Memo To: Doble & Doble LLP, Daniel Diamond
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Jurisdiction: Nova Scotia, Canada
Date: December 23, 2020
Regarding: NS - Family Law - Varying Spousal Support

Issue

How do the courts in Nova Scotia treat a post-separation increase in spousal income for the purposes of calculating variations in spousal support?

Facts

5 years after separation, the husband, who was formerly a law clerk, became a licensed lawyer, and his salary jumped from $45k a year to $120k a year. Wife's income has not changed since separation.

Conclusion

In cases of compensatory spousal support awards, the payee spouse may share in post-separation increases in the payor spouse's income. (*Volcko v Volcko*).

Post-separation increases in income should not be viewed the same way as employment income during the marriage for the purposes of determining the quantum of spousal support. A post-separation income increase on the part of the payor spouse raises an entitlement issue, namely whether all, some or none of the increase should be taken into account in calculating the formula range. Whether a post-separation increase in income of the payor spouse should lead to an increase in spousal support is dependent on factors including: the length of the marriage, the roles

adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase. The following principles, from the Spousal Support Advisory Guidelines (SSAG), should guide the treatment of increased post-separation income of a spouse in the context of spousal support:

a) A spouse is not automatically entitled to increased spousal support when a spouse's post–separation income increases.

b) The right to share in post-separation income increases does not typically arise in cases involving non-compensatory claims, since the primary focus of such claims is the standard of living enjoyed during the relationship.

c) Compensatory support claims may provide a foundation for entitlement to share in post-separation income increases in certain circumstances. The strength of the compensatory claim and the nature of the recipient's contributions appear to be the major factors which may tip the balance either for or against an entitlement to share in the increased income.

d) The recipient spouse may be permitted to share in post-separation increases in earnings if they can demonstrate that they made contributions that can be directly linked to the payor's post-separation success. The nature of the contributions does not have to be explicit, such as contribution to the payor's education or training. The question of whether the contributions made by the recipient specifically influenced the payor's post-separation success will depend on the unique facts of every case.

e) A spousal support award is more likely to take into account post-separation income increases where the relationship was long-term, the parties' personal and financial affairs became completely integrated during the course of the marriage and the recipient's sacrifices and contributions for the sake of the family and resulting benefits to the payor have been longstanding and significant. When this type of long history of contribution and sacrifice by a recipient spouse exists, the court will be more likely to find a connection between the recipient spouse's role in the

relationship and the payor's ability to achieve higher earnings following the separation.

f) In determining whether the contributions of the recipient were sufficient, the court should consider such factors as whether the parties divided their family responsibilities in a manner that indicated they were making a joint investment in one career, and whether there was a temporal link between the marriage and the income increase with no intervening change in the payor's career.

g) If the skills and credentials that led to the post-separation income increase were obtained and developed during the relationship while the recipient spouse was subordinating their career for the sake of the family, there is a greater likelihood of the recipient deriving the benefit of post-separation income increases.

h) By contrast, the likelihood of sharing in such increases lessens if the evidence indicates that the payor spouse acquired and developed the skills and credentials that led to the increase in income during the post-separation period, or if the income increase is related to an event that occurred during the post separation period.

i) Assuming primary responsibility for child care and household duties, without any evidence of having sacrificed personal educational or career plans, will likely not be sufficient to ground an entitlement to benefit from post-separation income increases.

j) Evidence that the post-separation income increase has evolved as a result of a different type of job acquired post-separation, a reorganization of the payor's employment arrangement with new responsibilities, or that the increase is a result of significant lifestyle changes which the payor has made since the separation may militate against a finding that the recipient should share in the increase.

k) Where the payor's post-separation advancement is related primarily to luck or connections which they made on his own, rather than on contributions from the recipient, the claim for a share in post-separation income increases will be more difficult.

l) The court may also consider the amount of time that has elapsed since separation as an indicator of whether the recipient's contributions during the marriage are causally related to the post–separation income increases.

m) Evidence that the payor also made contributions to the recipient's career advancement, or that the recipient has not made reasonable steps towards achieving self-sufficiency are also factors that may preclude an award that takes into account post separation income increases.

(*Darlington v. Moore*).

In *Mosher v. Mosher*, the Nova Scotia Court of Appeal dismissed the appeal of the payor spouse with respect to an order for spousal support based on the payor spouse's significant post-separation increase in income. The NSCA held that the wife's claim for spousal support should be viewed, to a significant degree, in the light of the post-separation income of her ex-spouse, which was significantly higher than the payor spouse's pre-separation income. The NSCA noted that the lower Court was influenced by the wife's contribution to the marriage, the upbringing of the children, and the wife's willingness to share in a compromise of the family's standard of living in order to purchase rental properties and to invest in the stock market during the marriage. The NSCA noted that it would be inequitable if the wife's claim was affected as a consequence of the reduction of her ex-spouse's income for the two years after he left a job, and not take into account the spectacular increases thereafter: (*Mosher v. Mosher*).

In *Bodhaine v. Bodhaine*, the Court held that the quantum of the spousal support order should reflect the husband's post-separation increase in income. The Court noted that while the wife's need for support was mostly non-compensatory, the relationship was a long term marriage in which the parties pooled their resources, and the husband took skills training during the marriage which enabled him to obtain the employment which led to an increased income. (*Bodhaine v. Bodhaine*).

In *Acker v. Acker*, the applicant's increase in income in the post-separation years were due to his own efforts and could not be said to be causally connected to the marriage or to the payee spouse's contributions made during the marriage. As a result, the Court ruled that an increase in

spousal support as a result of the applicant's post-separation income increase was not justified. (*Acker v. Acker*).

In *Shurson v. Shurson*, the Court granted the payor spouse's application to reduce his spousal support payments after his former spouse increased her income. Both parties agreed that spousal support payments should be reduced, but the parties disagreed on the quantum of the reduction. the payor spouse argued that the support payments should be reduced from $3,500/month to $500/month while the payee spouse argued that the payments should be reduced to $2,500/month. The Court ordered the payments to be reduced to $2,500/month and noted that the elements of the payee spouse's spousal support claim was based upon the divergent lifestyles of the parties which are issues considered both in compensatory and non-compensatory claims. The Court noted that the obligation to become self-supporting is but one factor to be considered and that the compensatory nature of a payee spouse's entitlement dictates a certain standard of living relative to their combined means (*Shurson v. Shurson*).

In *Balcom v. Balcom*, the Court reduced the spousal support payments of the payor spouse as a result of the payee spouse moving from part-time to full-time work which resulted in an increase in her salary. (*Balcom v. Balcom*).

Law

In *Volcko v Volcko*, 2019 NSSC 203 (CanLII), Beaton J. of the NSSC noted that, in cases of compensatory spousal support awards, the payee spouse may share in post-divorce increases in the payor spouse's income. However, in *Volcko*, the Court found that the payor spouse's income was reduced, and not increased, and declined to order an increase in the spousal support payments:

> [33] There is no shortage of authority that in variations of compensatory spousal support awards after longer-term traditional marriages, the recipient may share in post-divorce increases in the payor's income. This approach serves to recognize the relationship between the recipient's contributions to the marriage and career/economic advantages of the payor, and post-separation gains by the payor. That said, the failure of the recipient to demonstrate any efforts toward self-

sufficiency have also impacted that relationship or connection:

> [116] . . . if she is not making any effort towards self-sufficiency, it is also not fair that she be rewarded with an increased level of support solely because the claimant continued to work hard and as a result enjoyed some economic success. (*G.W.C. v. K.C.C.*, 2015 BCSC 1802)

Likewise, a lack of effort at self-sufficiency has informed both downward variations in the quantum of support (*Reid v. Gillingham*, 2014 NBQB 79 (appeal on other grounds dismissed, 2015 NBCA 27); *Breed* (*supra*)) and termination of the obligation (*Choquette v. Choquette*, 2019 ONCA 306). The Applicant's lack of effort to explore self-sufficiency negatively impacts her compensatory entitlement to spousal support.

[...]

> [53] In conclusion, I am satisfied there has been a change in circumstances found in the 2018 reduction of the Respondent's income, which reduction does not necessitate a change in the quantum of support. The claim for increased support is dismissed. The *SSAG* do not apply to the determination of spousal support on this application. The claim for a retroactive adjustment is dismissed. The claim for insurance on payments is *res judicata*, and the claim to secure payments against the Respondent's estate is dismissed. The claim for a reduction in support is dismissed. The claim for termination of support is dismissed.

In *Darlington v. Moore*, 2015 NSSC 124 (CanLII), (aff'd *Moore v Darlington*, 2017 NSCA 67 (CanLII)), the NSSC took the payor spouse's increased post-separation income into account for the purpose of calculating spousal support. However, the Court stated that this income was not to be viewed the same way as his pre-separation employment income for the purposes of determining the quantum of spousal support. The NSSC stated that a post-separation income increase on the part of the payor spouse raises an entitlement issue, namely whether all, some or none of the increase should be taken into account in calculating the formula range. Whether a post-separation increase in income of the payor spouse should lead to an increase in spousal

support is dependent on factors including: the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase. The following principles, from the SSAG, should guide the treatment of increased post-separation income of a spouse in the context of spousal support:

> a) A spouse is not automatically entitled to increased spousal support when a spouse's post–separation income increases.
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> b) The right to share in post-separation income increases does not typically arise in cases involving non-compensatory claims, since the primary focus of such claims is the standard of living enjoyed during the relationship.
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> c) Compensatory support claims may provide a foundation for entitlement to share in post-separation income increases in certain circumstances. The strength of the compensatory claim and the nature of the recipient's contributions appear to be the major factors which may tip the balance either for or against an entitlement to share in the increased income.
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> d) The recipient spouse may be permitted to share in post-separation increases in earnings if they can demonstrate that they made contributions that can be directly linked to the payor's post-separation success. The nature of the contributions does not have to be explicit, such as contribution to the payor's education or training. The question of whether the contributions made by the recipient specifically influenced the payor's post-separation success will depend on the unique facts of every case.
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> e) A spousal support award is more likely to take into account post-separation income increases where the relationship was long-term, the parties' personal and financial affairs became completely integrated during the course of the marriage and the recipient's sacrifices and contributions for the sake of the family and resulting benefits to the payor have been longstanding and significant. When this type of long history of contribution and sacrifice by a recipient spouse exists, the court will be more likely to find a connection between the recipient spouse's role in the

relationship and the payor's ability to achieve higher earnings following the separation.

f) In determining whether the contributions of the recipient were sufficient, the court should consider such factors as whether the parties divided their family responsibilities in a manner that indicated they were making a joint investment in one career, and whether there was a temporal link between the marriage and the income increase with no intervening change in the payor's career.

g) If the skills and credentials that led to the post-separation income increase were obtained and developed during the relationship while the recipient spouse was subordinating their career for the sake of the family, there is a greater likelihood of the recipient deriving the benefit of post-separation income increases.

h) By contrast, the likelihood of sharing in such increases lessens if the evidence indicates that the payor spouse acquired and developed the skills and credentials that led to the increase in income during the post-separation period, or if the income increase is related to an event that occurred during the post separation period.

i) Assuming primary responsibility for child care and household duties, without any evidence of having sacrificed personal educational or career plans, will likely not be sufficient to ground an entitlement to benefit from post-separation income increases.

j) Evidence that the post-separation income increase has evolved as a result of a different type of job acquired post-separation, a reorganization of the payor's employment arrangement with new responsibilities, or that the increase is a result of significant lifestyle changes which the payor has made since the separation may militate against a finding that the recipient should share in the increase.

k) Where the payor's post-separation advancement is related primarily to luck or connections which they made on his own, rather than on contributions from the recipient, the claim for a share in post-separation income increases will be more difficult.

> l) The court may also consider the amount of time that has elapsed since separation as an indicator of whether the recipient's contributions during the marriage are causally related to the post–separation income increases.
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> m) Evidence that the payor also made contributions to the recipient's career advancement, or that the recipient has not made reasonable steps towards achieving self-sufficiency are also factors that may preclude an award that takes into account post separation income increases.

In *Darlington, t*he Court set the payor spouse's support obligation at the low end of the Spousal Support Advisory Guidelines as a result of the Court's decision to treat the payor spouse's post-separation income differently as compared to his pre-separation income:

> [142] Finally, it is relevant that Mr. Moore's much higher DVA income became a reality around the time of the parties' separation. This income is not in any way attributable to the relationship with Ms. Darlington. I have ruled that it is income to be considered for purposes of child and spousal support determinations, however, this income is in the nature of an increase in post separation income. It is to considered but it is not on these facts to be viewed the same way as his employment income when the quantum of spousal support is to be determined. However, it was used to determine the table amount of child support over the post separation period.
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> [143] The issue of post separation income and its relevance when determining the quantum of spousal support was discussed in *Thompson v. Thompson* 2013 ONSC 5500 by Justice Chappell at paragraph 100-103:
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> > [100] The Respondent's position respecting spousal support is premised on the assumption that he should be permitted to benefit from alleged increases in the Applicant's income since the parties' separation in June 2009. This position raises difficult questions regarding the relevant timing for income determination in spousal support cases, and the circumstances in which a recipient spouse should be permitted to reap the benefits of the payor's post- separation

income increases.

[101] In addressing this issue, it is helpful to compare the approaches which the Ontario Court of Appeal adopted in two cases. In the 2003 decision of Marinangeli v. Marinangeli, where the facts indicate that the Respondent wife had a compensatory spousal support claim, the court made the following comments respecting need and ability to pay:

"In determining need, the court is to be guided by the principle that the spouse receiving support is entitled to receive the support that would allow her to maintain the standard of living to which she was accustomed at the time cohabitation ceased. In addition, there is jurisprudence to the effect that a spouse is entitled to an increase in the standard of living such as would have occurred in normal course of cohabitation. See MacDougall v. MacDougall (1973), 1973 CanLII 1940 (ON SC), 11 R.F.L. 266, 1973 CarswellOnt 130 (Ont. S.C.) per Henry, J. See also Linton v. Linton (1990) 1990 CanLII 2597 (ON CA), 1 O.R. 3d 1 (Ont. C.A.). At the same time the court must guard against redistributing the payor's capital in the guise of support."[104]

[102] By contrast, in Fisher v. Fisher, where the Court of Appeal was dealing with a non-compensatory support claim, Lang, J.A. did not consider the payor spouse's post-separation income in determining the spousal support claim. Rather, she averaged out the spouses' respective incomes during the three years prior to separation and in the year of separation. These two cases provide a backdrop against which to analyse the issue of post-separation increases in a payor's income, and they suggest that a fundamental consideration in determining how to treat such increases is whether the spousal support claim is based on compensatory or non-compensatory grounds.

[103] The authors of the SSAG and the cases decided since the guidelines were introduced have established that the treatment of

post-separation increases in a payor's earnings in spousal support cases is ultimately a matter of discretion for the court, to be undertaken having regard for the unique circumstances of each case and the general factors and objectives underlying spousal support. Upon considering these factors and objectives and the relevant case-law, I conclude that the following general principles should guide and inform the court's exercise of discretion on this issue:

a) A spouse is not automatically entitled to increased spousal support when a spouse's post–separation income increases.

b) The right to share in post-separation income increases does not typically arise in cases involving non-compensatory claims, since the primary focus of such claims is the standard of living enjoyed during the relationship.

c) Compensatory support claims may provide a foundation for entitlement to share in post-separation income increases in certain circumstances. The strength of the compensatory claim and the nature of the recipient's contributions appear to be the major factors which may tip the balance either for or against an entitlement to share in the increased income.

d) The recipient spouse may be permitted to share in post-separation increases in earnings if they can demonstrate that they made contributions that can be directly linked to the payor's post-separation success. The nature of the contributions does not have to be explicit, such as contribution to the payor's education or training. The question of whether the contributions made by the recipient specifically influenced the payor's post-separation success will depend on the unique facts of every case.

e) A spousal support award is more likely to take into account post-separation income increases where the relationship was

long-term, the parties' personal and financial affairs became completely integrated during the course of the marriage and the recipient's sacrifices and contributions for the sake of the family and resulting benefits to the payor have been longstanding and significant. When this type of long history of contribution and sacrifice by a recipient spouse exists, the court will be more likely to find a connection between the recipient spouse's role in the relationship and the payor's ability to achieve higher earnings following the separation.

f) In determining whether the contributions of the recipient were sufficient, the court should consider such factors as whether the parties divided their family responsibilities in a manner that indicated they were making a joint investment in one career, and whether there was a temporal link between the marriage and the income increase with no intervening change in the payor's career.

g) If the skills and credentials that led to the post-separation income increase were obtained and developed during the relationship while the recipient spouse was subordinating their career for the sake of the family, there is a greater likelihood of the recipient deriving the benefit of post-separation income increases.

h) By contrast, the likelihood of sharing in such increases lessens if the evidence indicates that the payor spouse acquired and developed the skills and credentials that led to the increase in income during the post-separation period, or if the income increase is related to an event that occurred during the post separation period.

i) Assuming primary responsibility for child care and household duties, without any evidence of having sacrificed personal educational or career plans, will likely not be sufficient to ground an entitlement to benefit from post-separation income increases.

j) Evidence that the post-separation income increase has evolved as a result of a different type of job acquired post-separation, a reorganization of the payor's employment arrangement with new responsibilities, or that the increase is a result of significant lifestyle changes which the payor has made since the separation may militate against a finding that the recipient should share in the increase.

k) Where the payor's post-separation advancement is related primarily to luck or connections which they made on his own, rather than on contributions from the recipient, the claim for a share in post-separation income increases will be more difficult.

l) The court may also consider the amount of time that has elapsed since separation as an indicator of whether the recipient's contributions during the marriage are causally related to the post–separation income increases.

m) Evidence that the payor also made contributions to the recipient's career advancement, or that the recipient has not made reasonable steps towards achieving self-sufficiency are also factors that may preclude an award that takes into account post separation income increases.

[144] The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version, Justice Canada 2010 described the issue as follows at page 51:

> Under the current law, a post-separation income increase on the part of the payor raises another distinct issue for spousal support analysis, an entitlement issue, namely whether **all, some or none of the increase** should be taken into account in calculating the formula range.
>
> As we said in the Final Version: "Some rough notion of causation is applied to post separation income increases for the payor, in

> determining both whether the income increase should be reflected in increased spousal support and, if it should, by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (new job vs. promotion with same employer, or career continuation vs. new venture)."
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> [...]
>
> [149] A significant part of Mr. Moore's income is analogous to "post separation" income. This is a very relevant consideration when considering the Spousal Support Advisory Guidelines. I am satisfied Mr. Moore's spousal support obligation should be set below the low end of the Spousal Support Advisory Guidelines as a consequence.
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> [...]
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> [155] The quantum selected is not based on a straight application of the spousal support guidelines. The parties are invited to suggest a structuring of the payment of this retroactive obligation to maximize the prospect of Mr. Moore being able to realize a tax benefit as a result of paying spousal support. This is contemplated by the spousal support guidelines.

In *Mosher v. Mosher*, 1995 NSCA 65 (CanLII), the Nova Scotia Court of Appeal dismissed the appeal of the payor spouse with respect to an order for spousal support based on the payor spouse's significant post-separation increase in income. The NSCA held that the wife's claim for spousal support should be viewed, to a significant degree, in the light of the post-separation income of her ex-spouse, which was significantly higher than the payor spouse's pre-separation income. The NSCA noted that the lower Court was influenced by the wife's contribution to the marriage, the upbringing of the children, and the wife's willingness to share in a compromise of the family's standard of living in order to purchase rental properties and to invest in the stock market during the marriage. The NSCA noted that it would be inequitable if the wife's claim was affected as a consequence of the reduction of her ex-spouse's income for the two years after he

left a job, and not take into account the spectacular increases thereafter:

> [99] During the first ten years of co-habitation, the parties maintained a modest life style. Any excess funds were used to purchase investment properties which were both managed and maintained by Mr. Mosher in his spare time.
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> [100] Both parties worked diligently to improve the family's financial circumstances.
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> [101] Mr. Mosher took a six-month correspondence course in order to improve his earning capabilities.
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> [102] Ms. Mosher, when child rearing responsibilities permitted, secured part-time employment. She worked both during the day when her parents and her mother-in-law could assist in the home, and during the evening hours when Mr. Mosher was available to look after the children.
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> [103] Their perseverance and modest life style paid off when the sale of the Lantz and Fairview properties resulted in capital gains of approximately $45,000.
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> [...]
>
> [111] Mr. Mosher's change in employment from Levesque Beaubien to Scotia Bond was bound to result in a reduction in income for some period of time until he attracted new clients. His commission income was, in fact, depressed for the next two years. Ms. Mosher was willing to go along with the change, presumably in the expectation that in time his income would improve.
>
> [112] The standard of living of the entire family suffered as a result of the losses sustained in October, 1988. It took a further period of two years before Mr. Mosher was able to extricate himself completely from the market.
>
> [113] In my opinion, it would be unfair to consider Ms. Mosher's application for spousal support, only in the light of the income earned by her husband in the three lean years, and not consider the three more productive years that followed.

[114] I agree with the trial judge when he concludes that Mr. Mosher's "income in recent years since the separation has shown a marked trend upward and it is appropriate that his children and his wife should share the benefits of this increase".

[115] Counsel for Mr. Mosher submits that if the case had been tried at the time of the separation (January 2, 1991) when his average net commission income during the final three years of co-habitation aggregated $43,000, that the monthly support order determined by the trial judge would have been dramatically lower.

[116] Counsel does not argue that Ms. Mosher and the children should be restricted in their application for support to the pre-separation income, but does submit that the post-separation capacity to pay should not result in the court quantifying support at the outer limits of that capacity.

[117] The recent decision of the Supreme Court of Canada in *Willick v. Willick* (1994), 6 R.F.L. (4th) 161, delivered on October 27, 1994, is relied upon in support.

[118] *Willick* was a case where the parties were married on August 25, 1979, separated on March 1, 1989, and entered into an interspousal agreement on July 28, 1989. Under the terms of that agreement the husband agreed to pay to his wife, $450 per month for each of their two children and $700 per monthspousal support, for a total of $1,600 per month. Mrs. Willick swore in an affidavit that the spousal and child support payments were sufficient to cover her expenses and the expenses of the two children.

[119] On October 7, 1991, she commenced an application to increase the child support on the ground that the children's needs had become too great a financial burden on her and that her former husband had experienced a significant increase in earnings.

[120] At the time of entering into the agreement in July '89 Mr. Willick, an airline pilot, was earning approximately $40,000 a year. At the time of the Application for Variation, his gross monthly income was $8,500 plus $4,200 housing allowance (he

was living in Hong Kong at the time). At the time of the application, Mrs. Willick had a gross monthly income of $2,000, including $325 earned through part-time employment, and child and spousal support payments of $1,697.

[121] The trial judge, based on affidavit evidence, increased the child support order from $450 a month per child to $850 a month per child. The Saskatchewan Court of Appeal allowed the appeal and set aside the increase, restoring the support provisions of the agreement.

[122] Sopinka J. on behalf of the court stated at p. 182 (emphasis added):

> Having found that the conditions for variation exist, the trial judge should proceed to determine what variation should be made. The trial judge must reassess the needs of the children in light of the change. The needs of children are not assessed in a vacuum but are affected by the standard set by the means of the parents. When the means of parents are limited, the children's needs may be satisfied by the bare necessities. In these circumstances the children are required to do without some things which would be available to them if the means of the parents were greater. The reasonable expectation of the children for future support upon marriage breakup are conditioned by the standard of living of the parents at the time. *This expectation is not frozen as of the date of marriage breakup. If there is a significant change in the circumstances of one of the parents subsequent to the support provisions, reasonable expectations of the children will be affected. ... Accordingly, a significant increase in the means of the payor parent may require that the needs of the child include benefits that previously were not available*. ... There is, however, a limit to the extent to which the reasonable expectations of children to increased support payments can continue by reason of increases in the wealth of the payor spouse.It must not be forgotten that we are dealing with maintenance and not income sharing.If the children are already being maintained at a very high standard, a change, even a significant change in the wealth

> of the payor spouse, will not in itself entitle the children to increased support so as to permit them to live in luxury simply to emulate the lifestyle of their parent. Such an expectation on the part of children would not be reasonable.

[...]

[126] *Willick* establishes that a significant increase in the payor's ability requires a reassessment of the needs of the children.

[127] The circumstances of this case, in my opinion, dictate that Ms.Mosher's claim for spousal support should be viewed, to a significant degree, in the light of the post-separation income.

[128] I come to this conclusion because of her contribution to the marriage and the upbringing of the children, her willingness to share in a compromise of the family's standard of living in order to purchase rental properties and to invest in the stock market.

[129] It would be inequitable if her claim was affected as a consequence of the reduction of Mr. Mosher's income for the two years after he left Levesque Beaubien, and not take into account the spectacular increases thereafter.

[130] I find support for this conclusion in the observations of L'Heureux-Dubé J. in *Moge* (supra) where she emphasized that the "support provisions of the Act are intended to deal with the *economic* consequences, for both parties, of the marriage or its breakdown." (at p. 373)

[...]

[145] Having regard to all of the evidence I cannot say that the trial judge erred in his assessment.

[146] I also agree with the trial judge that a further $500 per month will be payable as additional support to Ms. Mosher during her 9-month training period.

> [147] I would accordingly dismiss this ground of appeal.

In *Bodhaine v. Bodhaine*, 2013 NSSC 428 (CanLII), Wilson J. of the NSSC held that the quantum of the spousal support order should reflect the husband's post-separation increase in income. The Court noted that while the wife's need for support was mostly non-compensatory, the relationship was a long term marriage in which the parties pooled their resources, and the husband took skills training during the marriage which enabled him to obtain the employment which led to an increased income:

> [23] In determining the amount of spousal support I have considered the factors identified above including imputing income to the Applicant of $5,000.00 per year. I have considered the age of the parties and that the Respondent requires some incentive to continue to work at a good paying job in western Canada. The Respondent's income increased substantially around the time of separation. While the Applicant's need for support is mostly non-compensatory based, she should share in the Respondent's increased income post-separation. This was a long term marriage whereby the parties pooled their resources, the Respondent took skills training during the marriage, which enabled him to obtain his current employment and the Respondent was working in Western Canada at the time of separation.

In *Acker v. Acker*, 2014 NSSC 5 (CanLII), Sers J. heard an application by the payor spouse to terminate spousal support. The respondent sought to increase her spousal support on the basis of the applicant spouse's post-separation increase in income. The Court noted that the applicant's increase in income in the post-separation years were due to his own efforts and could not be said to be causally connected to the marriage or to the payee spouse's contributions made during the marriage. As a result, the Court ruled that an increase in spousal support as a result of the applicant's post-separation income increase was not justified:

> **Sharing in Post Divorce Income Increases**
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> [108] The respondent seeks to have an increase in her spousal support to address her difficulties based on the applicant's post divorce increases in income.
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> [109] His income increased significantly post divorce. However he has now been

reduced to a level somewhat consistent with what he earned on divorce.

[110] Mr. Acker argues that the multiple moves as a result of the difficulties in the marriage were in fact difficult on his career and income earning potential during marriage.

[111] He argues that the significant increases in sales and his income post separation are only due to his own efforts post separation.

[112] One could not discount his previous experience in looking at the significant increase in his income and success even though the increase is more tangible post separation.

[113] His income in the intervening years represents a significant increase. This is due to his own efforts, accepting remote and sometimes isolated, hard to fill, postings which require rigorous training.

[...]

[247] The significant increases in his income post separation up to the reduction most recently could not be said to be casually connected to the marriage or direct contributions made during the marriage other than as resulted from the experience he gleaned during those years.

[248] Thus, on the totality of the evidence in this case, the facts do not justify an increase in spousal support as a result of the applicant's post separation income increases, as requested by the respondent

[...]

[256] The request for an increased spousal support award because the applicant improved his financial picture through his own efforts is not justified.

In *Shurson v. Shurson*, 2008 NSSC 264 (CanLII), MacDonald J. of the NSSC granted the payor

spouse's application to reduce his spousal support payments after his former spouse increased her income. Both parties agreed that spousal support payments should be reduced, but the parties disagreed on the quantum of the reduction. the payor spouse argued that the support payments should be reduced from $3,500/month to $500/month while the payee spouse argued that the payments should be reduced to $2,500/month. The Court ordered the payments to be reduced to $2,500/month and noted that the elements of the payee spouse's spousal support claim was based upon the divergent lifestyles of the parties which are issues considered both in compensatory and non-compensatory claims. The Court noted that the obligation to become self-supporting is but one factor to be considered and that the compensatory nature of a payee spouse's entitlement dictates a certain standard of living relative to their combined means:

> [1] On 2008 Mr. Shurson filed an application to vary the Order issued in these proceedings dated July 12, 2007. He requests a reduction in the quantum of spousal support. Pursuant to the present order Mr. Shurson is required to pay spousal support in the amount of $3,500.00 per month. He argues he should pay the sum of $500.00 per month as a result of Ms. Sudds (nee: Shurson) increased ability to support herself. Ms. Sudds is prepared to consent to a reduction in spousal support but argues there should only be a $1,000.00 monthly reduction thus requiring Mr. Shurson to pay $2,500.00 per month. She argues that she has a continuing compensatory and non-compensatory entitlement and requires additional time to adust to economic independence in respect to her non-compensatory claim. Both parties accept there have been changes in circumstances justifying a variation application.
>
> [...]
>
> [3] In the proceeding before me, as was the case in the proceeding before Justice Legere-Sers, the parties referred to, and Justice Legere-Sers applied, the principles governing spousal support pursuant to the Divorce Act, R.S. , 1985, c.3 although the proceeding had been initiated pursuant to the *Maintenance and Custody Act*, 1989, c. 160. It has been generally accepted that these principles do have application to *Maintenance and Custody Act* spousal support claims. The factors and obligations set out in sections 4 and 5 of that Act are similar to the objectives and

factors set out in sections 15.2(6) and 15.2(4) of the Divorce Act.

[4] The objectives to be considered when examining a request for variation of an order for spousal support issued pursuant to the Divorce Act are found in s. 17(7)(1):

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

[5] These directions are the same as those contained in s. 15.2 (6) of the Divorce Act, the section governing interim or initial spousal support orders.

[6] The Divorce Act also requires a court :

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

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

[7] Although these factors are not repeated in respect to variation orders they remain to be considered in a variation proceeding.

[...]

[24] Arguments about Ms. Sudds obligation to become self-supporting by finding additional employment and reducing her living expenses fail to take into account the elements of her spousal support claim based upon the divergent lifestyles of the parties which are issues considered both in compensatory and non-compensatory claims. The obligation to become self-supporting is but one factor to be considered. As Justice Legere-Sers has said, "In addition to self-sufficiency, the compensatory nature of her entitlement dictates a certain standard of living relative to their combined means." This concept echos the "merger over time" rationale used to develop the Spousal Support Advisory Guidelines. In the Executive Summary of the Guidelines the following appears:

> The **without child support formula** is built around two crucial factors: the **gross income difference** between the spouses and the **length of the marriage**. Both the amount and the duration of support increase incrementally with the length of the marriage.... The idea that explains this formula is **merger over time**: as a marriage lengthens, spouses more deeply merge their economic and non-economic lives, with each spouse making countless decisions to mould his or her skills, behaviours and finances around those of the other spouse. The gross income difference measures their differential loss of the mutual standard of living at the end of the marriage. The formulas for both amount and duration reflect the idea that the longer the marriage, the more the lower income spouse should be protected against such a differential loss. Merger over time captures both the compensatory and non-compensatory spousal support objectives that have been recognized by our law since *Moge* and *Bracklow.*

[25] Mr. Shurson is able to earn approximately $117,000 per year. He suggests he would like to work less but his health appears good and he has at present no exact date when he will be reducing his hours of work. He has ability to pay spousal support and this has not been disputed. Because he is working I do not have to

consider whether a voluntary reduction in his income would be reasonable in light of his spousal support obligation.

[26] The Spousal Support Guidelines are of some use in variation proceedings but they have limitations. The authors state on page 97 of their report *Spousal Support Advisory Guidelines: A Draft Proposal - January 2005:*

> We identified certain situations where the advisory guidelines would apply on reviews and variations, including increases in the recipient's income and decreases in the payor's income. We have left others, such as post-separation increases in the payor's income, re-partnering, remarriage and second families, to discretionary, case by case determinations under the evolving framework of current law.

[...]

[29] Ms. Sudds has agreed that a reduction in the quantum of spousal support is appropriate. I have considered both the statutory objectives and the factors outlined in the Divorce Act and the Maintenance and Custody Act in respect to spousal support. I have decided that Mr. Shurson is to pay spousal support in the amount of $2,500 per month commencing September 1, 2008. The duration remains indefinite and subject to variation based upon a material change in circumstances.

In *Balcom v. Balcom*, 1999 CanLII 2230 (NS SC), Kelly J. of the NSSC reduced the spousal support payments of the payor spouse as a result of the payee spouse moving from part-time to full-time work which resulted in an increase in her salary:

> [1] The applicant father, Mr Balcom, seeks to vary the Corollary Relief Judgment in this matter to terminate spousal support and to eliminate an "extracurricular" child support payment of $234 per month. Guideline table child support as well as the "extracurricular" support had been agreed upon by the parties in a December 1997 Minutes of Settlement agreement which was incorporated into the above Judgment.
>
> [2] Counsel are in agreement that the date of the above agreement is the appropriate

date I should consider for the purpose of variation. The respondent mother, Ms Balcom, submits that the Corollary Relief Judgment should not be varied and opposes the application. Mr Balcom also submits that any variation should be retroactive because he continued to pay support in accordance with the order, after Ms Balcom obtained full-time employment with a substantial increase in her income[.]

[...]

[6] At the time the Agreement was negotiated by the parties, the respondent, Sandra Balcom, was employed as a secretary on a part-time basis with International Trade Centre/ Industry Canada and she earned $19,348.20 per annum. Mr Balcom was employed with the Provincial Government at the Department of Transportation and Public Works and earned $54,963.80.

[7] In May 1998, Sandra Balcom commenced full-time employment with Agriculture and Agri-Food Canada and presently earns $36,883 per annum.

[...]

[39] For these and other reasons I am not convinced that spousal support should be terminated nor should a future date of termination be specified at this time. On the basis of present circumstances, I would anticipate that a few years will pass before termination should be seriously considered. However, I am also satisfied that it should be reduced, based mainly on Ms Balcom's increase in employment income. I conclude that monthly payments should be in the amount of $300 a month.

Authorities

Volcko v Volcko, 2019 NSSC 203 (CanLII)

Darlington v. Moore, 2015 NSSC 124 (CanLII)

Moore v Darlington, 2017 NSCA 67 (CanLII)

Mosher v. Mosher, 1995 NSCA 65 (CanLII)

Acker v. Acker, 2014 NSSC 5 (CanLII)

Bodhaine v. Bodhaine, 2013 NSSC 428 (CanLII)

Shurson v. Shurson, 2008 NSSC 264 (CanLII)

Balcom v. Balcom, 1999 CanLII 2230 (NS SC)