S.C.A. No. 02704

NOVA SCOTIA COURT OF APPEAL

Jones, Hallett and Chipman, JJ.A.

Cite as: Mooy v. Mooy, 1993 NSCA 14

BETWEEN:

| | | |
|---|---|---|
| JOSEPHINE JUNE MOOY | ) | M.G. Forse, Q.C. |
| | ) | M.V. Coyle |
| appellant | ) | for the appellant |
| | ) | |
| | ) | Steven G. Zatzman |
| - and - | ) | for the respondent |
| | ) | |
| CORNELIUS GERARDUS MOOY | ) | Appeal Heard: |
| | ) | December 9, 1992 |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | February 25, 1993 |

THE COURT: Appeal allowed without costs and the judgment and order of Hall, L.J.S.C. set aside per reasons for judgment of Jones, J.A.; Chipman, J.A. concurring by separate reasons and Hallett, J.A. dissenting.

JONES, J.A.:

This is an appeal from a decision of Hall, L.J.S.C. reducing the appellant's support from $2,000.00 to $1200.00 per month.

The parties were married on September 9, 1961. There were three children of the marriage. The wife remained at home and raised the children. The respondent operated his own business as a life insurance broker.

The parties separated on February 22, 1983. In 1983 they signed a settlement agreement with the advice of counsel. The following clauses are contained in the agreement:

> "(4) Commencing January 1, 1988, and on the first day of each month thereafter the Petitioner shall pay to the Respondent maintenance in the amount of $2,000 while she resides in the matrimonial home. The sale of the matrimonial home shall be regarded as a change of circumstances and the amount of maintenance shall be reviewed by the Parties. If they are unable to reach agreement either may apply to the court for variation of the Corollary Relief pursuant to the provisions of the **Divorce Act** 1986.
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> (5) The Respondent recognizes her obligation to contribute to her own support and will continue her efforts to find employment.
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> (16) Of the total amount of cash owing by the Petitioner to the Respondent ($7,300 plus $20,285, a total of $27,585) $8,000 shall be paid upon entering into this agreement and the remaining $19,585 shall be paid in five annual instalments due on November 1, 1988, 1989, 1990, and 1991, respectively, four of which shall be $4,000 each and the final one shall be $3,585. The Petitioner reserves the right to accelerate these payments at any time.
>
> (24) It is expressly agreed by and between the parties that this settlement constitutes a full and final settlement on all corollary matters between the parties."

On December 21, 1987, the parties were divorced. The agreement for maintenance was incorporated in the order for corollary relief. At the time of the present application the respondent was 57 and the appellant 53. The respondent has remarried. The appellant has not remarried and continues to reside in the matrimonial home.

On June 23, 1989 the respondent applied to terminate the maintenance payments. The application was dismissed on April 10, 1990. There have been defaults in making the maintenance payments. On February 10, 1992, the respondent applied to the Family Court to have the arrears forgiven. On February 24, 1992, the application was dismissed. On February 26, 1992, the

respondent commenced the present application to vary and suspend retroactively the amount of maintenance paid to the appellant. In 1987 the respondent's gross total income was $79,445.00. In 1991 his total income was $35,507.10. With respect to this drop in income Judge Hall stated:

> "The petitioner accounts for the significant drop in his income by the fact that with his advancing age he is not able to work as hard and as effectively as he did previously. At the time of the divorce he worked an average of sixty hours per week, whereas now he feels he can only work 35 to 40 hours per week. He also had a serious health problem in 1991 which incapacitated him for approximately five months. As a result his income declined radically and he fell into arrears with respect to the maintenance payments. The arrears were subsequently paid out of an R.R.S.P. fund that was cashed.
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> The respondent has for sale a portion of the land adjacent to the matrimonial home for $35,000.00. She has not received any satisfactory offers to date.
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> It seems that in large measure in recent years the petitioner has been able to meet the maintenance payments which total $24,000.00 per year by drawing on the retained earnings of his insurance sales company. It also appears that the company suffered a severe loss in 1991 as a result of one or more of its most important accounts being lost. As a result of this and the excessive withdrawals by the applicant the company is now in a deficit position. The loss of the accounts have also been a significant factor in the applicant's annual income being reduced."

Notwithstanding the setback in his health the respondent successfully ran for the Kings County Council. The application was supported by financial records from the respondent's company. There were additional payments in excess of $20,000.00 made by the Company to the respondent in 1991. There was also evidence that the respondent had investment properties. It is clear from the evidence that the appellant is dependent on the respondent for support and the trial judge so found.

The learned trial judge referred to the judgment in **Pelech** v. **Pelech**, [1987] 1 S.C.R. 801. He distinguished that decision by stating:

> "It is well established in the jurisprudence that the Court may in a proper case intervene to vary the amount of maintenance payable under a separation agreement incorporated in a divorce judgment. The Court will do so, however, only where a radical change of circumstances has been established by the

> applicant. Where the circumstances are such as in **Pelech** or analogous thereto the applicant must also establish that the change in circumstances had its 'genesis' in the marriage. Where the basis for the relief sought is not such as in **Pelech** it is not necessary, in my opinion, that the applicant establish any connection between the change in circumstances and the marriage. Indeed, it seems to me that to attempt to rigidly adhere to the terms of the agreement would be folly in this case as it is absolutely impossible for the applicant to do so and survive.
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> Accordingly, I am satisfied that the petitioner has established that there has been a radical change in his financial and other circumstances which mandate a reduction in the amount of maintenance payable."

In **Pelech** v. **Pelech**, Wilson J. defined the issue as follows at p. 826:

> "The central issue in this case concerns the effect of a valid and enforceable antecedent settlement agreement on the court's discretionary power under s. 11(2) to vary maintenance orders."

She then pointed out that a maintenance agreement can never totally extinguish the jurisdiction of the court to impose its own terms on the parties. At p. 850 Wilson, J. stated:

> "The approach taken by Zuber J.A. in **Farguar** also falls short of articulating a workable criterion by failing to identify the requisites of the 'narrow range of cases'. I do, however, agree with Zuber J.A.'s emphasis on the importance of finality in the financial affairs of former spouses and that considerable deference should be paid to the right and the responsibility of individuals to make their own decisions.
>
> It seems to me that where the parties have negotiated their own agreement, freely and on the advice of independent legal counsel, as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. This should be the overriding policy consideration."

She went on to deal with those cases where a court could intervene and set out the requirement "that there be some relationship between the change and the marriage".

The basic principle in **Pelech** is that settlement agreements must be respected. See in this Court **Jensen** v. **Jensen** 109 N.S.R. (2d) 106 and **Kalavrouziotis** v. **Kalavrouziotis**,

14 R.F.L. (3d) 376 where this Court has followed that principle. That principle has been confirmed in the recent decision of the Supreme Court of Canada in **Moge v. Moge** dated December 17, 1992 (unreported).

There are strong policy reasons for enforcing separation agreements. Such agreements are contemplated under the **Matrimonial Property Act** and the **Divorce Act**. Parties who effect their own settlements are more likely to abide by them. These agreements avoid the necessity of costly litigation. Those objects are important in settling matrimonial disputes particularly where children are involved. The parties have the right to make their own agreement with the advice of counsel. They also have the right to expect the courts to enforce those agreements in the same manner as any other agreement. The knowledge that agreements will be enforced is essential if counsel are to be in a position to advise their clients.

A wife chooses to follow her husband's fortunes good or bad. A divorced spouse is not in the same position. She has lost all benefits which stem from the marital relationship. Statistics show that a spouse, particularly with children, is in a much poorer position following a divorce. The purpose of an agreement is to stablilize the parties position as best they can at the time of separation. In most cases the husband is anxious to terminate all aspects of the association. In such cases the wife makes substantial concessions and gets minimal benefits. To review these agreements particularly after the lapse of substantial periods of time can lead to grave injustices to one or both parties. In many cases it would be necessary to review all of the terms of the agreement in order to deal appropriately with an application to vary. The matter should normally be left in the hands of the parties. Having settled their rights it is up to the parties whether they will surrender those rights. I have no doubt in this case that if the appellant applied for an increase in maintenance she would be confronted with the terms of the agreement by the respondent.

I see no difference between an agreement which provides for long term maintenance and one that does not contain such a provision. The effect is to permanently settle the issues in both cases. As noted **Pellech** does not deprive the courts of ultimate jurisdiction in the matter of support. The parties can provide in the agreement that it is a final settlement. No other formal words are

necessary.

It is unnecessary in the present case to consider those circumstances which would warrant a variation in support under an agreement. The Family Court had thoroughly reviewed the circumstances of the parties on two occasions and refused to grant relief.

In my view the circumstances in this case did not warrant a variation. A change in one year in the respondent's financial circumstances was not sufficient to vary the agreement entered into between the parties. The learned trial judge erred in failing to apply the principles in **Pellech**.

I would allow the appeal without costs and set aside the judgment and order of Hall, L.J.S.C.

J.A.

**CHIPMAN, J.A.:** (Concurring by separate reasons)

The appeal should be allowed.

I agree with Mr. Justice Hallett that the causal connection test established in **Pelech** should not apply in cases where a payor spouse seeks reduction of a consensual support obligation. In such a case, that test is not appropriate in considering "means" under s. 17 of the **Divorce Act**.

However, where the circumstances disclose an intention that finality in the financial relationship was intended, the principles in **Pelech** should otherwise apply in their full vigour. The threshold for determining a radical change in circumstances is high. It includes, I suggest, an element of unforeseeability by the parties as of the time the consensual arrangement is arrived at. In **Katz v. Katz, et al.** (1990), 30 R.F.L. (3d) 260, the Manitoba Court of Appeal refused to disturb a support order based on mutual agreement notwithstanding that there was a substantial adverse

change in the payor's earning power. Helper, J.A. said at p. 265:

> "In *Pelech*, supra, the Court was dealing with an application by the former wife to reinstitute maintenance payments which had terminated in accordance with the terms of a separation agreement. The facts in this case are distinguishable. Thus, the principles enunciated in *Pelech* are not entirely applicable to the case at Bar. However, I am of the view that, where parties have negotiated a final separation agreement incorporating not only maintenance provisions but also property distribution, and the terms of that agreement are reflected in a subsequent court order, only a radical change in the circumstances of the payor, not within the specific contemplation of the parties, would allow for a review of that court order dealing with on-going maintenance.
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> At the time the parties executed the separation agreement, the husband was 60 years of age and the petitioner was 56 years of age. It was certainly within the contemplation of the parties that the husband would not, in all likelihood, during the entire life of the separation agreement, continue to earn income of $80,000 per annum. Therefore, his change in annual income to the present level of $43,000,although substantial, is not, by itself, the type of radical change in circumstance that would in this case trigger the Court's jurisdiction in reviewing the decree nisi."

See also the annotation by James G. MacLeod in **Kalavrouziotis** v. **Kalavrouziotis** (1988), 14 R.F.L. (3d) 376 - 377, **Story v. Story** (1989), 23 R.F.L. (3d) 225 (B.C.C.A.) at 232, **Fyffe v. Fyffe** (1988), 12 R.F.L. (3d) 196 at 201, **Masters v. Masters** (1991), 34 R.F.L. (3d) 34 (Sask. C.A.).

The review under s. 17 of the **Divorce Act** must be conducted with a view to the circumstances surrounding the settlement agreement and the present circumstances now alleged to be radically different. The trial judge's decision must not be interfered with on appeal unless the reasons therefor disclose a material error.

Here the parties disclosed an intention to reach a final agreement. The agreement dated December 3, 1987 and incorporated into the corollary relief judgment dated December 21, 1987 provided **inter alia**:

> "(4) Commencing January 1, 1988, and on the first day of each month thereafter the Petitioner shall pay to the Respondent maintenance in the amount of $2,000 while she resides in the matrimonial home. The sale of the matrimonial home shall be regarded as a change of circumstances and the amount of

> maintenance shall be reviewed by the Parties. If they are unable to reach agreement either may apply to the court for variation of the Corollary Relief pursuant to the provisions of the Divorce Act 1986.
>
> (5) The Respondent recognizes her obligation to contribute to her own support and will continue her efforts to find employment.
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> . . .
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> (16) Of the total amount of cash owing by the Petitioner to the Respondent ($7,300 plus $20,285, a total of $27,585) $8,000 shall be paid upon entering into this agreement and the remaining $19,585 shall be paid in five annual instalments due on November 1, 1988, 1989, 1990, and 1991, respectively, four of which shall be $4,000 each and the final one shall be $3,585. The Petitioner reserves the right to accelerate these payments at any time.
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> . . .
>
> (24) It is expressly agreed by and between the parties that this settlement constitutes a full and final settlement on all corollary matters between the parties."
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> (emphasis added)

The parties had counsel. They specifically provided for one instance that would be regarded by them as a change of circumstances justifying a review. It is inconceivable that they did not understand that substantial variations in the income of the husband - a self-employed business man - could occur. Such changes in this context could not be considered radical unless they were permanent or substantially long-standing, such as for example the stroke referred to by Mr. Justice Hallett. The **Pelech** principles and the emphasis on finality by the parties here clearly requires such a rigorous approach to a request to vary.

The reality is that within 18 months of the judgment the husband here commenced proceedings to terminate maintenance. These proceedings were not successful. There were several defaults by the husband resulting in judgments for arrears. An application for forgiveness of these arrears was dismissed just two days before these very proceedings were commenced.

The trial judge had evidence of the husband's accountant who prepared his 1991 income tax returns and financial statements of his business. While the latter certainly support an

argument that for future years the outlook was not as good, it would be unsafe to draw any hard conclusions too soon. The after tax cash flow position of the husband in 1991 was not materially, let alone radically, worse off than it was at the time of the agreement. Clearly, at $54,000, such cash flow could have comfortably permitted support payments of $24,000 in 1991. The trial judge did not even refer in his reasons to this significant evidence of the accountant. He simply referred to "a projected annual income of approximately $32,000" of the husband. That is not a safe conclusion in dealing with a person in business of the nature of that carried on by the husband. The argument that the husband's age was advancing does not, in the short space of time since the corollary relief judgment, successfully convey the impression of radical change. See **Katz v. Katz, supra**.

As Mr. Justice Jones says, a change in one year in the financial circumstances is not sufficient. I agree with him that the trial judge erred in failing to apply the principles in **Pelech**. He ignored the recognition of finality by the parties in their consensual arrangement. He ignored, by categorizing as a radical change, that which was not shown to be more than temporary foreseeable ups and downs in the financial life of a businessman.

I would allow the appeal and set aside the judgment and order of Hall, L.J.S.C.

J.A.

HALLETT, J.A. (Dissenting)

I have read the reasons of Justice Jones for allowing the appeal. With respect, I would dismiss the appeal. I agree with the learned chambers judge that the criteria for granting a variation of spousal support as developed in **Pelech v. Pelech** (1987), 38 D.L.R. (4th) 641 should not be applied in this case.

In **Pelech** Wilson, J., after a thorough review of the case law respecting applications for variation of spousal support that had been agreed to by the parties pursuant to Minutes of Settlement

incorporated into the corollary relief judgment, reached certain conclusions that are well set forth in the headnote of the case as follows:

> " Section 17(2) of the *Divorce Act*, which empowers a court of appeal to "pronounce the judgment that ought to have been pronounced", does not confer a broad power to review discretionary decisions. A provincial court of appeal should only interfere with a trial judge's decision where it is persuaded that the reasons disclose material error and the court has no independent discretion to decide questions of maintenance. The Supreme Court of Canada, however, has jurisdiction to articulate the criteria according to which judicial discretion must be exercised and any situation in which a court below errs in formulating the principles upon which it exercises its discretion gives rise to a question of law.
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> It is a well established principle that a court supervisory jurisdiction over maintenance cannot be extinguished by contract. There has been a general trend in the case-law in fashioning maintenance orders away from "fault" in the direction of achieving arrangements that are fair and reasonable in light of all the circumstances. Where parties have negotiated their own agreement, freely and on the advice of independent counsel, as to how their financial affairs should be settled on the break-down of marriage, and that agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions. The court's jurisdiction, however, is not ousted and may be exercised where there has been a radical change of circumstances. However, the radical change must be related to the fact of the marriage. Where a wife has devoted herself exclusively to home and children and has acquired no working skills outside the home, the relationship is readily established as the ex-wife's circumstances are generated as a consequence of her total dependency during the period of marriage. However, where a former spouse simply falls upon hard times, that spouse should not be able to fall back upon the former spouse no matter how radical the change may be, simply because they were once husband and wife. Accordingly, where a former spouse establishes that he or she has suffered a radical change in circumstances forming from an economic pattern of dependency engendered by the marriage, the court may exercise its relieving power. Otherwise, the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the State. In the present case, while there had been a radical change in the wife's circumstances, there was no link between the change and her former marriage."

In the **Pelech** case, the payee spouse had agreed at the time of separation that there would be a payment of $28,760. over 13 months; the payments were made. The agreement provided that

the payee spouse accepted the payments "in full satisfaction of all claim she now has or may have in the future for maintenance from the Respondent." The application to vary was made 12 years after the settlement. It is important to recognize that the conclusions of Madam Justice Wilson in the **Pelech** case were made in the context of this type of settlement agreement. The wife had accepted a lump sum payment; there was no ongoing requirement for periodic support from the husband. The parties had agreed to be self-sufficient; incidentally, one of the goals of **s. 15** of the **Divorce Act**. There was truly a finality to the financial relationship between the parties.

The so-called trilogy of cases: **Pelech v. Pelech**, supra; **Richardson v. Richardson** (1987), 38 D.L.R. (4th) 699; and **Caron v. Caron** (1987) 38 D.L.R. (4th) 735 which developed the policy considerations I have set out from the report of the **Pelech** decision each involved situations of this nature. In each of these cases, the divorcing spouse had entered into a settlement agreement that contained provisions for the termination of support. Furthermore, in each case, the payee's application to vary was made after support payments provided for by the agreement had ceased. The application to vary was denied in all of these cases due to the fact that the parties had, by their agreement, clearly provided for the termination of their financial relationship.

In **Richardson**, Wilson J., writing for the majority, explored the rationale underlying the policy that a court should vary a settlement agreement only where there has been a radical change in the circumstances of a former spouse and that the change is as a result of a pattern of economic dependency generated by the marriage relationship. In particular, she pointed to two considerations. First, she noted the importance of finality in settling the financial affairs of the former spouses. Secondly, she pointed to the deference to be given by the courts to the right and responsibility of individuals to make their own decisions.

The parties in **Pelech** had negotiated an agreement that provided for the spouses' financial independence from one another following the marriage breakdown. One of the legislated objectives of support orders is to promote the economic self-sufficiency of each former spouse within a reasonable time. The decision in **Pelech** that the disadvantaged spouse is restricted in coming back

to re-open the issue of support is consistent with this legislated objective. But where a disadvantaged former spouse negotiates an agreement that provides for periodic support for an indefinite period, there is a recognition that economic self-sufficiency is not likely attainable.

On divorce, the general rule is that matrimonial assets are divided equally. In addition, if the marriage was of fairly long duration and the wife did not work, there is generally a need for indefinite periodic support, particularly if the parties are well into middle age or older. In the majority of cases, the parties reach an agreement on the division of assets and the amount of periodic support and enter into minutes of settlement. If the wife has not worked during the marriage and has not any specific skills, it is recognized that her former husband will have to pay support indefinitely as the objective of economic self-sufficiency is unrealistic. The level of support agreed upon is based on the husband's ability to pay and the wife's needs at the time the agreement is signed. If either his means to pay or her needs radically change, the parties would reasonably expect that there could be a change in the amount of the support payments even though the agreement may purport to be a final settlement. Any other conclusion would, in my view, unduly restrict the application and purposes of s. 17 of the **Divorce Act**.

I tend to agree with those cases that hold that the causal connection test established in **Pelech** should not apply to payors of periodic support for an indefinite period. I do not, however, reach this conclusion on the basis that the application is brought by the payor. Rather, the relevant distinction relates, as indicated above, to the nature of the agreement. It is the agreement itself which reveals whether or not the relationship is intended to be an ongoing one. Agreements which provide for payment of indefinite periodic support do not have that degree of finality that was effected by the settlement agreement under consideration in the **Pelech** case.

Looking at the husband and wife relationship in a <u>traditional</u> marriage, a wife, who is dependent on her husband's income during the marriage has the benefit of his good times and suffers when his income falls. One must ask the question whether she should be better off after divorce than before if her husband suffers financial misfortune while paying periodic support under the terms of

a settlement agreement; I pose the question because that would be the effect of applying the causal connection test. In my opinion this principle espoused in **Pelech**, **Richardson** and **Caron** should be confined to similar cases. Each case must be decided on its own facts. While the statements in the trilogy are very broad they were nevertheless made in the context of applications to vary by the payee spouse in circumstances where the payor had completed all his financial obligations under the settlement agreement; there was no ongoing financial relationship between the parties.

Furthermore, it is difficult to imagine under what circumstances a payor of periodic support who had a radical reduction in income could ever prove that his or her deteriorating financial circumstances were causally connected to the marriage. For example, a payor spouse, having signed an agreement to pay periodic support for an indefinite period, who suffers a serious stroke and, as a result, has a total inability to earn income, could not, on the strict application of **Pelech** proposed by the Respondent, succeed on an application to vary support as the radical change in circumstances was not grounded in the marriage. It seems to me that Madam Justice Wilson in writing **Pelech** could not have intended that the causal connection test would apply in such a situation. I agree with the conclusions of Vancise, J.A. in **Masters v. Masters** (1991), 34 R.F.L. (3d) 34 that the full thrust of the **Pelech** analysis should not be transplanted to factual situations which are considerably different (p. 58). Unless a party has explicitly agreed not to apply for a variation of periodic support, **s. 17** should be given its full effect in the event of a radical change in the means of the payor or the needs of the payee.

Although parties cannot oust the jurisdiction of the court if the terms of the settlement provide that a party would not apply <u>under any circumstances</u> to vary the periodic support provisions, such an agreement should generally be respected by the courts as it would express a clear intention that the level of support payments was written in stone.

In summary, a settlement agreement that provides for payment of periodic support for an indefinite period is very different than the type of agreements under consideration in the trilogy. One has to ask the question whether the parties who enter into agreements that provide for periodic

support had the reasonable expectation that the periodic support payment would go on indefinitely at the same level no matter what happened in their respective lives. In the absence of explicit agreements not to apply for a variation under any circumstances, it seems to me the parties would have had a reasonable expectation, considering the provisions of **s. 17** of the **Divorce Act** and the legal advice they would obtain, that in the event of a radical change in circumstances there could be a variation in the level of support payments. Where parties have signed minutes of settlement applications to vary periodic support should rarely be granted; parties should be bound by their agreements. It is only if there is a radical change in the circumstances should such applications be entertained. Judges should carefully scrutinize the legitimacy of such applications before granting a variation.

I do not find the foreseeability test as propounded by some authorities as particularly helpful; one can argue that virtually any misfortune is foreseeable such as loss of job, health, etc. The causal connection test is appropriate in circumstances where the parties, by agreement, have clearly severed their financial relationship and the application to vary is brought after the financial obligations as provided in the agreement have been fulfilled.

In the case we have under consideration the payor's income had dropped from $80,000.00 annually when the agreement was signed to $32,000.00 at the time of the application to vary. The respondent testified that the combined effect of (i) his inability to work the 60-hour weeks he could when he was a younger man, (ii) the poor economy, and (iii) the loss of key clients was the reasons for the substantial reduction of his income from the levels of 1987 when the settlement agreement was made. It is apparent that the trial judge accepted his evidence.

In February 1992 the respondent had unsuccessfully applied to the Family Court to have arrears forgiven. He then cashed in an RRSP and paid the net proceeds of some $17,000.00 to pay up the arrears. The application to vary was initiated on February 26, 1992, and was heard by Judge Hall on March 24 and 31, 1992. By decision dated April 15, 1992 Judge Hall reduced the monthly support payment from $2,000.00 to $1,200.00. The learned trial judge had before him financial

statements from both parties showing their respective incomes and expenses. The position of the respondent was that he could not afford to pay $24,000.00 a year support out of an income of $32,000.00. The appellant wife's position was that in 1991 he had cashed distribution from his company of $53,000.00 consisting of a salary of $28,000.00 and repayment to him of a shareholders loan of $25,000.00 and therefore he had the ability to pay the $2,000.00 a month support. Her counsel argued that the respondent's alleged inability to generate more income was not causally connected to the marriage and therefore on counsel's interpretation of the decision of Wilson J. in **Pelech v. Pelech**, supra, the variation should have been refused as the support payment of $2,000.00 a month had been agreed to by the parties pursuant to the settlement agreement.

Judge Hall in his decision, after reviewing the facts, concluded that the respondent had only been able to pay the annual support payment of $24,000.00 by drawing on the retained earnings of his company to the point where the balance sheet as of December 31, 1991, showed a deficit. The learned chambers judge considered the provisions of **s. 17** of the **Divorce Act** and the **Pelech** decision. He concluded:

> " In the present case the applicant is seeking a reduction in the amount of maintenance payable due to his radically reduced income and deterioration in his financial circumstances, which I am satisfied are beyond his control. It is apparent that if he is compelled to continue making the payments provided for in the current order he will soon be driven to bankruptcy. It is also apparent that this change of circumstances is not causally connected to the marriage."

He felt the **Pelech** case had no application on the facts before him and stated:

> " ...it seems to me that to attempt to rigidly adhere to the terms of the agreement would be folly in this case as it is absolutely impossible for the applicant to do so and survive.
>
> Accordingly, I am satisfied that the petitioner has established that there has been a radical change in his financial and other circumstances which mandate a reduction in the amount of maintenance payable."

A Court of Appeal should only interfere with a trial judge's decision on a variation

application if the reasons for the decision disclose material error (**Pelech v. Pelech, supra**). In my opinion Judge Hall had the benefit of seeing and hearing Mr. Mooy testify; he accepted the evidence of Mr. Mooy that he could not longer earn the levels of income he was achieving when the minutes of settlement were signed. One cannot say the trial judge erred in his assessment of the evidence respecting the respondent's ability to pay.

In my opinion, on the facts of this case, the learned trial judge did not err in not applying the so-called "causal connection test" enunciated in 1987 in **Pelech**. Considering the circumstances at the time the agreement was signed in 1983 the parties would not have had the expectation that the level of support would be varied only if there was a radical change in their financial circumstances that had its genesis in the marriage. The settlement agreement does not rule out the option of applying for a variation. The parties expectation would have been that the periodic support could be varied according to the criteria prescribed by **s. 17** of the **Divorce Act**.

I would not interfere with the trial judge's conclusion that there was a radical change in the appellant's financial circumstances that warranted a reduction of support from $2,000.00 a month to $1,200.00. I would dismiss the appeal with costs to the respondent.

J.A.