SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Myers v. Myers*, 2015 NSSC 378

Date: 20151217
Docket: *SFSND1206-6006*
Registry: Sydney, Nova Scotia

Between:

Mitchell Myers

Applicant

v.

Mary Myers

Respondent

DECISION

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated March 17, 2016
Judge:	The Honourable Justice Robert M. Gregan
Heard:	December 17, 2015, in Sydney, Nova Scotia
Written Decision:	February 17, 2016
Counsel:	Mitchell Myers, Self-Rep, Applicant Elaine Gibney, Counsel for the Respondent, Mary Myers

By the Court:

[1] Mitchell Myers, by application dated April 1, 2015, seeks to change the Consent Varied Corollary Relief Order, dated the 13th day of November, 2013. In that order, Mr. Myers was ordered to pay the Respondent, Mary Elizabeth Myers, $700.00 per month, commencing June 1st, 2013. That order was based upon Mr. Myers having an annual income of $59,713.00 and Mrs. Myers having an annual employment income of $37,000.00. The order also contained a provision that both parties were to exchange by no later than June 1st of each year, a copy of his and her Income Tax Return completed with all attachments (regardless of whether filed with Canada Revenue Agency) and also to provide each other with all Notices of Assessments from the Canada Revenue Agency immediately after they are received.

HISTORY

[2] A Divorce Order was granted in this matter on September 15, 2011. A Consent Corollary Relief Order was also granted, commensurate with that Divorce Order. Under the terms of the Consent Corollary Relief Order, Mr. Myers was to pay spousal support to Mrs. Myers in the amount of $1,000.00, commencing March 1, 2011. The $1,000.00 was based upon Mr. Myers having an annual income of $56,625.00 and Mrs. Myers having an annual income of $16,758.00. That Order also contained a review provision, paragraph 6, which provided for a review of the quantum of spousal support upon a change in circumstances, including the dependent child, Nathan, becoming independent, upon conclusion of his education or upon the conclusion of Mrs. Myers' education. There were also a number of other clauses in the order which need not be considered as part of this application.

[3] The aforementioned order of 2013, which Mr. Myers is now seeking to vary, it is worthy to note, while containing a provision that Income Tax information was to be provided, did not contain a specific review provision. This matter, therefore, now comes before the court as an application to vary pursuant to Section 17 of the *Divorce Act*.

Position of the Parties

Mr. Myers

[4] Mr. Myers takes the position that he should no longer be obliged to pay spousal support because:

- He is of the view that Mrs. Myers continues to work a limited amount of hours or is intentionally underemployed.

- That the parties' son, Nathan, was no longer a dependent child of the marriage, but continues to live with Mrs. Myers. (It is unclear from the evidence, however, whether or not Nathan, now 23, still continues to live with Mrs. Myers, although she did briefly in her evidence refer to the fact that she was still assisting him in the not too recent past.)

- Mr. Myers says that he has made all of his payments on time since separation and has been paying since 2008 and, therefore, should no longer be required to pay.

- Mr. Myers cites financial issues and home repairs that he has indicated that have had to wait because he did not have money to do those. (I note on cross-examination that some of those repairs have been effected.)

- Mr. Myers says he will be retiring in seven years and has approximately $33,000.00 left owing on his mortgage.

Position of Mrs. Myers

[5] Mrs. Myers' takes the following position:

- Mrs. Myers says that the marriage was a traditional marriage of 24 years and that the parties had one (1) child, Nathan, now age 23, and that she worked part-time at minimum wage the last 16 years of the marriage, as a waitress and cleaning homes when work was available. She notes that at the time of separation, Mrs. Myers was 48 years of age and Mr. Myers was 51 years of age, and that during the marriage, Mr. Myers was able to re-train and that six years' prior to the separation was able to obtain full-time employment with the Canada Revenue Agency.

- Mrs. Myers says that she has only been able to obtain employment when she was 50 years of age, post-separation, while Mr. Myers advanced his education and was able to obtain full-time employment with benefits such as pension, vacation pay, sick days and health benefits.

- Mrs. Myers argues that having returned to the work force late, she continues to be employed on a casual basis and subject to on-call status. Further, until recently, she asserts that she had been able to obtain two term positions. (In her evidence she testified, however, that one of those positions ended September 9, 2015 and as a result of which, Mrs. Myers has filed for and is in receipt of E.I. Benefits.)

- Mrs. Myers now argues that the Consent Varied Corollary Relief Order from November 13, 2013, was based upon her having an annual income or, at the very least, was one which was contemplated to be closer to her present circumstances as opposed to $37,000.00, and, therefore, that there has not been a material change in circumstances that would warrant a variation. In essence, she argues that her circumstances are the same.

[6] The two issues for the court to determine are as follows:

(1) Has there been a material change in circumstances as contemplated by Section 17 of the Divorce Act?

(2) What is the appropriate quantum of spousal support?

[7] With respect to the relevant legislation, I note that in reviewing the application of Mr. Myers, he cites Section 37 of the *Maintenance and Custody Act.* This clearly is incorrect. The governing legislation is the *Divorce Act* – the parties having been divorced. The governing section with respect to variation is Section 17 of the *Divorce Act* and that is referred to at page 4 of Ms. Gibney's memorandum.

[8] Those provisions are as follows:

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

Factors for spousal support order

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

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Objectives of variation order varying spousal support order

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

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[9] In reviewing the analysis of the approach the court should take, I want to refer to a couple of cases. The first case is a case of Justice Jollimore, **Dodman v. Chiola,** [2012] NSJ 474. There, the court was dealing with a Corollary Relief Order of December 10, 2010 in which the payor, Mr. Dodman, had an annual income of $90,000.00 and Ms. Chiola had an annual income of $21,000.00 and Mr. Dodman had been ordered to pay $800.00 per month spousal support. Mr. Dodman's annual income had decreased from $90,000.00 to $86,642.00 and Ms. Chiola's employment income had increased from $21,000.00 to between $34,000.00 and $35,0000.00.

[10] At paragraph 18, Justice Jollimore stated as follows:

18. A material change is a change which "if known at the time [of the order sought to be varied], would likely have resulted in different terms" according to the majority decision in Willick, 1994 CanLII 28 (S.C.C.) at paragraph 20. Justice Sopinka, who wrote the majority reasons, continued that "the corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as a basis for variation." While Willick addresses child support under the *Divorce Act*, in G. (L.) v. B. (G.), 1995 CanLII 65 (S.C.C.), both the majority opinion (by Justice Sopinka at paragraph 73) and the minority opinion (of Justice L'Heureux-Dubé at paragraphs 49 to 51)

> confirmed that Willick's analysis is applicable to spousal support variation applications.

[11] Mr. Myers asserts that he has overpaid spousal support for Mrs. Myers owing to her having a greater income in 2014 and 2015. I have reviewed the evidence and, in particular, Exhibit A, attached to the Affidavit of Mrs. Myers (Exhibit #3).

[12] In my view, the income, however, that she presently receives (Exhibit A, in Exhibit #3), shows a year-to-date income as of October 10, 2015, of $40,620.00. Her total gross income per pay was $1,089.50, which would translate into an annual income of approximately $46,065.00. Based upon her year-to-date income, the amounts of income for 2014 and 2015 were not sustained, or to use the language in **L.M.P. v. L.S.**, 2011 SCC 64, had not attained a degree of certainty but was, in fact, a temporary set of circumstances.

[13] Referring once again to **Chiola** *(supra)*, the court there found that the increase from $21,000.00 to $34,000.00 - $35,000.00 was a material change (see paragraph 21).

[14] That does not stop the analysis, however. As was pointed out by Justice Jollimore, the following must occur, once I have determined that there has been material change, and goes towards the issue of quantum and the approach the court should take:

> 22. Where the threshold for varying the spousal support has been met, I must determine what variation needs to be made in light of the change in circumstances. According to the majority reasons in L.M.P. v. L.S., 2011 SCC 64, at paragraph 47, I am to take into account the material change and I should limit myself to making on the variation justified by that change. I am not to "weigh all the factors to make a fresh order unrelated to the existed [Corollary Relief Order], unless circumstances require the rescission, rather than a mere variation of the order".

[15] Ms. Gibney, on behalf of Mrs. Myers, asked the court to find that the possibility of her client earning $46,000.00 was known at the time of the granting of the last Order and, therefore, cannot be relied upon for the variation. I decline to accept this approach for several reasons:

(1) The Consent Varied Corollary Relief Order of November 13, 2013, contains a provision requiring income tax returns to be filed;

(2) As already referred to per **L.M.P. v. L.S.** *(supra)*, in taking into account a material change, I should limit myself to making the variation justified by that change and not weigh all the factors;

(3) The corollary relief that is sought to be varied explicitly referenced Mrs. Myers having an annual income of $37,000.00. It is not for the court to go behind that order, absent parole evidence which has not been presented before this court.

[16] Therefore, having been satisfied that there has been a material change in allowing a variation, I must now consider the appropriate amount.

[17] Mr. Myers says that support should be terminated (and I already set out his position):

(1) The passage of time;

(2) Financial burdens and pending retirement;

(3) The fact that Ms. Myers has been underemployed.

[18] These various factors have also been canvassed in **Rondeau v. Rondeau**, [2011] N.S.J. No. 10 (NSCA) which was referred to in the memorandum of Ms. Gibney, and also referred to by Mr. Myers in his oral submissions. There, in reviewing the judge's findings that the passage of time was sufficient to warrant a change in the spousal support, the court said as follows:

> 14. The judge's reasons suggest he found a change in circumstances on at least three bases: (1) the mere passage of time (having paid spousal support for nine years), (2) Dr. Rondeau's health problems, (3) his age, and perhaps on a fourth basis, Dr. Rondeau's wish to accumulate money for his retirement.

[19] In commenting on the trial judge's findings, the Court of Appeal said as follows at paragraph 15:

> 15. As set out previously, I am satisfied the judge erred in principle in finding a material change in circumstances. The mere passage of time, Dr. Rondeau's age of 61 at the time of the hearing, and his wish to save money for retirement, do not amount to such a change based on the record in this appeal.

[20] Reference was also made to **Rushton v. Rushton**, 2002 ABQB 1074, wherein at paragraph 27 the court stated that neither the mere passage of time nor the normal process of aging amounted to a material change in circumstances:

> 27. Section 17(4.1) requires that there be a change in circumstances before a variation of a spousal support order can be made. This change of circumstances must be one that was not reasonably anticipated at the time the original order was made. Obviously the mere passage of time cannot suffice, as that would render the subsection meaningless. In addition, the normal process of aging, and the maturation of the family unit would not suffice as a change of circumstances, as such changes are universal.

[21] Here we have a 24 year marriage. Support was paid for seven years, since 2008. The parties were 48 and 51 when they separated. Their respective incomes are just now becoming relatively equal or more even. I do not find, based on the evidence, that Mrs. Myers is underemployed. Her work is casual – one term position – previously there had been two, until one of the term positions was eliminated. Mrs. Myers' income is still not equal to that of Mr. Myers, who works less hours, gets greater benefits and enjoys stability.

[22] I listened carefully to the evidence of Mrs. Myers in cross-examination regarding her employment attempts. She described when she graduated from her LPN course in 2012 and having discussions with a recruiter and despite finishing at the top of her class, she did not get selected for employment in the first round. She discussed how she went back – had to go back. She also talked about taking two term positions, working shifts when people could not come in for storms, "anything she could get" was the term that she used. As was pointed out by her counsel, Mrs. Myers, just prior to this court hearing, worked a double-shift yesterday. I find she has been diligent in finding employment.

[23] As I have already indicated, and referred to in Exhibit A of Exhibit #3, the Affidavit of Mrs. Myers of November 5, 2015, I refer to her paystub from the Cove Guest Home. Her income-to-date was $40,620.68. If she continued to earn the $1,089.50 per pay, it would give her an income of $46,065.00 for 2015. I note that when the original order was made, spousal support was set at $1,000.00. There was a $40,000.00 discrepancy in the parties' incomes – that was in the 2011 order. When the 2013 order was made, there was a change of approximately $22,000.00 and spousal support was reduced to $700.00 per month. In my view, the appropriate level of support in this case is $500.00 per month – this is in keeping with the amounts that were provided by Ms. Gibney in her helpful memorandum

where she, at pages 14 and 15, listed the low, medium and high range with respect to her client's income. In particular, at page 15, it was advanced that Mrs. Myers had been employed for two full calendar years only and based on her 2014 and 2013 average income of $47,530.00 and based upon Mr. Myers current annual income of $60,470.00, she suggested the following ranges: $396.00, $463.00 and $529.00.

[24] For the reasons I've outlined, it is my view that $500.00 is an appropriate amount. That would take into account the fact that Mr. Myers has had an increase in income to $60,747.00 for 2015 and that Mrs. Myers' income for 2015 as stated, was anticipated to be $46,065.00, based upon the figures provided.

[25] This, in the end, would mean that a payment of $500.00 a month will result in $6,000.00 a year in spousal support. That would reduce Mr. Myers' income from $60,747.00 to $54,747.00. It would also mean that Mrs. Myers' income would increase from $46,065.00 to $52,259.00. Of course, as the parties are well aware, there are tax benefits to Mr. Myers, and the cost, in actuality, will not be $6,000.00 in after-tax dollars and Mrs. Myers will have to claim the spousal support for income tax purposes. The result will be that the respective incomes of both parties will be very close to being even.

[26] I will order that change be effective January 1, 2016. I am not going to vary the order retroactive to April of 2015. I decline to do so, owing to the fact that Mrs. Myers has had a recent setback in her employment, losing one of her two term positions and that there was a wait time for her to receive E.I. benefits. I take this approach, as well, owing to the delay in matters proceeding to hearing, which was a direct result of Mr. Myers declining to engage in the settlement process.

DECISION ON COSTS

[27] At the conclusion of the hearing, having found in favour of the Respondent, Mrs. Myers, I invited the parties to provide me with submissions with respect to costs.

[28] Counsel for Mrs. Myers presented to the court and marked as Exhibit #8 an offer to settle, which was made on November 10, 2015, by Mrs. Myers to counsel to the Applicant, Mr. Myers. The offer was for settlement by Mr. Myers paying spousal support in the amount of $463.00 per month.

[29] In light of the rejection of Mr. Myers with respect to the offer to settle, asked the court to consider awarding costs on the basis of Mr. Myers making a contribution towards Mrs. Myers' legal counsel's fees in the amount of 66% prior to the offer to settle and 80% of legal fees accumulated after the settlement offer.

[30] Mrs. Myers' counsel, therefore, based upon the calculations that she provided to the court, asked the court to order costs in the amount of $6,728.00.

Civil Procedure Rules

[31] *Rule* 77 of the *Nova Scotia Civil Procedure Rules* sets out the appropriate tariffs with respect to costs. In part, the Rule reads as follows:

> Increasing or decreasing tariff amount
>
> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
>
> (c) an offer of contribution;
>
> (d) a payment into court;
>
> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
>
> (h) a failure to admit something that should have been admitted.

[32] The court relies upon the following cases. In **Higgins v. Bourgeois-Higgins**, [2015] N.S.J. No. 507, Associate Chief Justice O'Neil awarded costs in the amount of $15,000.00. Associate Chief Justice O'Neil referred to the *Rule* I have referred to, i.e. *Rule 77.07* as well as a decision of Justice B. MacDonald in the cases of **L. (N.D.) v. L. (M.S.)**, 2010 NSSC 159 and also in **Gagnon v. Gagnon**, 2012 NSSC 137. In **L.(N.D.)** *(supra)* and **Gagnon** *(supra)* the court

outlined 12 principles from the Rules and the case law with respect to the issue of costs:

> 3 Several principles emerge from the Rules and the case law.
>
> 1. Costs are in the discretion of the Court.
>
> 2. A successful party is generally entitled to a cost award.
>
> 3. A decision not to award costs must be for a "very good reason" and be based on principle.
>
> 4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to a otherwise successful party or to reduce a cost award.
>
> 5. The amount of a party and party cost award should "represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity".
>
> 6. The ability of a party to pay a cost award is a factor that can be considered; but as noted by Judge Dyer in M.C.Q. v. P.L.T. 2005 NSFC 27: "Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must "pay their own way". In such cases, fairness may dictate that the successful party's recovery of costs not be thwarted by later pleas of inability to pay. [See Muir v. Lipon, 2004 BCSC 65]."
>
> 7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.
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> 8. In the first analysis the "amount involved", required for the application of the tariffs and for the general consideration of quantum, is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the "amount involved".
>
> 9. When determining the "amount involved" proves difficult or impossible the court may use a "rule of thumb" by equating each day of trial to an amount of $20,000 in order to determine the "amount involved".
>
> 10. If the award determined by the tariff does not represent a substantial contribution towards the parties' reasonable expenses "it is preferable not to increase artificially the "amount involved", but rather, to award a lump sum". However, departure from the tariff should be infrequent.
>
> 11. In determining what are "reasonable expenses", the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.

> 12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the court.

[33] In addition, the approach that has been suggested by Mrs. Myer's counsel was also set out in the cases of **Cameron v. Cameron**, 2014 NSSC 325 and **Buchhofer v. Buchhofer**, 2015 NSSC 154 which make it very clear that the parties who take an unreasonable position or, as in the case here, where Mr. Myers has declined to participate in the settlement process, that costs be awarded. Particularly in those instances where the result has been one which the court has ordered relief in excess of what was being requested of the opposing counsel, as has occurred here.

[34] At previous court appearances, the court inquired as to whether or not the parties would be interested in participating in a settlement conference. Mr. Myers declined to participate in a settlement conference. I, therefore, do not think it is appropriate for him to say that he would have sat down to discuss matters. He certainly had an opportunity to do so and declined the invitation to enter into settlement negotiations. He was then provided with an offer to settle and there was nothing before me to indicate that there was a response to that offer.

[35] This clearly is a case, therefore, in my view, as was stated by Fichaud, JA, in **Armoyan v. Armoyan** 2013 NSCA 136, paragraph 18, as cited by Associate Chief Justice O'Neil at para. 16 of Higgins:

> [18] But some cases bear no resemblance to the tariffs' assumptions. A proceeding begun nominally as a chambers motion, signalling Tariff C, may assume trial functions, contemplated by Tariff A. A Tariff A case may have no "amount involved", other important issues being at stake. Sometimes the effort is substantially lessened by the efficiencies of capable counsel, or handicapped by obstructionism. The amount claimed may vary widely from the amount awarded. The case may assume a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs. Conversely, a substantial sum may turn on a concisely presented issue. There may be a rejected settlement offer, formal or informal, that would have saved everyone significant expense. These are just examples. Some cases may combine several such factors to the degree that the reflexive use of the tariffs may inject a heavy dose of the very subjectivity - e.g. to define an artificial "amount involved" as Justice Freeman noted in Williamson - that the tariffs aim to avoid. When this subjectivity exceeds a critical level, the tariff may be more distracting than useful. Then it is more realistic to circumvent the tariffs, and

> channel that discretion directly to the principled calculation of a lump sum. A principled calculation should turn on the objective criteria that are accepted by the Rules or case law. [emphasis added]

[36] In the circumstances, I will award costs in the amount of $6,000.00 and I will order that that be payable through the Maintenance Enforcement Program.

[37] Finally, I would say a couple of comments to the parties. The court has heard evidence about the possibility of Mrs. Myers returning to school to get her RNs and the frustration of working in the LPN process. It is difficult for Mrs. Myers to know which is the best route that she wishes to go on that, as she has indicated that by the time she starts the course, she will be 56 years of age. It is not for the court to speculate, but I would say that the window is closing fairly quickly if she wishes to do so and to continue to have support from Mr. Myers.

[38] I also am not going to put a provision in this order that the matter not be reviewed until such time as Mr. Myers is in receipt of pension income, as has been suggested by Mrs. Myers' counsel. I think, however, having had a full hearing on this matter, Mr. Myers, has been made a little more aware of how the court views this in terms of the equality of the respective incomes between the parties.

[39] In addition, because there is a fluctuation in the income of Mrs. Myers, there will continue to be a term in the order that was in the order from 2013, requiring the filing of income tax information. The court hesitates to do that, because Mr. Myers, that is not an invitation to file a notice of variation because you see a difference in income. It is one where there needs to be a material change.

[40] I have now found that the incomes are pretty close to being even, and so there would have to be quite a change in circumstances to warrant income roughly equal to yours without the benefit of spousal support in order for that to trigger the variation. Clearly, your retirement is going to be something that is going to be…a change is going to do that, but I am not saying that you have to wait until then to do that, but what I am pointing out is that (because again, the court cannot speculate) Mrs. Myers may very well get her RNs and be able to earn an income which is equivalent to yours, in which case, obviously, that would something that you may wish to bring back for a review.

[41] It may be that her dedication to the Cove Guest Home, that you talked about, would pay off and she would have a full-time position, but again, that is something that would depend upon the evidence, so, that's why the term of the order was put

in the 2013 order – to allow for the exchange of income tax information and I do think it is appropriate for that to continue and so, I will also have that be a term of this order as well.

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Gregan J.

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Myers v. Myers*, 2015 NSSC 378

Date: 20151217
Docket: *SFSND1206-6006*
Registry: Sydney, Nova Scotia

Between:

Mitchell Myers

Applicant

v.

Mary Myers

Respondent

Judge:	The Honourable Justice Robert M. Gregan
Heard:	December 17, 2015, in Sydney, Nova Scotia
Written Decision:	February 17, 2016
Erratum Date:	March 17, 2016
Counsel:	Mitchell Myers, Self-Rep, Applicant Elaine Gibney, Counsel for the Respondent, Mary Myers

Erratum:

In paragraph 35 of the judgment, the comments and dicta from **Higgins** were incorrectly attributed to Associate Chief Justice Lawrence O'Neil. The quotation was, in fact, the words of Fichaud, JA, in **Armoyan v. Armoyan** 2013 NSCA 136, paragraph 18, as cited by Associate Chief Justice O'Neil at para. 16 of **Higgins**.

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Gregan J.