ibid* at s. 17(6) and 16(9).
[103] *Ibid* at s. 17(5.1).

> Manitoba is the only province that also includes a requirement for making a variation order that it be 'fit and just to do so, having regard to any material change in circumstances'.
>
> British Columbia's new *Family Law Act* provides for changing, suspending or termination orders respecting parenting arrangements where there has been 'a change in the needs or circumstances of the child, including because of a change in the circumstances of another person'. Only New Brunswick's *Family Services Act* provides for variation of custody or access without specifying a need for a material change."[104]

In Ontario, the *Children's Law Reform Act* governs *inter alia* custody of and access to children where parents are unmarried. Section 29 of the *Children's Law Reform Act* prohibits a court from making a variation order in respect of custody or access unless there has been a material change in circumstances that affects or is likely to affect the best interest of the child.[105]

Pursuant to section 24(2) of the *Children's Law Reform Act*, the considerations relevant to determining the best interests of a child are as follows:

(a) the love, affection and emotional ties between the child and,

  (i) each person entitled to or claiming custody of or access to the child;

  (ii) other members of the child's family who reside with the child; and

  (iii) persons involved in the child's care and upbringing.

(b) the child's views and preferences, if they can be reasonably ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the chid with guidance and education, the necessaries of life and any special needs of the child;

(e) the plan proposed by each person applying for custody of or access to the child's care and upbringing;

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[104] Sharon Kravetsky "Variation of Custody Orders: Material Change and Best Interests" (Paper delivered at the National Family Law Program, July 14-17, 2014) [unpublished] ("Variation of Custody Orders") at p. 2-3.

[105] *Children's Law Reform Act, supra* note 10 at s.29.

(f) the permanence and stability of the family unit with which it is proposed to that the child will live;

(g) the ability of each person applying for custody of or access to the child to act as a parent; and

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.[106]

B. Evolution of the Material Change Test

The language of section 29 of the *Children's Law Reform Act* explicitly requires a material change in circumstances in order or vary an order for custody or access. Section 17(5) of the *Divorce Act* only requires a "change in the condition, means, needs or other circumstances."[107] The Ontario Court of Appeal in *Woodhouse v. Woodhouse,* confirmed that the tests for variation of custody or access orders under section 29 of the *Children's Law Reform Act* and under section 17(5) of the *Divorce Act* are the same, despite the difference in wording between the two statutes.[108]

The material change test set out in *Willick* was adopted with slight modification in the context of a variation of a custody or access order by the Supreme Court of Canada in *Gordon v. Goertz*.[109] The court explained the threshold for a variation and the framework of analysis in determining whether that threshold has been met, as follows:

> The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued...

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[106] *Ibid* at s.24(2).
[107] Noel Semple, "Whose Best Interests? Custody and Access Law and Procedure" (2010) 48 Osgoode Hall L.J. 287 ("Whose Best Interests?") at 308.
[108] *Woodhouse v. Woodhouse*, [1996] O.J. No. 1975 (ONCA).
[109] *Gordon v. Goertz,* [1996] S.C.J. No. 52 (SCC) ("*Gordon v. Goertz*").

> It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
>
> What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way…The question is whether the previous order might have been different had the circumstances now existing prevailed earlier… Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place….[110]

The onus of proving that there has been a change rests with the party who seeks the variation order; however, both parents bear the onus of establishing the child's best interests.[111] Once this threshold has been met, the court must embark on a fresh inquiry into what is in the best interests of the child.[112]

The threshold test of material change must be applied to each child before the court, thus, a court may determine that a material change in circumstances has occurred regarding one child but not the other.[113]

In 2012, the Ontario Superior Court of Justice in *Cassidy v. Cassidy* reiterated the *Willick* analysis, as adopted by *Gordon v. Goertz*. The overarching requirement is to demonstrate a material change in circumstances since the making of the custody order in question, and only the

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[110] *Ibid* at paras. 11, 12 and 13.
[111] "Variation of Custody Orders", *supra* note 104 at p. 2.
[112] *Gordon v. Goertz, supra* note 109.
[113] *Cosineau v. Martin,* 2002 CarswellOnt 7421 (Ont. S.C.J.).

best interests of the child or children in question should be taken into consideration, having reference to the material change in circumstances so found.[114]

More recently, the Nova Scotia Court of Appeal in *Elliot v. Melnyk* refined the definition of material change, holding:

> A material change in circumstances must be a substantial, continuing one which in the case of a parenting decision, impacts the child and the ability of the caregivers to meet the needs of the child.[115]

C. Recent Case Law – What Constitutes a Material Change in Circumstances?

As undertaken in the context of a variation of an order for child support and spousal support, the following summary of decisions reflect the recent judicial treatment of the material change test where the variation sought is of an order for custody of or access to a child. The primary focus of each decision is how the change, if established, affects the best interests of the child in question.

1. Conflict between the parents

In *Yasinchuk v. Farkas*[116] acrimony between the parties and the wishes of the parties not to be bound by a joint custody order was held to be sufficient to constitute a material change in circumstances and the variation of the parties' joint custody order. The level of conflict had escalated and the child was aware of the conflict and negatively affected by it.

Similarly, in *Zambito v. Zambito*,[117] a material change in circumstances was established on the evidence that the joint parenting regime was not working. The court granted mother sole custody with supervised access to father. In *Rowles v. MacDonald*[118] both parents sought sole custody.

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[114] *Cassidy v.Cassidy*, [2012] O.J. No. 1614 (Ont. S.C.J.) at para. 59.
[115] *Elliot v. Melnyk*, [2014] N.S.J. No. 680 (NSSC) at para. 24.
[116] *Yasinchuk v. Farkas,* [2012] O.J. No. 3122 (Ont. S.C.J.).
[117] *Zambito v. Zambito,* [2012] O.J. No. 317 (Ont. S.C.J.).
[118] *Rowles v. MacDonald,* [2011] O.J. No. 5643 (Ont. C.J.).

On account of the increasingly high level of conflict between the parents, the court found a material change in circumstances that was affecting the child's best interests.

However in *Duncan v. Johnson*,[119] despite the court finding a material change in circumstances on the basis that conflict between the parents had increased, the court found that it was in the best interests of the child that shared custody arrangement persist.

It is interesting to note that the Alberta Court of Appeal held that even where both parents agree to a variation, a judge may nonetheless decline to change custody based on an analysis of the best interests of the child, as was the case in *Dahlseide v. Dahlseide.*[120]

2. Conduct of the parties

In *Giri v. Wentges*[121] the final order granting the mother custody and the father unsupervised access was varied to provide that access would be at mother's discretion. The court found a material change in circumstances in relation to the father's health and ability to parent and cope.

The custodial mother's relentless alienating behaviour in *Hsiung v. Tsioutsioulas*[122] constituted a material change in circumstances, especially in light of the parties agreement that the mother would consult the father on decisions. The order was varied to joint custody with equal parenting time and shared decision making.

In *Cohen v. Cohen*,[123] the court found a material change in circumstances resulting from the severity of an incident whereby the father passed out due to alcohol consumption, leaving the two young children unsupervised on a boat. Similarly in *Irving v. Gardiner*,[124] the court found a

[119] *Duncan v. Johnson,* [2012] O.J. No. 1470 (Ont. C.J.).
[120] *Dahlseide v. Dahlseide,* [2009] A.J. No. 1233 (ABCA).
[121] *Giri v. Wentges*, [2012] O.J. No. 2794 (Ont. S.C.J.).
[122] *Hsiung v. Tsioutsioulas*, [2011] O.J. No. 4492 (Ont. C.J.).
[123] *Cohen v. Cohen*, [2012] O.J. No. 248 (Ont. S.C.J.).
[124] *Irving v. Gardiner,* [2011] O.J. No. 5635 (Ont. C.J.).

marital change based on the father's alcohol abuse and abusive behaviour towards the mother. The court denied access to the father and granted a restraining order.

The New Brunswick Court of Appeal held in *V. (K.C.W.) v. P. (K.L.)*[125] that the lack of involvement of a parent who has joint custody is sufficient to justify a variation of custody from joint custody to sole.

3. Change in the circumstances of the child

In *Bromm v. Bromm,*[126] the Saskatchewan Court of Appeal held that the children's aging and attendance at school may constitute a material change in circumstances. More recently in *Stirling v. Blake*,[127] the Ontario Superior Court of Justice considered the ages of the children in question and found that particularly in access cases, the passage of time alone can amount to a material change in circumstances.

In *Paulo v. Yousif*,[128] the court was satisfied that there has been a material change in circumstances that affected the best interests of the child, as the child in question was much older at the time of the hearing than when the separation agreement was reached and was able to perceive the conflict between her parents. The final order was varied such that exchanges of access were to take place in a supervised location.

4. Children's wishes

In *Feist v. Feist*,[129] the Saskatchewan Court of Queen's Bench stated that the court should exercise extreme caution in varying an order based on the child's wishes. Absent evidence of

[125] *V. (K.C.W.) v. P. (K.L.),* [2010] N.B.J. No. 303 (NBCA).
[126] *Bromm v. Bromm*, [2010] S.J. No. 733 (SKCA).
[127] *Stirling v. Blake*, [2013] O.J. No. 3680 (Ont. S.C.J.).
[128] *Paulo v. Yousif*, [2011] O.J. No. 6296 (Ont. C.J.).
[129] *Feist v. Feist*, [2007] S.J. No. 722 (SKQB).

why the current expression has been made by the child, there was no reason why the status quo was not in the child's best interests and could not be maintained.

5. Remarriage of non-custodial parent

In *Ryan v. Ryan*,[130] the Alberta Court of Appeal found that though the husband's new wife had given birth to a child, this did not constitute a material change in circumstances that was neither foreseen nor contemplated at the time the parties had agreed to their children being in the mother's custody.

V. CRITIQUE OF CURRENT STANDARDS

The material change test, as it has evolved to the date of writing may be summarized as follows:

	Leading Case	**The Material Change Test**
Child Support	*Willick v. Willick*	Has a material change of circumstances occurred since the making of the order?
Spousal Support	*LMP v. LS* , incorporating *Willick v. Willick*	Has a material change of circumstances occurred since the making of the order?
Custody and Access	*Gordon v. Goertz,* incorporating *Willick v. Willick*	(1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

As we have come to realize, the application of this test in the contexts of child support, spousal support and custody and access is entirely dependent on the facts of each particular case. However, apart from the difficulty in arriving at a set of factors to lend predictability to a finding of material change of circumstances, the test raises other problems, as will be addressed below.

Child Support

As argued by appellant's counsel in the recent Ontario Court of Appeal decision of *Stevenson v. Smit*,[131] the requirement that a change in circumstances be foreseeable in order to be material, as elucidated in *Willick* is an onerous, judge-made threshold inappropriate in the context of a child

[130] *Ryan v. Ryan*, [2008] A.J. No. 128 (ABCA).
[131] *Stevenson v. Smit,* [2014 O.J. No. 3204 (ONCA).

support obligation not made in accordance with the CSGs, and inconsistent with the wording of the *Family Law Act*.

Willick was decided three (3) years prior to the enactment of the CSGs. At that time, child support awards were decided on a case-by-case basis, resulting in significant variation in awards, even for cases with similar characteristics.[132]

With the inception of the CSGs came a fair, predictable standard of support. Among the stated objectives of the CSGs is to "establish a fair standard of support for children" and to "ensure consistent treatment of parents or spouses and their children" across the nation. As interpreted by the Supreme Court of Canada, the purpose of the CSGs is to provide fair levels of support for children from both parents upon marriage breakdown, in a predictable and consistent manner.[133] [134]

Thus, as Professor Rollie Thompson, writes:

> "as a matter of policy, we are less concerned with stability of orders and relitigation in the child support setting... Part of the reason for such a relaxed standard is that the *Guidelines* through the Tables, provide a "rule" which does not raise the risk of inconsistent exercise of discretion." [135]

It therefore follows that section 37(2.1) of the *Family Law Act* (which came into force prior to the enactment of the CSGs) provides that an order for the support of a child may be varied where

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[132] Ross Finnie, "Child Support Guidelines: An Analysis of Current Government Proposals" (1995-1996) 13 C.F.L.Q. 162, page 146.
[133] *The Guidelines, supra* note 14 at s. 1(a) and 1(b).
[134] *Francis v. Baker*, [1999] S.C.J. No. 52 (SCC) at para 39
[135] Rollie Thompson, "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012) 31 C.F.L.Q. 355, at p. 363

there has been "any change in the conditions, means needs or other circumstances of either parent or spouse of any child entitled to support" within the meaning of the CSGs.[136]

Section 14 of the CSGs makes a clear distinction between (1) a change in circumstances where the order for support of a child is made in the amount prescribed under the Table, and (2) a change in circumstances where the order of support of a child is not made in the amount prescribed under the Table.

In the former circumstance, an order for the support of a child may be varied if any change has occurred "that would result in a different order". As correctly interpreted by the Supreme Court in *Willick,* section 14(a) of the CSGs requires the court to look backwards, and determine whether the change is one, which if known at the time, would have resulted in a different order.

However, in the latter circumstance, the wording of section 14(b) of the CSGs does not require that the change be foreseeable to justify a variation of an order for the support of a child.

As Thomas A. Heeney postulates, albeit in the context of spousal support,

> "Foreseeability is a dangerous concept if it is used to preclude access to a variation where circumstances are clearly different than they were at the time the agreement was negotiated."[137]

In fact, the rationale for excluding the concept of foreseeability where the child support obligation in question is not made in accordance with the amount prescribed under the Table was conceded by the Honourable Supreme Court Justice L'Heureux Dubé, writing for the minority in *Willick*:

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[136] *Family Law Act, supra* note 9, at s. 37(2.1).
[137] Thomas A. Heeney, "From Pelech to Moge and Beyond: The Test for Variation of a Consensual Spousal Support Order"(1996) 14 C.F.L.Q. 81, at p. 94,

> "It must be recognized that an agreement can rarely accurately predict the future and the way in which the circumstances of the parents and their children may evolve over the years."[138]

Thus, in harmony with the intention of the CSGs to provide a consistent standard of child support, where the support of a child is set out in a domestic agreement and is not in accordance with the CSGs, a court should have unfettered discretion to apply the amount of support prescribed by the Table.

Where a child support obligation is set out in a domestic contract and is made outside the range prescribed by the CSGs, the appropriate test to determine whether a material change or simply a change in circumstances is sufficient to justify a variation is not one of foreseeability, but rather one of fact. If it is in fact impossible for the payor to meet his or her child support obligations by virtue of a significant and enduring change of circumstances relative to the circumstances of the payor at the time the agreement is made, it follows logically that the child support obligation must be varied accordingly.

Spousal Support

In *L.M.P. v. L.S.*, Justices Abella and Rothstein make it clear that once an agreement is incorporated into a court order, the test for variation is whether or not there had been a material change. This does not mean, however, that the incorporated agreement is rendered irrelevant.

The court considered that three ways that the parties might in their agreements deal with changes that may give rise to variation. These have been summarized by the authors of *Law and Practice Under the Family Law Act of Ontario* as follows:

> (i). Parties may either contemplate in an agreement incorporated in an order that a specific type of change will or will not give rise to variation. In such cases the answer to whether a material change in

[138] *Willick, supra* note 1, at para. 89,

> circumstances since the making of the order may be found in the terms of the order itself. As the agreement has been incorporated into a court order, the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the *Divorce Act* when the order was made.
>
> (ii). 'An agreement incorporated into an order may include a general provision stating that it is subject to variation upon a material change in circumstances.'
>
> (iii). 'An agreement incorporated into a s.15.2 order may simply include a general term providing that it is final, or finality may be necessarily implied.' However even in these circumstances, the court's jurisdiction under s.17 cannot be ousted…A provision indicating that an order is final in fact means that the order of the court is final *subject* to s.17 of the *Divorce Act*. Consequently, courts will always apply the *Willick* inquiry to determine if a material change of circumstances exists.[139]

The guidance provided by Justices Abella and Rothstein, in the writer's opinion, may be taken by counsel as a lesson in drafting. Professor Rollie Thompson comments, "specific clauses will have to be more concrete and more factual if they are to be upheld in the face of a variation application, where the agreement is incorporated into a court order.

Custody and Access

The material change threshold was created to prevent unnecessary litigation, and courts do apply it to give effect to this intent. In the context of custody and access, the material change test is qualified by the requirement that any variation must be in the best interests of the children.

Unfortunately, as noted by Noel Semple,

> the material change threshold does not by any means deprive parents of their right to decide when litigation will end. It can only be applied by a judge. Thus, while it deters variation applications, if the application is commenced, litigation and its attendant costs will be required merely in order to determine that there has been no material change.[140]

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[139] *Law and Practice, supra* note 77 at Vol. 1, Part III, at 232 to 233.
[140] Whose Best Interests?, *supra* note 107 at 308.

Despite the fact that at the time the parenting arrangement was established, it may have been in the child's best interests, parenting arrangement following a separation are mutable. empirical evidence suggests that in particular, shared parenting or joint custody arrangements are especially likely to shift over time.[141] With this mutability comes an increased need for variation, which again, subjects children to the deleterious effects of litigation and its accompanying conflict.

It is interesting to note that in *Gordon v. Goertz,* the Supreme Court found that a move is likely to satisfy the material change threshold. Thus, parents may use a move as a reason to change custody, again incurring the costs of litigation and the negative effect of litigation on children. However, in 2007, Professor Rollie Thompson identified the "upward creep in the proportion of 'no' cases where not only is the move refused, but custody is changed to the non-moving parent" as a trend in post-2000 mobility applications.[142]

V. CONCLUSION

In the end, the common thread in variation applications is the test of material change. Our survey of the cases has revealed that be it child support, spousal support or custody and access, there is no particular standard that may be applied within that definition, save for the fact that the material change must be unforeseen at the time of the original order or agreement, it must be substantial and have some degree of continuity. In each instance, it is a fact-driven analysis. Regrettably, there are no quantifiable factors which if satisfied, constitute a 'material' change, and thus justify a variation.

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[141] Jeffery Wilson and Maryellen Symons, *Wilson on Children and the Law*, loose-leaf (consulted on March 8, 2015) (Toronto: Butterworths, 1994), Vol. 1, 2.2.

[142] Rollie Thompson, "Ten Years After *Gordon*: No Law, Nowhere" (2007) 35 R.F.L. (6th) 307 at 311.

Given the myriad of factors which could be at play, not across a number of cases, but indeed, in any one case, it is almost impossible to arrive at a finite list of factors which constitute a material change and the weight to be put on each. In one simple example, relocation in the context of a custody regime has been deemed to be a material change, but in other cases, it has not. Once the variable or variables have been identified, the materiality of the factor is then again a question of fact. All we can do is introduce the factors that the courts have considered.

So, to best assist the reader, we will identify the changes to which courts have referred in addressing the notion of a material change in circumstances in variation proceedings, and the resulting conclusion as to their materiality, in the chart below:

Citation	Variation Sought	Change Alleged	Decision	Reasons
CHILD SUPPORT				
Levandoski v. Levandoski, [2010] M.J. No. 163 (MBCA)	Termination of child support	Child not enrolled in full-time program of education	Granted	Despite the fact that the child was in fact enrolled in post-secondary studies, he was able to support himself.
Clancy v. Hansman, [2013] O.J. No. 5345 (Ont. C.J.)	Downward variation of child support	Child no longer a dependent	Denied	Child enrolled in full-time program of education and Separation Agreement contemplated support for first year.
Hiebert v. Hiebert, [2007] S.J. No. 569 (SKQB)	Upward variation of child support	Child commenced police studies program	Denied	Child lived with his mother, had a monthly surplus of income and was expected to contribute to his education.
Matheson v. Matheson, [2003] O.J. No. 3857 (Ont. S.C.J.)	Termination of child support	Child severely injured and received a financial settlement	Granted	The settlement could meet the needs of the child for the rest of her life.
Senos v. Karcz, [2014] O.J. No. 2808 (ONCA)	Downward variation of child support	Child's receipt of ODSP benefits.	Granted	Benefits offset payor's obligation
F*leckenstein v. Hutchison*, [2009] A.J. No. 1031 (ABCA)	Upward variation of child support	Child diagnosed with learning disability	Granted	The increased needs of the child were material, despite the parties' agreement that neither would seek to vary same.
Greig v. Young-Greig, [2014] O.J. No. 464 (Ont. S.C.J.)	Downward variation of child support	Child residing more time with payor	Granted	At the time of the separation agreement, the children were primarily resident with mother.
Flynn v. Halleran, [2004] N.J. No. 457 (Newf. & Lab. S.C.)	Downward variation of child support	Children residing more time with payor	Granted	Change in residence was material
Nitkin v. Nitkin, [2006] O.J. No. 2769 (Ont. S.C.J.)	Reimbursement of s.7 expenses	Children and mother had relocated	Denied	Mother benefited financially from the move
Gaudet v. Mainville, [2014] N.B.J. No. 110 (NBQB)	Downward variation of child support	Children no longer children of the marriage	Granted	All children had withdrawn from their parents' charge
Martin v. Ahrens, [2011] B.C.J. No. 185 (BCCA)	Downward variation of child support	Decrease in payor's income	Granted	Income imputed to payor much higher than actual income

Paddock v. Kilfoy, [2015] N.J. No. 30 (Newf. & Lab. S.C.)	Downward variation of child support	Decrease in payor's income	Granted	Payor never earned the amount of income imputed to her in the initial order
Rickerby v. Burr, [2012] B.C.J. No. 2444 (BCSC)	Upward variation of child support	Increase in payor's income	Granted	Recipient provided evidence that payor's income had increased since initial order
Carten v. Carten, [2015] B.C.J. No. 22 (BCSC)	Downward variation of child support	Decrease in payor's income	Granted	Payor had less ability to earn income than when the other was originally made.
Jensen v. Lemieux, [2013] O.J. No. 3051 (Ont. S.C.J.)	Downward variation of child support	Decrease in payor's income	Granted	Payor's business had closed and he had increased debt
Quinn v. Quinn, [2013] O.J. No. 3362 (Ont. C.J.)	Downward variation of child support	Decrease in payor's income	Granted	Payor had lost stable employment
Savoia v. Santaera, [2015] O.J. No. 112 (Ont. S.C.J.)	Downward variation of child support	Decrease in payor's income	Granted	Despite the fact that the payor had filed for bankruptcy to punish the recipient, the original order was well beyond what he could afford.
Brenton v. James, [2015] N.J. No. 29 (Newf. & Lab. S.C.)	Upward variation of child support	Increase in payor's income	Granted	Payor had obtained gainful employment and had engaged in blameworthy disregard of initial order
Rasmussen v. Rasmussen, [2009] N.W.T.J. No. 53 (NWT S.C.)	Downward variation of child support	Decrease in payor's income	Denied	Payor failed to provide evidence to support his contention that he could not earn an income sufficient to meet his child support obligations.
Clarke v. Babensee, [2009] B.C.J. No. 533 (BCCA)	Upward variation of child support	Increase in payor's income	Denied	Payor's increase in income did not significantly change her lifestyle or that of the children
N.C. v. E.S., [2014] N.B.J. No. 327 (NBQB)	Retroactive upward variation of child support	Increase in payor's income	Granted	Recipient had established an increase in income, but payor's assumption of family debt taken into account re quantum of variation.
Hoeg v. Bukler, [2011] N.S.J. No. 368 (NSSC)	Variation of agreement re no child support payable	Increased time with the children	Granted	Parties originally shared time with children equally, but children had begun spending a greater proportion of time with father.
Zubek v. Nizol, [2011] B.C.J. No. 1088 (BCSC)	Downward variation of child support	Payor's increased time with children	Granted	Child support should reflect the actual time the children spent with each parent.
Marchant v. Hendriks, [2013] O.J. No. 1272 (Ont. S.C.J.)	Upward variation of child support	Decreased time with children	Granted	Father was spending less time with the children than was expected at the time of the original order.
SPOUSAL SUPPORT				
Ferguson v. Ferguson, [2008] O.J. No. 1140 (Ont. S.C.J.)	Downward variation of spousal support	Termination of child support	Granted	Any material reduction of termination of child support constitutes a material change in circumstances
Sasonow v. Sasonow, [2000] O.J. No. 1134 (Ont. S.C.J.)	Downward variation of spousal support	Decrease in payor's income	Denied	Loss of employment not a material change as payor had the benefit of a severance package and consulting contract
Jensen v. Lemieux, [2013] O.J. No. 3051 (Ont. S.C.J.)	Downward variation of spousal support	Decrease in payor's income	Granted	Payor's increase in debt, reliance on social assistance
Campbell v. Campbell, [2012] N.S.J. No. 447 (NSCA)	Downward variation of spousal support	Decrease in payor's income	Granted	Payor's loss of employment and exhaustion of severance package
Pustai v. Pustai, [2014] O.J. No. 3624 (ONCA)	Termination of spousal support	Recipient's increase in income and decrease in payor's income	Granted	Recipient's financial circumstances had improved and payor's salary had decreased.

Mondino v. Mondino, [2013] O.J. No. 5147 (Ont. S.C.J.)	Downward variation of spousal support	Decrease in payor's income; increase in recipient's income	Denied/Granted	Payor's unemployment was temporary but wife's income had doubled
Gallagher v. Gallagher, [2013] O.J. No. 594 (Ont. S.C.J.)	Downward variation of spousal support	Decrease in payor's income and agreement that it would constitute a material change	Denied	Payor's income only decreased by 20%, not sufficient decrease to justify variation
Hepburn v. Hepburn, [2013] B.C.J. No. 1894 (BCCA)	Downward variation of spousal support	Decrease in payor's income	Denied	Decrease in income voluntary
LeBlanc v. LeBlanc, [2013] N.B.J. No. 79 (NBCA)	Downward variation of spousal support	Recipient received inheritance	Denied	Recipient still in need of support
Flieger v. Adams, [2012] N.B.J. No. 137 (NBCA)	Downward variation of spousal support	Retirement of payor	Granted	Constituted material change
Powell v. Levesque, [2014] B.C.J. No. 129 (BCCA)	Downward variation of spousal support	Retirement of payor	Granted	Payor retired with a full pension from the Army and had ill health
Chase v. Chase, [2013] A.J. No. 145 (ABCA)	Downward variation of spousal support	Retirement of payor	Denied	Parties' separation agreement stipulated discreet events constituting a material change, and retirement was not one of them. Payor choose to retire and failed to provide evidence of ill-health.
Rideout v. Rideout, [2014] N.J. No. 89 (Newf. & Lab. S.C.)	Downward variation of spousal support	Retirement of payor	Denied	Payor established a material change in circumstances but not that spousal support should be varied as a consequence.
Parker v. Parker, [2014] O.J. No. 3362 (Ont. S.C.J.)	Downward variation of spousal support	Retirement of payor	Granted	Payor's retirement was voluntary, but not in bad faith.
Dishman v. Dishman, [2010] O.J. No. 4314 (Ont. S.C.J.)	Downward variation of spousal support	Retirement of payor	Denied	Payor had accepted early retirement for a $125,000.00 incentive.
MacLanders v. MacLanders, [2012] B.C.J. No. 2482 (BCCA)	Downward variation of spousal support	Retirement of payor	Denied	Payor knew at the time of the original order that he planned to retire, but did not disclose this to the recipient.
Jacobs v. Jacobs, [1990] O.J. No. 1857 (Ont. D.C.)	Downward variation of spousal support	Payor's remarriage	Denied	Payor failed to provide proof of the economic effect of remarriage.
T.(C.J.) v. T. (G.A.), [2012] A.J. No. 333 (ABCA)	Downward variation of spousal support	Recipient's cohabitation	Granted	Recipient was receiving $2,000.00 from her common law partner to cover her living expenses.
Kenny v. MacDougall, [2007] N.S.J. No. 516 (NSCA)	Termination of obligation to maintain insurance	Both parties remarried	Granted	Payor had fulfilled his support obligations, both parties were in new, committed relationships.
Uberall v. Uberall, [2010] B.C.J. No. 340 (BCSC)	Downward variation of spousal support	Recipient in new relationship	Denied	After a 19 year marriage, recipient still entitled to support.
Bhupal v. Bhupal, (2008) 92 O.R. (3d) 211(Ont. S.C.J.)	Downward variation of spousal support	Recipient remarried	Denied	Payor knew at the time of the agreement that the recipient's relationship was likely to lead to marriage.
CUSTODY AND ACCESS				
Yasinchuk v. Farkas, [2012] O.J. No. 3122 (Ont. S.C.J.)	Variation of custody	Conflict between the parties	Granted	Parties wished not to be bound by a joint custody order and the level of conflict had escalated, negatively affecting the child.
Zambito v. Zambito, [2012] O.J. No. 317 (Ont. S.C.J.)	Variation of access	Conflict between the parties	Granted	Parenting regime was not working, supervised access to the father.
Rowles v. MacDonald, [2011] O.J. No. 5643 (Ont. C.J.)	Variation of custody	Conflict between the parties	Granted	Increasingly high level of conflict was affecting child's best interests.

Duncan v. Johnson, [2012] O.J. No. 1470 (Ont. C.J.)	Variation of custody	Conflict between the parties	Denied	A material change in circumstances was established, but court found it was in child's best interests that the shared custody arrangement persist.
Dahlseide v. Dahlseide, [2009] A.J. No. 1233 (ABCA)	Variation of custody	Conflict between parties	Denied	Despite the fact that both parents agreed to the variation, the court found it was not in the child's best interests.
Giri v. Wentges, [2012] O.J. No. 2794 (Ont. S.C.J.)	Variation of custody and access	Conduct of the parties	Granted	Father's health and ability to parent affecting best interests of the child.
Hsiung v. Tsioutsioulas, [2011] O.J. No. 4492 (Ont. C.J.)	Variation of custody and access	Conduct of the parties	Granted	Mother's conduct was alienating and she made unilateral decisions despite an agreement that she would consult father in respect of same.
Cohen v. Cohen, [2012] O.J. No. 248 (Ont. S.C.J.)	Variation of custody and access	Conduct of the parties	Granted	Father's alcoholism affecting best interests of the child.
Irving v. Gardiner, [2011] O.J. No. 5635 (Ont. C.J.)	Variation of access	Conduct of the parties	Granted	Father's alcoholism and abusive behaviour negatively affecting child.
V. (K.C.W.) v. P. (K.L.), [2010] N.B.J. No. 303 (NBCA)	Variation of custody	Conduct of the parties	Granted	Father, a joint custodian, was uninvolved with the child.
Bromm v. Bromm, [2010] S.J. No. 733 (SKCA)	Variation of access	Change in circumstances of the child	Granted	Children's aging and attendance at school may constitute a material change.
Stirling v. Blake, [2013] O.J. No. 3680 (Ont. S.C.J.)	Variation of access	Change in circumstances of the child	Granted	Particularly in access cases, the passage of time alone can amount to a material change in circumstances.
Paulo v. Yousif, [2011] O.J. No. 6296 (Ont. C.J.)	Variation of access	Change in circumstances of the child	Granted	Child was much older than at the time of the agreement, and was able to perceive the conflict between her parents.
Feist v. Feist, [2007] S.J. No. 722 (SKQB)	Variation of custody and access	Children's wishes	Denied	A court should exercise extreme caution in varying an order based on the child's wishes. There was no evidence as to why the child had made the current expression and why the status quo was not in her best interests.
Ryan v. Ryan, [2008] A.J. No. 128 (ABCA)	Variation of custody	Remarriage of non-custodial parent	Denied	Husband's new wife and birth of child did not constitute material change in circumstances.

This survey of cases vividly illustrates the need to, when drafting a separation agreement and otherwise dealing with the relief at issue in the first instance, isolate as many variables as possible in defining a 'material change' in the future. Also, when counsel finds themselves in a situation where a client insists that there has been a material change, it is critical to adduce strong evidence of the circumstances which existed at the time of the agreement or order, and the factors which allegedly constitute a material change based on present circumstances. Therefore,

the key is to clearly present a snapshot of these two points in time for the court. When one must rely on a fact-driven standard, all necessary steps must be taken to drive the facts home to the tribunal. To do so is to do something and not nothing.

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