SCC view of support orders too strict, lawyers say

BY MICHAEL McKIERNAN
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The Supreme Court of Canada has reinforced the finality of spousal support orders that incorporate the terms of negotiated separation agreements in a move some family lawyers have labelled too strict.

In two rulings delivered together on Dec. 21, the top court unanimously reinstated original spousal support orders after lower courts in Quebec agreed to two former husbands' requests to vary them.

"I think they've tightened the test to the point where it's virtually impossible to go before a superior court now and ask for a change in spousal support," says Robert Shawyer, a Toronto lawyer who practises family law.

"The law is not a static instrument. It's an instrument that's meant to be used to come up with solutions to problems as times change, and the Supreme Court of Canada with this judgment is basically saying that the law is a static thing and there has to be some finality. I think they're being too rigid."

In the 7-0 decision, the court confirmed its earlier approach in the 1994 case of *Willick v. Willick*. In the earlier case, which dealt with child support, the majority said that to allow a variation, a material change of circumstances must have occurred since making the order. It must be a change that, "if known at the time, would likely have resulted in different terms."

Markham, Ont., family lawyer Andrew Feldstein says some practitioners in the field were hoping the court would step back from the view in *Willick* that a foreseeable change in circumstance can't be material.

"It's unfortunate that the court didn't look at it from a more practical basis because I think people want the ability to revisit orders and it seems a little bit too strict on foreseeability," says Feldstein.

"The difficult question that lies with that is what is foreseeable and what isn't foreseeable. The unfortunate reality is that the Supreme Court has now probably increased the cost of legal fees for counsel who feel it necessary to incorporate separation agreement provisions into a final court order."

Shawyer says he'll steer his clients away from open-ended spousal support agreements as a result of the decision.

"If they enter into an open-ended spousal support agreement, they have to be very cognizant of the fact that the Supreme Court has said this may end up being a lifelong obligation," he says.

"I'll make sure they understand that there has to be a very tight set of wording around the circumstances for material change that has to take into account every foreseeable change."

The first case, *L.M.P. v. L.S.*, involved a couple who married in 1988. Shortly after the wedding, the wife was diagnosed with multiple sclerosis and hasn't worked since. The pair separated in 2002 and came to a comprehensive agreement incorporated into an order the next year that gave the wife $3,688 a month in spousal support.

In 2007, the husband applied to cancel the support on the grounds that his financial position had changed and his wife should be seeking work. The Quebec judge hearing the case dismissed the husband's claim about his finances but agreed that the wife was able to work and ordered the spousal support reduced until August 2010.

At that point, the support would stop altogether. The wife appealed but was unsuccessful before the Quebec Court of Appeal, which found that her failure to become self-sufficient constituted a material change in circumstances.

Writing for five of the Supreme Court judges, justices Rosalie Abella and Marshall Rothstein said the husband was fully aware of the wife's condition both before and after the separation.

"The husband also argued that the wife was able to work outside the home and ought to make efforts to find employment," the judges wrote.

The court 'seems a little bit too strict on foreseeability,' says Andrew Feldstein. *Photo: Kenneth Jackson*

"He did not argue that this was a change since the time of the original order but rather appears to have argued that the wife was always capable of working outside the home, even during the marriage. The expert evidence was that there has been little or no change in the wife's medical condition in 19 years. That means that there has been no improvement. It is, in short, the same as when the order was made. And that in turn means that there has been no change, let alone a material one, since the order."

In the second case, R.P. and R.C. married in 1958, separated in 1974, and divorced in 1984. The wife continued to live in the matrimonial home with the two children after the separation and the husband was ordered to pay her $1,950 in combined spousal and child support. When the children moved out in 1987, the husband successfully applied to terminate spousal support, but in 1991, the Quebec Court of Appeal allowed his ex-wife's appeal and boosted his monthly payments to $2,000. It found that her domestic responsibilities had prevented her from becoming financially independent.

The husband didn't dispute his ability to pay at that time but in 2008 he again applied to terminate support. By that time, he had retired and sold his house for $2 million but claimed the market downturn had put a large dent in his finances. With a son from his second marriage in university and no employment income, he said he was no longer able to pay.

A trial judge reduced his payments to $1,500 before the Court of Appeal ordered the payments to gradually decrease until they ended altogether in September 2010.

Citing two evidentiary gaps, the Supreme Court overturned that decision. Abella and Rothstein, again writing for five of the seven concurring judges, said there was no information to show the husband had sold any of his investments to crystallize his losses and noted that there was no evidence of his financial situation in 1991 when the order was made.

"The husband's acknowledgment of sufficient resources in prior proceedings does not relieve him of his evidentiary and legal burdens in this one," the judges wrote.

"These gaps mean that there is no way of measuring whether there has been any material change that would entitle the husband to a variation of spousal support. As for the 2006 retirement, the trial judge noted that the change in the nature of his income from employment to investment did not provoke the husband to seek a variation. His own actions, therefore, suggest he did not view his retirement as a material change."

Feldstein says the requirement to show the financial position at the time of the agreement may cause problems for parties who divorced more than five years ago when financial disclosure was much less routine in family law matters.

"Sometimes, I think the court takes a very strict legal interpretation, but they don't look at the practicality of the situation in terms of the solicitors who are going to have to practise and interpret these agreements," he says.

"If a client comes in with an agreement that was entered into in 1995, we won't know what the income baseline was. Getting hold of your financial statements from 16 years ago can be a real challenge for some." LT