

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Matheson v. Matheson*, 2024 NSSC 19

Date: 20240405

Docket: SFH1201-066582

Registry: Halifax

Between:

Karen Matheson

Petitioner

v.

Brian Matheson

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Daniel W. Ingersoll

Heard: September 26, 2023, in Halifax, Nova Scotia

Submissions: October 5, 2024

Written Release: April 5, 2024

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Legislation: *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3

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Counsel: Judith Schoen, counsel for the Petitioner
Nicole MacIsaac, counsel for the Respondent

By the Court:

1 Introduction

[1] Karen and Brian Matheson separated in 2012 after a twenty-four-year marriage. They divorced in 2021.

[2] Mr. Matheson paid Ms. Matheson spousal support from 2014 until he retired in 2021.

[3] Ms. Matheson says Mr. Matheson underpaid spousal support between 2014 and 2021 and improperly ceased paying spousal support in 2021. She seeks an order requiring Mr. Matheson to pay additional spousal support between 2014 and 2021 and an order requiring him to continue to pay spousal support thereafter indefinitely. She also says that she and Mr. Matheson should each contribute \$15,000 to their daughter's university expenses. Finally, she says she should not be liable for half of the Canada Revenue Agency (CRA) debt accrued during the marriage.

[4] Mr. Matheson says he paid spousal support until he retired as required in the parties' Separation Agreement and Minutes of Settlement (incorporated into the March 23, 2021, Corollary Relief Order ("CRO")) and that Ms. Matheson is not entitled to further spousal support. He says he should not be required to contribute

to his daughter's university costs. Finally, he says Ms. Matheson should be held to her agreement to pay half of the CRA debt.

[5] I must resolve the following issues:

- a. Is Ms. Matheson entitled to prospective spousal support?
- b. Is Ms. Matheson entitled to retroactive spousal support in an amount greater than that paid by Mr. Matheson?
- c. Must the parties each contribute \$15,000 toward their daughter's university education expenses?
- d. Is Ms. Matheson responsible for half of a CRA debt accrued during the marriage?

[6] I will address each issue in turn.

2 Spousal support

[7] Ms. Matheson seeks retroactive and prospective spousal support.

[8] Ms. Matheson says Mr. Matheson underpaid spousal support since 2015 and that he ought to have continued paying spousal support notwithstanding his retirement in 2021.

[9] Mr. Matheson says he paid and terminated spousal support in accordance with the Minutes of Settlement.

[10] I will first consider Ms. Matheson's request for prospective spousal support and then consider her claim for increased retroactive spousal support.

3 Is Ms. Matheson entitled to prospective spousal support?

[11] Mr. Matheson paid monthly spousal support of \$4,500 until he retired at 72, on April 1, 2021.

[12] Ms. Matheson seeks monthly spousal support of \$4,340 on an indefinite basis from January 1, 2022, forward.

[13] Mr. Matheson says the Minutes of Settlement obliged him to pay spousal support until his (April 1, 2021) retirement and not thereafter. He further says Ms. Matheson's positive financial circumstances disentitle her to prospective spousal support.

[14] Ms. Matheson does not say Mr. Matheson should continue working. She says the CRO does not preclude post retirement spousal support and that an order for prospective spousal support is appropriate given Mr. Matheson's retirement income.

[15] Ms. Matheson's request for prospective spousal support requires consideration of the following issues:

- a. Do the Minutes of Settlement preclude post-retirement spousal support?
- b. If the Minutes of Settlement do not preclude post-retirement spousal support, can Ms. Matheson seek a review of spousal support?
- c. Is Ms. Matheson's entitled to prospective spousal support?

3.1 Do the Minutes of Settlement preclude post-retirement spousal support?

[16] In considering Ms. Matheson's request for prospective spousal support, I must first consider whether the Minutes of Settlement (incorporated into the CRO) preclude post retirement spousal support.

[17] Paragraph 36 of the Minutes of Settlement required Mr. Matheson to pay monthly spousal support of \$4,500 until his retirement from the IBEW. That monthly payment is stipulated to reflect the approximate amount that Ms. Matheson would receive on a monthly basis once Mr. Matheson's pensions have been divided at source.

[18] The Minutes of Settlement do not state Ms. Matheson's entitlement to spousal support will terminate when Mr. Matheson retires. The Minutes of Settlement do not say Mr. Matheson's obligation to pay spousal support in any amount ceases upon his retirement; the Minutes of Settlement relieve Mr. Matheson of his obligation to pay spousal support of \$4,500 every month upon his retirement. Paragraph 36 of the Minutes of Settlement and states:

36. The Husband agrees to pay to the Wife spousal support in the amount of \$4,500.00 monthly, commencing on the 15th day of October, and continuing on the 15th day of each and every month thereafter until the Husband's retirement from his employment with IBEW. This amount is intended to reflect the approximate amount that the Wife will receive on a monthly basis, once all of the Husband's pensions have been divided at source.

[19] I find that the Minutes of Settlement stipulate Mr. Matheson's \$4,500 per month spousal support obligation ends when he retires. I find the Minutes of Settlement are silent with respect to Ms. Matheson's entitlement to spousal support after Mr. Matheson's retirement. Because the Minutes of Settlement are silent on this issue it cannot be said the Minutes of Settlement preclude Ms. Matheson's post retirement spousal support entitlement.

3.2 If the Minutes of Settlement do not preclude post-retirement spousal support can Ms. Matheson seek a review of spousal support?

[20] Ms. Matheson says the Minutes of Settlement grant her the right to bring a review of spousal support. Mr. Matheson says Ms. Matheson must prove a material change in circumstances before advancing a claim of prospective spousal support.

[21] I must look to the Minutes of Settlement to determine if the parties agreed that spousal support could be reviewed without the necessity of finding a material change in circumstances.

[22] Paragraph 39 of the Minutes of Settlement stipulates that the parties agree that spousal support payments will be adjusted as of the effective date of the pension division or divisions. The means by which this adjustment would occur is addressed in Paragraph 38 of the Minutes of Settlement which stipulates that either party may apply for an automatic review of spousal support after Mr. Matheson's pensions are divided. These two paragraphs state:

38. Either party may apply for an automatic review of spousal support upon the division of the Husband's employment pension or pensions.

39. Upon division of the Husband's employment pensions, or any of them, as set out herein, it is agreed that spousal support payments will be adjusted as of the effective date of the pension division or divisions, as the case may be.

[23] It is not disputed by either party that Mr. Matheson's pensions have been divided. As a result, the Minutes of Settlement permit either party to seek a review

of spousal support. Ms. Matheson may seek a review of spousal support without first establishing that a material change in circumstances has occurred.

[24] To summarize, I find that the Minutes of Settlement required Mr. Matheson to pay \$4,500 in monthly spousal support until his retirement and provided that either party may seek a review of spousal support following the division of his pensions.

[25] The question which I must next answer is whether Ms. Matheson has a prospective entitlement to spousal support after Mr. Matheson's pension division and if so in what amount and for what duration.

3.3 Is Ms. Matheson entitled to prospective spousal support?

[26] Ms. Matheson says she is entitled to monthly prospective spousal support of \$4,340.

[27] Mr. Matheson says that Ms. Matheson is not entitled to prospective spousal support because she has not established a need for spousal support. Mr. Matheson says Ms. Matheson's spousal support entitlement was based on contract and that he has discharged his contractual commitment to Ms. Matheson.

[28] To determine if Ms. Matheson is entitled to prospective spousal support and if so in what amount and for what duration I must apply Section 15.2 of the

Divorce Act taking the Minutes of Settlement into account as a relevant consideration. To determine if Ms. Matheson is entitled to prospective spousal support, I must apply the conceptional framework provided by the Supreme Court of Canada in *Moge v. Moge* (1992) 3 S.C.R. 813 and *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 and consider the factors and objectives of spousal support set out in Sections 15.2(4) and (6) of the *Divorce Act*. *Moge, supra* and *Bracklow, supra* establish that spousal support entitlement may arise on a contractual, compensatory and or non-compensatory basis.

[29] To determine if Ms. Matheson is entitled to prospective spousal support and if so for what period of time and in what amount I must consider:

- a. The particulars of the parties' marriage (including but not limited to length, distribution of responsibilities, whether there were children of the marriage, work experience outside of the home).
- b. The circumstances of the parties at separation (including but not limited to their ages, financial circumstances, employment circumstances and health).

- c. The basis upon which Ms. Matheson was entitled to spousal support in the Minutes of Settlement.
- d. Ms. Matheson's current condition, means, needs and other circumstances and relevant Section 15.2(6) considerations.

3.3.1 The particulars of the parties' marriage (including but not limited to length, distribution of responsibilities, whether there were children of the marriage, work experience outside of the home).

[30] The parties had a lengthy relationship. They cohabited for two and a half years and married on May 21, 1988, when Ms. Matheson was thirty-three and Mr. Matheson thirty-nine. They separated twenty-four years later on August 17, 2012.

[31] Ms. Matheson was employed when the parties married and attending Dalhousie University part time. The parties had two children; Ms. Matheson took birth-related leaves following the birth of each child but returned to full time work after each leave. Ms. Matheson did not continue with her education at Dalhousie University after her children were born.

[32] Ms. Matheson eventually became disabled from employment due to chronic neck and shoulder pain and resulting fibromyalgia caused by a car accident. Ms. Matheson received long term disability benefits when she was no longer able to work.

[33] I have very few details about the parties' pre-separation division of child care or household responsibilities. The evidence does not establish that Ms. Matheson's career development or earning potential were impeded as a result of the marriage or as a result of her care of the children or assumption of household duties during the marriage.

[34] I find that Ms. Matheson did not lose an economic advantage due to the role she assumed during the marriage. She continued to work after the marriage and returned to work after the birth of each child. She stopped working due to her disability, not due to her responsibilities as a spouse or mother.

[35] Mr. Matheson was employed with the IBEW when the parties married. Ms. Matheson's uncontradicted evidence is that Mr. Matheson secured a well-paying job in 1995 as the IBEW International Representative (seven years into the marriage) when the children were young (seven and three), that his income in this position rose steadily during the marriage and that the position required Mr. Matheson to travel extensively while Ms. Matheson stayed home. The evidence does not establish any link between Mr. Matheson securing the 1995 position and Ms. Matheson's contribution on the home front, but does establish that Ms. Matheson cared for the parties' children while Mr. Matheson traveled with his work.

[36] I find that Mr. Matheson was free to develop his career in part because of the role Ms. Matheson assumed during the marriage.

3.3.2 The circumstances of the parties at separation (including but not limited to their ages, financial circumstances, employment circumstances and health).

[37] At separation on August 17, 2012, Ms. Matheson was fifty-seven and Mr. Matheson sixty-four; their children were twenty-four and twenty. Mr. Matheson earned \$150,682 in 2012.

[38] Although separated, the parties continued to reside in the matrimonial home until October of 2014. During this period, Mr. Matheson remained employed with the IBEW; Ms. Matheson remained on leave due to disability with no prospect of returning to work.

3.3.3 The basis upon which Ms. Matheson was entitled to spousal support in the Minutes of Settlement.

[39] The 2014 Minutes of Settlement stipulated that Mr. Matheson's annual income was \$159,000 and Ms. Matheson's annual income was \$31,000. Among other issues, the Minutes of Settlement addressed property division and spousal support.

[40] With respect to property division, Schedule A to the Minutes of Settlement valued the parties' net assets as of 2014 at \$479,680. Ms. Matheson kept the family

home valued at \$263,000, a car, her RRSP (net value \$9,300) and an investment account valued at \$75,619. Offsetting these assets Ms. Matheson assumed responsibility for a leverage loan of \$99,399 and capital gain debt of \$6,840. Ms. Matheson paid Mr. Matheson \$9,840 to equalize the parties' assets. Although Ms. Matheson kept the family home, the investments she retained did not exceed the debt associated with the investments. Short of selling her home, she had no resources to call upon to supplement her income.

[41] The property equalization process resulted in Mr. Matheson (in addition to the equalization payment) keeping the entire value of his LIRA/self-directed RRSP from his previous employment (net value of \$217,000) and his vehicle.

[42] The equalization of the parties' assets pursuant to the Minutes of Settlement did not adequately compensate Ms. Matheson for the economic consequences of the marriage or its breakdown.

[43] With respect to spousal support, the Minutes of Settlement required Mr. Matheson to pay monthly spousal support of \$4,500 until his retirement from the IBEW. The Minutes of Settlement are silent as to whether Ms. Matheson's entitlement to spousal support was based on a compensatory or non-compensatory

basis. Upon execution of the Minutes of Settlement Ms. Matheson's support entitlement was contractual in nature.

3.3.3.1 Was Ms. Matheson entitled to compensatory spousal support in 2014?

[44] Justice Jesudason in *Gates v. Gates*, 2016 NSSC 49 considered the circumstances in which an order for compensatory spousal support would be appropriate:

Examples of circumstances that may lead to an award of compensatory support could include, but are not limited to, where a spouse's education, career development or earning potential have been impeded as a result of the marriage, or the spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development (*Shurson v. Shurson*, 2008 NSSC 264, para. 13);

Often, the most significant economic consequence of marriage or marital breakdown arises from the birth of children. Traditionally, this would often result in the wife cutting back on participating in the workforce in order to care for the children potentially jeopardizing her ability to ensure her own income security and independent economic well-being. In such situations, compensatory support may be a way to compensate for such economic disadvantage (*Moge*, at para. 80); and

When considering entitlement to compensatory support, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. A marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (*Moge*, para. 84).

[45] As observed by Justice Chappel in *Kinsella v. Mills*, 2020 ONSC 4785 “[t]he fact that a party continued to work during the relationship while also assuming child care and household responsibilities does not preclude the possibility of a

compensatory claim, since their disproportionate "labour on the home front" may have enabled the other party to pursue their own career and advance financially (*Gray v. Gray*, 2014 ONCA 659 (C.A.), at para. 40). ...In considering whether a compensatory claim exists, the court must undertake a broad and expansive analysis of any advantages and disadvantages which each party experienced as a result of the marital union and the roles adopted post-separation. (Paragraph 97)''

[46] Ms. Matheson's career or income earning potential were not negatively affected by the marriage or by her assumption of child care or other household responsibilities during the marriage. The fact that Ms. Matheson cared for the children while Mr. Matheson traveled in fulfilment of his job duties is a direct contribution by Ms. Matheson to Mr. Matheson's ability to meet his job requirements.

[47] Ms. Matheson's contribution to Mr. Matheson's career development after 1995 is a factor which justifies, to some degree, a finding of entitlement to compensatory spousal support. Ms. Matheson's claim to compensatory spousal support, while present, is not strong because the evidence does not establish that she suffered any career or income earning detriment as a result of the marriage or that her efforts contributed to Mr. Matheson securing his 1995 position.

3.3.3.2 Was Ms. Matheson entitled to non-compensatory spousal support?

[48] The Minutes of Settlement indicated that in 2014 (two years post separation) Mr. Matheson's income was \$159,000 and Ms. Matheson's income was \$31,000.

[49] Justice Jesudason in *Gates, supra* considered the circumstances in which an order for non-compensatory spousal support would be appropriate:

Non-compensatory support is grounded in the “basic social obligation” or “mutual obligation” model of marriage which stresses that marriage creates interdependencies which cannot be easily unravelled. These interdependencies create expectations and obligations that the law recognizes and enforces. It holds that a mutual obligation of support may arise after the marital “break” and places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the former spouse rather than the state (*Bracklow*, at paras. 23, 27, 30 and 31);

Non-compensatory support acknowledges that even if a spouse has not foregone any career opportunities or has not otherwise been disadvantaged by the marriage, the court is required to consider that spouse's actual ability to fend for himself or herself and the effort that was made to do so, including efforts after the marital breakdown (*Bracklow*, at para 40); and

Non-compensatory support focusses on the “needs” and “means” of the parties. It recognizes that spouses may have an obligation to meet or to contribute to the needs of their former spouses where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation. Need alone may be enough (*Bracklow*, at para. 32, 43 and 44).

[50] Justice L'Heureux-Dubé described the rationale underlying spousal support in *Moge, supra* at paragraph 84:

84 Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint

endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution. (citations omitted)

[51] Justice Cromwell in *Fisher v. Fisher* 2001 NSCA 18 confirmed at paragraph 86 that after a long marriage a spouse who was absent from the workforce because of child care responsibilities and who has demonstrated need and a disparity of income as compared to their former spouse has a strong entitlement to spousal support:

I take this to be a strong indication from the Supreme Court of Canada that, while all relevant circumstances must of course be considered, in long term marriages in which the party seeking support has not been in the workforce as a result of assuming domestic and child care responsibilities, demonstrated need and a significant disparity in standards of living between the former spouses are strong indicators that a support order is required to address the financial consequences of the breakdown of the marriage. To similar effect see, for example, *Roberts v. Shotton, supra* at [paragraph] 48.

[52] Prior to separation the parties' combined annual income was in excess of \$190,000. Following the breakdown of the marriage, Ms. Matheson could not have maintained her pre-separation standard of living on an annual income of \$31,000. Without spousal support, Ms. Matheson's standard of living following the breakdown of the marriage would have been much less than Mr. Matheson's.

[53] Ms. Matheson had a strong entitlement to indefinite non-compensatory spousal support.

3.3.4 Ms. Matheson's current condition, means, needs and other circumstances and relevant *Divorce Act*, Section 15.2(6) considerations.

[54] In determining whether Ms. Matheson has prospective entitlement to spousal support I must consider the condition, means, needs and other circumstances of the parties bearing in mind the length of time the spouses cohabited, and the functions performed by each spouse during cohabitation (*Divorce Act*, Section 15.2(4)).

[55] I must also recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown, apportion between the spouses any financial consequences arising from the care of any child of the marriage, relieve any economic hardship of the spouses arising from the breakdown of the marriage; and in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time (*Divorce Act*, Section 15.2(6)).

[56] Ms. Matheson is now sixty-nine; she lives alone in her home which is mortgage free. On cross examination she admitted that the value of her house has increased since 2014. She has no debt, two savings account with combined balances of approximately \$95,000 and an RRSP with a value of approximately \$75,000 which she will convert to a RIFF and start drawing down after she turns seventy.

[57] Ms. Matheson's 2014 debt load exceeded her investment/RRSP balances by \$21,320. By 2023, she had eliminated that debt and accumulated approximately \$170,000 in savings/RRSP. In addition to eliminating the investment related debt, Ms. Matheson has also eliminated other debt incurred as a result of the separation. As a result of cash flow issues experience post separation, Ms. Matheson borrowed \$23,000 from her son and subsequently converted that debt to a home equity loan which has now been paid.

[58] Ms. Matheson's 2022 income of \$95,744 was comprised of \$60,062.88 of pension income from the division of Mr. Matheson's pension, \$16,067.64 of income from her own pension income (which was divided with Mr. Matheson), \$7,929.75 of income from Old Age Security ("OAS"), \$11,328.84 of income from CPP benefits (which have also been divided with Mr. Matheson), and interest income of \$353.95. Ms. Matheson's income will increase once she starts to draw down her RRSP.

[59] Ms. Matheson testified that she lives frugally which I find accounts for the fact that her income exceeds her expenses. When monthly savings, charitable donations, anticipated car purchase and household repair expenses are deducted from her budget, Ms. Matheson's net monthly income exceeds her current monthly expenses by approximately \$1,706.08. Ms. Matheson has sufficient monthly

income to maintain her lifestyle, purchase a new vehicle and save for a new roof without encroaching into her capital.

[60] Ms. Matheson has not received spousal support since 2021. Ms. Matheson began receiving pension income in respect of Mr. Matheson's pensions after his 2021 retirement. Ms. Matheson's pension income stream (\$60,062.88 in 2022) exceeded the annual spousal support she had received since 2014 by \$6,062.88.

[61] There is limited evidence concerning the parties' pre-separation life style. The parties owned a home before they separated. Ms. Matheson still lives in that home. At separation, Ms. Matheson had a car. She still has a car and the income to purchase a new car. The parties together earned approximately \$190,000 in 2014. In 2022 Ms. Matheson earned more than half that amount without spousal support; her income will increase further once she starts to draw down her RRSP.

[62] Ms. Matheson's net disposal income in 2022 without spousal support was higher than her net disposal income in 2015 when she received \$54,000 in spousal support.

[63] I have considered Ms. Matheson's condition, means, needs and other circumstances including the length of the marriage and the functions performed by the parties during the marriage and am satisfied that Ms. Matheson can maintain

her pre-separation lifestyle without spousal support. Ms. Matheson no longer experiences an economic disadvantage or hardship arising from the marriage or its breakdown.

[64] I find that Ms. Matheson's need for spousal support ended when she began receiving her share of Mr. Matheson's pensions in 2021 together with her other sources of income.

[65] I will now determine whether Ms. Matheson is entitled to a retroactive spousal support award between 2015 and 2021.

4 Is Ms. Matheson entitled to historic spousal support in an amount greater than that paid by Mr. Matheson?

[66] Ms. Matheson says Mr. Matheson underpaid spousal support between 2015 and 2022 and seeks \$167,371.20 (discounted by 40%) in retroactive spousal support.

[67] Ms. Matheson's retroactive spousal support claim requires that I consider the following issues:

- a. Must Ms. Matheson prove a material change in circumstances has occurred to proceed with her request for a reconsideration of spousal support?

- b. If so, has a material change in circumstances occurred?
- c. Do the circumstances justify a retroactive spousal support order?
- d. If so, how should the retroactive spousal support claim be quantified?
- e. Application of the Spousal Support Advisory Guidelines.

4.1 Must Ms. Matheson prove a material change in circumstances has occurred to proceed with her request for a reconsideration of spousal support?

[68] Ms. Matheson says the Minutes of Settlement entitle her to seek a review of historic spousal support. I do not agree. The Minutes of Settlement confer a right of review of spousal support on the parties once Mr. Matheson's pensions are divided. I interpret the Minutes of Settlement to provide for a review of spousal support on a prospective basis once the pensions are divided.

[69] I do not interpret the Minutes of Settlement as creating a retrospective right of review back to 2015 for the following two reasons: First, the CRO specifically contemplated a variation of the terms of the CRO not a review. The CRO states that the granting of the divorce and the issuance of the CRO did not prevent a retroactive application by either party effective to the date of the Separation

Agreement (CRO paragraph 4). Such a provision is inconsistent with the suggestion that a reconsideration of the historic terms of the CRO was also available by way of a review. Second, the review contemplated in the CRO was in respect of prospective spousal support not historic spousal support. Paragraph 39 of the Minutes of Settlement states that upon division of Mr. Matheson's pensions, or any of them, spousal support payments would be adjusted as of the effective date of the pension division. The addition of the qualifier that spousal support payments will be adjusted as of the effective date of the pension division is consistent with a prospective review commencing on and after the pension division date. A right of review of all spousal support payments back to 2015 could result in an adjustment of spousal support well before the pension division date. I find that the right of review of spousal support set out in the Minutes of Settlement was a prospective review as of the pension division date.

[70] In the alternative, Ms. Matheson says she is entitled to have historic spousal support assessed by way of a retroactive application because there has been a material change in circumstances since the Minutes of Settlement were negotiated. She says four events occurred that were not anticipated in 2014: Mr. Matheson's failure to retire immediately; Mr. Matheson's "exponential" income increase as a

result of his failure to retire; Mr. Matheson's failure to annually provide his financial information and Mr. Matheson's repartnering.

[71] Mr. Matheson says the fact he benefited from annual pay increases after 2014 is not sufficient basis for a retroactive adjustment to spousal support. Mr. Matheson says Ms. Matheson's lack of action prevented him from retiring and she should not benefit from her own lack of action.

4.2 Has a material change in circumstances occurred?

[72] Section 17(1) of the *Divorce Act*, R.S.C. 1985 (2nd Supp), c. 3 empowers me to vary a support order if I am satisfied 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, and, in making the variation order, I must take that change into consideration (Section 17(4.1) of the *Divorce Act*).

[73] The *Divorce Act* has established the following objectives of a variation order varying a spousal support order:

17 (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.

[74] To vary a spousal support order, I must be satisfied the material change in circumstances was not foreseen at the time the original support order was made.

[75] In *Willick v. Willick*, [1994] 3. S.C.R. 670, Justice Sopinka writing on behalf of the majority of the Supreme Court, confirmed the requirement that the material change must be unknown at the time the original order was granted:

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

[76] The Supreme Court in *G. (L.) v. B. (G.)*, [1995] S.C.J. No. 72, confirmed that the *Willick, supra* analysis applied to spousal support variation cases. In *G. (L.) v. B. (G.)*, *supra* the Supreme Court also clarified that if the parties foresaw or ought to have foreseen the new circumstances, the required change has not occurred. However, the Supreme Court clarified that mere foreseeability is not a bar to variation finding because “the fact that a change was objectively foreseeable does not mean that it was contemplated by the parties” (paragraph 51).

[77] The Supreme Court in *Miglin v. Miglin*, 2003 SCC 24, clarified, at paragraph 88:

Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the [Divorce] Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

[78] The Supreme Court in *L.M.P. v L.S.*, 2011 SCC 64 confirmed that the test in a variation case is whether any given change "would likely have resulted in different terms" to the order (paragraph 33) and constitutes a material change will depend on the actual circumstances of the parties at the time of the order (paragraph 34).

[79] In *Daigle v. Daigle*, 2013 NSSC 205, Justice Jollimore observed that in addition to the requirement that the change be one which was not reasonably anticipated by the parties, the change must have other qualities:

In *P.M.B. v. M.L.B.*, 2010 NBCA 5 at paragraph 2, Justice Robertson said that, "As a general proposition, the court will be asking whether the change was significant and long-lasting; whether it was real and not one of choice." The Nova Scotia Court of Appeal approved of *P.M.B. v. M.L.B.*, 2010 NBCA 5, at paragraph 21 of *Smith v. Helppi*, 2011 NSCA 65, referring to the decision by the style of cause under which it had earlier been reported. (paragraph 13)

[80] Ms. Matheson bears the onus of establishing that a change of circumstances justifying a review of the spousal support order has occurred (*L.M.P. v L.S.*, *supra* paragraph 31).

[81] I find a material change in circumstances has occurred since the Minutes of Settlement were executed. I find the following material changes in circumstances have occurred:

4.2.1 Mr. Matheson's delayed retirement

[82] Ms. Matheson says Mr. Matheson's failure to retire as planned constituted a material change of circumstances justifying a review of the CRO which incorporated the Minutes of Settlement.

[83] There is no dispute that the parties both anticipated Mr. Matheson would retire soon after the Minutes of Settlement were executed. Mr. Matheson admitted on cross examination that his pending retirement was the basis for many of the terms in the Minutes of Settlement.

[84] Mr. Matheson says he did not retire because Ms. Matheson failed to file the requisite documents with the Pension Administrator. Ms. Matheson says she did all she could to request the division of Mr. Matheson's pension and Mr. Matheson's

decision to not retire following execution of the Minutes of Settlement had nothing to do with her.

[85] I do not accept that Mr. Matheson's continued employment and his delayed resignation was Ms. Matheson fault for the following six reasons: First, the Minutes of Settlement empower either party to seek a division of Mr. Matheson's pensions, Mr. Matheson was able to pursue pension division independent of Ms. Matheson. Secondly, Ms. Matheson did take steps to secure division of Mr. Matheson's pension in July of 2015 and was told that no pension division would occur until Mr. Matheson retired. Third, Ms. Matheson took steps in 2017 to obtain division of the Canadian component of Mr. Matheson's pension entitlement – the IBEW Local 928 pension. This pension was paid out in a lump sum to Ms. Matheson in 2018. Fourth, Ms. Matheson was told in 2017 that calculations concerning the American components of Mr. Matheson's pension could not be prepared until information regarding Mr. Matheson's retirement was received by the pension administrator. Fifth, Mr. Matheson's IBEW pension was "maxed out" in 2021, the year in which he actually retired. Sixth, Mr. Matheson wanted to have the Divorce granted before he retired, and his pension divided to ensure that his partner could obtain survivor benefits.

[86] The evidence establishes at one point Mr. Matheson intended to retire as of November 1, 2019, but did not in fact retire on that date for reasons not shared with court.

[87] I find Ms. Matheson did not delay Mr. Matheson's retirement. I find Mr. Matheson controlled when he retired.

[88] Mr. Matheson continued to earn employment income until he retired in 2021.

[89] Although the Minutes of Settlement are silent with respect to when Mr. Matheson would retire from the IBEW I accept that the parties anticipated Mr. Matheson would retire shortly after the Minutes of Settlement were executed. He did not retire as planned but rather worked for a further seven years. The evidence establishes a material change of circumstances occurred when Mr. Matheson did not retire as contemplated.

4.2.2 Mr. Matheson's increased employment income compared to anticipated pension income

[90] Another material change in circumstances involves Mr. Matheson's income following execution of the Minutes of Settlement.

[91] The evidence establishes that in 2012 Mr. Matheson's pension, in respect of his IBEW International Representative position, would be in the range of \$90,000. This pension income would then be reduced after his pension was shared with Ms. Matheson. Not only did Mr. Matheson not retire, his employment income continued to increase over the seven years after the Minutes of Settlement were executed increasing from \$159,000 in 2014 to \$193,604 in 2020. Increased income was not the only benefit Mr. Matheson realized by delaying his retirement - Mr. Matheson continued to contribute to his pension until his retirement in 2021. The evidence establishes that Mr. Matheson continued to contribute to, and thereby accumulate, pension benefits until 2021. Further, Mr. Matheson's IBEW International Representative pension entitlement is calculated based on his highest 36 months of employment income. His highest employment income was earned well after the Minutes of Settlement were executed and well after the parties anticipated that he would retire.

[92] I have no difficulty finding that the Minutes of Settlement would likely have had different terms if the parties had known in 2014 that Mr. Matheson would not retire until 2021; that his income would not decrease but rather increase over the next seven years; that his pension contributions and prospective pension benefit

would also increase, and that he would repartner thereby reducing his living expenses.

[93] Ms. Matheson has satisfied the burden on her to establish that a material change in circumstances has occurred justifying a review by me to determine whether a retroactive award of spousal support is appropriate.

4.3 Do the circumstances justify a retroactive spousal support order?

[94] The law on retroactive spousal support was addressed by Justice Cromwell set out in *Kerr v. Baranow*, 2011 SCC 10:

While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support.

Those principles and objectives are found in section 15.2(4) and 15.2(6) of the *Divorce Act*, *supra*, and this Court is entitled to assume the agreement these parties have reached as to spousal support quantum reflects the same. The question is whether the circumstances of the Petitioner during the retroactive period have left her deprived of the proper application of those same principles and objectives?

[95] As noted by Justice MacKeigan in *Calder v. Calder*, 2022 NSSC 146:

[185] A retroactive award of spousal support is discretionary. The Court should "strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix" (*S (D.B.) v. G (S.R.)*, 2006 SCC 37).

[96] To determine whether Ms. Matheson is entitled to a retroactive spousal support award I will consider her needs, Mr. Matheson's conduct, her delay in bringing this application and whether an order for retroactive spousal support would impose a hardship on Mr. Matheson.

4.3.1 Ms. Matheson's needs

[97] Ms. Matheson acknowledges that hers is not a situation of desperate need but rather a situation where there is an expectation of an equalized standard of living.

[98] Mr. Matheson says that Ms. Matheson has not established that she has a need which would justify a retroactive spousal support adjustment. He says that Ms. Matheson's income between 2015 and 2022 was more than sufficient to meet her needs and to afford to her self-sufficiency.

[99] Ms. Matheson's reported the following income (including spousal support) from 2015 up and including 2022:

Year	Total 150	Spousal support	Line 101	Other 104	OAS 113	CPP 114	Other 115	Int 121
2022	\$95,744.00	-	\$60,062.00	-	\$7,929.75	\$11,328.84	\$16,067.64	\$353.95
2021	\$94,376.00	\$13,500	\$44,571.00	-	\$7,486.00	\$11,031.00	\$17,787.00	-
2020	\$95,328.00	\$54,000	-	-	\$7,364.00	\$10,921.00	\$22,948.00	\$93.00
2019	\$91,651.00	\$54,000	\$141.00	\$16,770.00	\$1,840.00	\$10,495.00 \$2,679.00	\$5,724.00	-
2018	\$106,326.00	\$54,000	\$18,253.00	\$20,217.00	-	\$13,854.00	-	-
2017	\$87,265.00	\$54,000	\$168.00	\$19,921.00	-	\$13,176.00	-	-
2016	\$86,869.00	\$54,000	\$168.00	\$19,640.00	-	\$12,993.00	-	\$66.00
2015	\$86,422.00	\$54,000	\$172.00	\$19,410.00	-	\$12,839.00	-	-

[100] The Minutes of Settlement confirmed Ms. Matheson's entitlement to spousal support on a contractual basis. Although the Minutes of Settlement are silent

regarding any other basis justifying spousal support, I have found that Ms. Matheson was entitled to spousal support on a non-compensatory basis and to a lesser degree on a compensatory basis.

[101] The fact that Ms. Matheson met her basic needs between 2015 and 2021 relying in part on monthly spousal support of \$4,500 does not necessarily disentitle her to a retroactive spousal support award.

[102] Justice Weiler on behalf of the Ontario Court of Appeal in *Marinangeli v. Marinangeli*, [2003] OJ No 2819 observed that when considering spousal support entitlement a parties' "need" is a relative concept which must be assessed in the context of the parties' pre-separation lifestyle:

74 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.

[103] Justice L'Heureux-Dubé J. on behalf of the Supreme Court of Canada confirmed the relevance of the parties' standard of living as a measure of dependency in long term marriages in *Moge, supra* (p. 870):

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), *supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the

relationship endures, the closer the economic union, the greater will be the presumptive claim to [page257] equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at pp. 174-75).

[104] The Minutes of Settlement confirm that the parties agreed in 2014 that Ms. Matheson would receive spousal support. I have found that Ms. Matheson required spousal support to meet her needs until 2021 when she began receiving a portion of Mr. Matheson's pension.

[105] Ms. Matheson calculates her retroactive spousal support entitlement from 2015 to 2021 by reference to the Spousal Support Advisory Guidelines (SSAG). She says that this analysis discloses that she was entitled to more support than Mr. Matheson paid her over those years.

[106] Mr. Matheson cites *Volcko v. Volcko*, 2019 NSSC 203 and says the SSAG should not be used to calibrate Ms. Matheson's spousal support entitlement because the parties chose not to apply the SSAG when they agreed upon the contractual spousal support. He says the \$4,500 per month spousal support payment required in the Minutes of Settlement was intended to reflect not the SSAG recommendation but rather the approximate amount that Ms. Matheson would receive on a monthly basis once Mr. Matheson's pension have been divided (Paragraph 36).

[107] I find the SSAG should be used to calibrate Ms. Matheson's spousal support entitlement for the following reasons:

- a. The CRO states that the granting of the divorce and the issuance of the CRO shall not prevent a retroactive application by either party effective to the date of the Separation Agreement (CRO paragraph 4). The CRO but does not stipulate that the SSAG should not be used in any retroactive application.
- b. The parties' monthly spousal support agreement of \$4,500 was based on a set of assumptions that did not occur. The \$4,500 per month spousal support was premised on the assumption that Mr. Matheson would retire soon, that Ms. Matheson would receive about \$4,500 per month from Mr. Matheson's divided pension, and that Mr. Matheson's post-retirement pension income would not much exceed Ms. Matheson's pension income. I find it is likely that a different agreement would have been reached had the parties known in 2014 that Mr. Matheson would continue to work for seven more years, thereby increasing his employment income and his prospective pension income. It is likely the parties would have applied the SSAG had they known in 2014

that Mr. Matheson would continue to work for seven more years, thereby increasing his employment income and his prospective pension income.

- c. The Minutes of Settlement do not confirm that Ms. Matheson's \$4,500 monthly spousal entitlement was intended to address the spousal support factors and objectives set out in the Section 15.2 of the *Divorce Act*. The Minutes of Settlement simply confirm that Ms. Matheson would be paid spousal support of \$4,500 per month and that amount equated to the amount that she would receive once Mr. Matheson's pension was divided. Because the SSAG is an instructive benchmark by which the appropriate range of spousal support can be calculated, I find it is appropriate to calculate Ms. Matheson's spousal support entitlement using the SSAG and use that data to determine the extent to which the \$4,500 monthly support paid to Ms. Matheson from 2015 to 2021 addressed and satisfied the spousal support objectives set out in Sections 15.2(6) and 17.7 of the *Divorce Act*. The Nova Scotia Court of Appeal in *MacDonald v. MacDonald*, 2017 NSCA 34 at paragraph 31

confirmed that SSAG calculations are instructive as the SSAG accommodates the scheme for spousal support in Section 15.2 of the *Divorce Act*. Although the Nova Scotia Court of Appeal in *MacDonald, supra* observed that the SSAG accommodates Section 15.2 of the *Divorce Act* I consider the SSAG equally instructive in calibrating spousal support in a retroactive review of spousal support under Section 17.7 of the *Divorce Act*. The New Brunswick Court of Appeal observed in *S.A.H v. K.A.H.*, [2022] N.B.J. No.98 “it is now settled that the SSAG apply the same way in applications to vary spousal support as they do in initial applications” (paragraph 55). Reference to the SSAG generally, and in this case specifically will enhance the legitimacy and consistency of the spousal support award (*Strecko v. Strecko*, 2014 NSCA 66 as confirmed in *MacDonald, supra*).

[108] I find it is appropriate to use the SSAG as a reference in calibrating Ms. Matheson’s retroactive spousal support claim.

[109] I find the mid range of the SSAG calculations is the appropriate reference point in calculating Ms. Matheson’s 2015 to 2021 retroactive claim as there were

no children of the marriage living with Ms. Matheson (the parties' daughter was not a child of the marriage when she lived with Ms. Matheson after completing her MBA), Ms. Matheson's spousal support entitlement was largely non-compensatory in nature, her basic living needs were being met and additional support was not needed to fund retraining to achieve self sufficiency.

4.3.2 Mr. Matheson's conduct

[110] The Minutes of Settlement obliged Mr. Matheson to pay his spousal support to Ms. Matheson via post dated cheques. He did not provide Ms. Matheson with post dated cheques but rather sent her a cheque each month.

[111] The Minutes of Settlement also obliged Mr. Matheson to exchange tax returns and notices of assessment annually with Ms. Matheson. He did not do that. Ms. Matheson disclosed her tax returns and notices of assessments as required. The annual receipt of these documents from Ms. Matheson did not prompt Mr. Matheson to disclose his financial information until 2019, by which time Mr. Matheson had missed five year-end disclosure commitments to Ms. Matheson.

[112] Mr. Matheson's lack of disclosure is material. The lack of disclosure prevented Ms. Matheson from appreciating the increase in his income. Mr. Matheson dismisses his failure as "an oversight which commonly happens" and as

such was not blameworthy. I reject that explanation. Mr. Matheson had a disclosure obligation which he failed to honour. Ms. Matheson honoured her disclosure commitment. Mr. Matheson's failure to disclose his annual income deprived Ms. Matheson of understanding his employment particulars and taking the action she deemed appropriate.

4.3.3 Ms. Matheson's delay and the reason for the delay seeking retroactive spousal support

[113] The evidence establishes Ms. Matheson moved quickly once Mr. Matheson disclosed his financial information in 2019. Ms. Matheson's lawyer wrote to Mr. Matheson's lawyer in 2019 and advanced a claim for additional spousal support back to 2015 based on Mr. Matheson's increased income.

[114] Mr. Matheson accuses Ms. Matheson of delaying his ability to retire by not promptly attending to the pension division. For the reasons already given, I reject the suggestion that Ms. Matheson delayed Mr. Matheson's ability to retire or that she was not sufficiently diligent in attending to the pension division requirements. Mr. Matheson could have advanced the pension division process himself but did not do so.

4.3.4 Hardship the retroactive award may cause Mr. Matheson

[115] Mr. Matheson says that a retroactive award of spousal support would cause him financial hardship but provides no details as to why a retroactive award would cause him hardship.

[116] Mr. Matheson bears the onus of proving that a retroactive spousal support award would cause him financial hardship. It is not sufficient to allege a potential hardship; evidence must be led to establish the hardship that would result from such an award. No such evidence was led. Mr. Matheson has not established that a retroactive spousal support award would cause him financial hardship.

[117] Mr. Matheson received the following income from all sources from 2015 to 2022:

	Total 150	Union Dues	OAS 113	CPP 114	Other 115	RRSP 129	Line 101
2022	\$204,248.66	\$1,387.00	\$7,929.75	\$20,511.00	\$170,418.38	\$5,388.00	\$0.00
2021	\$170,035.00	\$1,175.00	\$7,486.00	\$19,972.00	\$45,084.00	-	\$97,492.00
2020	\$260,024.00	\$1,359.00	\$7,364.00	\$19,774.00	\$38,088.00	-	\$193,604.00
2019	\$231,524.00	\$1,343.00	-	\$19,422.00	\$29,682.00	-	\$182,419.00
2018	\$217,987.00	\$1,305.00	-	\$7,888.00	\$32,958.00	-	\$177,140.00
2017	\$173,663.00	\$1,279.00	-	-	-	-	\$173,663.00
2016	\$199,944.00	\$1,265.00	-	-	\$29,066.00	-	\$170,877.00
2015	\$242,034.00	\$1,039.00	-	-	\$14,975.00	\$61,587.00	\$165,472.00

*Mr. Matheson's 2020 income also includes Line 121 interest income of \$1,192.00

[119] I find the evidence establishes that a retroactive award would not impose a hardship upon Mr. Matheson.

[120] I find Ms. Matheson has established entitlement to a retroactive spousal support award. I must now determine the amount of that award.

4.4 How should the retroactive spousal support claim be quantified?

[121] Mr. Matheson says that the circumstances do not justify a retroactive spousal support award. Notwithstanding his position that a retroactive award is not appropriate, and that the SSAG should not be applied, Mr. Matheson provided SSAG calculations for the period 2015 to 2021. He says that using this approach, the maximum outstanding retroactive spousal support award owing up to April 1, 2021 (his retirement date) is \$31,832 which amount needs to be “netted down” by 35% to \$20,690.80. Although he provided these calculations, Mr. Matheson was firm in his position that a retroactive spousal support award is not appropriate.

[122] Ms. Matheson says the outstanding retroactive unreduced spousal support claim from January 1, 2015, to April 1, 2021, is \$194,778.

4.4.1 Mr. Matheson’s income between January 1, 2015, and April 1, 2021

[123] I must determine the parties’ incomes in each year to calculate the SSAG spousal support ranges. Ms. Matheson’s income in these years is not in dispute. Ms. Matheson calculates her income at a higher amount than Mr. Matheson. I will use Ms. Matheson’s income figures as they are more favourable to Mr. Matheson.

[124] Mr. Matheson's SSAG calculations include his pay increases between 2015 and 2021 but exclude his OAS, CPP and divided pensions. With respect to Mr. Matheson's income, I find his income increased steadily during the marriage, during the two years they lived separately in the matrimonial home post-separation and thereafter. For example, Mr. Matheson's employment income in 2009 was \$141,788, in 2011 was \$150,602, in 2014 was \$159,000, and in 2016 was \$170,877.

[125] Ms. Matheson says that Mr. Matheson's retroactive spousal support obligation should be calculated based on his income from all sources. She did not reduce his income to account for his annual Union dues. Ms. Matheson says I should calculate Mr. Matheson's retroactive spousal support obligation on Mr. Matheson's line 150 income for each year. I decline to do that for the following reasons:

- a. **Union dues must be deducted from income.** Mr. Matheson paid union dues each year. Those dues must be deducted from his Line 150 income for the purposes of calculating his retroactive spousal support obligations.

b. **2015 RRSP income should not be included in income.** Mr.

Matheson reported RRSP income at Line 129 of his 2015 income tax return. That RRSP income should not be included in his 2015 income for the purposes of calculating his spousal support obligations because Mr. Matheson's RRSP had been included in the parties' equalization of matrimonial property.

Excluding Mr. Matheson's RRSP, which was part of the equalization of matrimonial assets, is consistent with the direction of the Supreme Court of Canada in *Boston v. Boston*, 2001 SCC 43:

64 To avoid double recovery, the court should, where practicable, focus on that portion of the payor's income and assets that have not been part of the equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown (see *Hutchison, supra*, at para. 9). In this appeal, that would include the portion of the pension that was earned following the date of separation and not included in the equalization of net family property.

c. **Income from divided pensions should not be included in**

income. Mr. Matheson reported "pension income" at Line 115 of his income tax returns in 2015, 2016, 2018, 2019, 2020 and 2021. The evidence establishes that Mr. Matheson had a LIRA account in 2014 which he retained as part of the parties'

property equalization. The evidence does not disclose any other source of this Line 115 income prior to the division and pay out of Ms. Matheson's pension and Mr. Matheson's IBEW International Representative pensions. As Mr. Matheson's LIRA account was included in the parties' equalization of matrimonial assets it would be unfair to him to include LIRA income in his income for the purposes of determining his spousal support obligations.

4.4.2 Application of the Spousal Support Advisory Guidelines

[126] I find that the parties incomes and the mid range of spousal support contemplated by the SSAG for the years 2015 to 2021 are as follows:

Year	Mr. Matheson income net of RRSP, Pension income and union dues	Ms. Matheson income (excludes spousal support paid)	SSAG mid-range	Difference between SSAG and support paid	Total annual difference
2015	\$164,433	\$32,421	\$4,813	\$313x12	\$3,756
2016	\$169,613	\$32,633	\$4,994	\$494x12	\$5,928
2017	\$172,384	\$33,265	\$5,072	\$572x12	\$6,864
2018	\$183,724	\$52,326	\$4,791	\$291x12	\$3,492
2019	\$200,499	\$37,651	\$5,937	\$1,437x12	\$17,244
2020	\$220,577	\$41,000	\$6,547	\$2,047x12	\$24,564
2021	\$123,776	\$80,876	\$1,564	\$-2,936 (for three months)	-\$8,808
Outstanding retroactive spousal support payment 2015 to April 1, 2021					\$53,040.00

[127] I find that Ms. Matheson's spousal support entitlement from 2015 to April 1, 2021, was greater than the amount of spousal support she was paid by Mr.

Matheson. I find that Mr. Matheson underpaid spousal support between January 1, 2015, and April 1, 2021, in the amount of \$53,040. I order Mr. Matheson to pay this amount subject to discount. The parties agree that this amount must be discounted to account for the fact that Mr. Matheson will not deduct this amount from his income and Ms. Matheson will not declare this income. Ms. Matheson proposes a 40% deduction. Mr. Matheson proposes a 35% deduction. I will reduce the spousal support underpayment by 35% for a total net payment of \$34,476. I order Mr. Matheson to pay Ms. Matheson \$34,476 within thirty days of this decision.

[128] I will now consider Ms. Matheson's request that the parties be ordered to contribute to their daughter's MBA costs and her request to be relieved of the obligation to contribute to a CRA debt.

5 Must Mr. Matheson contribute \$15,000 toward his daughter's university education expenses?

[129] Ms. Matheson seeks an order requiring that she and Mr. Matheson subsidize their daughter's student loan by paying \$15,000 toward her student loan debt.

[130] Ms. Matheson says the parties paid for their daughter's undergraduate degree but not her Master of Business Administration ("MBA"). She says their daughter incurred student loan debt of approximately \$30,000 during her MBA. Ms. Matheson says that their daughter worked part time and contributed to her education costs.

[131] Ms. Matheson says that the parties paid for their son's undergraduate degree and law degree and should likewise fund both of their daughter's degrees.

[132] Ms. Matheson acknowledges that Mr. Matheson provided their daughter with \$5,000 to cover the cost of summer courses which amount was not, to her knowledge, repaid by the daughter.

[133] Mr. Matheson says there is no basis for such an order. He says the fact that the parties paid for two degrees for their other child is irrelevant as that child had a clear education plan, did his degrees consecutively, was a good student and is working in his profession. Mr. Matheson says the costs of his daughter's first degree were fully covered but that she took time off after her first degree and worked before returning for her MBA. Mr. Matheson says there are insufficient details concerning his daughter's income during her degree, her expenses and whether she is working in her profession.

[134] The parties entered into Minutes of Settlement in September of 2014. At that time, their daughter was twenty-two. The Minutes of Settlement confirmed the parties' son was no longer a child of the marriage and with respect to their daughter stated she:

...is currently working part time and attending university part time. Support payments for [daughter] and payment of school expenses is not currently an issue. Upon acceptance into a full time program, costs and child support will be addressed.

[135] Mr. Matheson says this CRO provision was addressed by his payment of \$5,000 toward her education costs and Ms. Matheson's offer that their daughter could live at home during her MBA.

[136] I find the CRO does not preclude the parties contribution to their daughter's continued education. The Minutes of Settlement in fact contemplated the daughter returning to university to continue her education and that associated costs would be addressed. Absent any evidence that the parties agreed on how those costs should be addressed I find it is open to me to determine if the parties should contribute to their daughter's education costs and if so in what amount.

[137] I can consider whether the parties should contribute to the costs of their daughter's MBA if I find that she was a child of the marriage during her MBA.

[138] The *Divorce Act* R.S.C., 1985, c. 3 (the *Divorce Act*) defines child of the marriage as:

child of the marriage means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life; (*enfant à charge*)

[139] There is no evidence that their daughter was unable to withdraw from their charge or obtain the necessities of life due to illness or disability. I must consider whether her pursuit of an MBA constituted “other cause” which prevented her from withdrawing from the charge of her parents.

[140] A child pursuing a second degree may qualify for child support.

[141] In *Yaschuk v. Logan*, 1992 CanLII 2595 (NS CA), Justice Chipman said that "an education that will fit a child for a career can be properly regarded as a necessity."

[142] As stated by Freeman J.A. for the Nova Scotia Court of Appeal in *Martell v. Height* 1994 NSCA 65 at paragraph 8:

There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.

[143] Justice MacLeod-Archer in *Dove v. MacIntyre*, 2021 NSSC 1 found that a twenty-four-year-old child regained her “dependent status” when she returned to college to pursue a career that would allow her to generate a living wage. In *Dove v. MacIntyre*, *supra*, Justice MacLeod-Archer identified thirteen factors which the jurisprudence indicates should be considered in determining whether a child is eligible for support while pursuing a post-secondary education which factors include whether the child contributes to their own support through part time employment, whether the child has a reasonable education and career plan, the means, needs and circumstances of the parents and child, and the parent’s plans for financing their children’s education. Justice MacLeod-Archer noted that in considering the parents’ plan for their children the court should bear in mind that reasonable parents are ordinarily concerned about treating each of their children comparatively equally.

[144] The parties’ daughter started her MBA at age twenty-four at the Sobey School of Business at Saint Mary’s University in 2016 and completed the degree at age twenty-six in January of 2018.

[145] I do not have evidence from the daughter herself. The parties agreed to permit hearsay evidence concerning her MBA costs. Other than the \$5,000 provided by Mr. Matheson, the parties’ daughter financed her MBA (tuition, living

costs, vehicle, and insurance). Her tuition costs were \$26,774. She chose to not live at home during this degree because she was concerned that she could not obtain a student loan while living at home. She worked full time before returning to do her MBA and worked part time during her MBA. She secured student loans which Ms. Matheson says totaled \$30,000.

[146] The parties had combined income of \$286,814 in 2016, \$260,928 in 2017 and \$324,314 in 2018. There is no evidence that the parties discussed their daughter's MBA costs prior to or during their daughter's engagement in her MBA.

[147] The parties' daughter moved back home with her mother after she completed her MBA. The daughter subsequently returned to full time work at a dental clinic and then started working with the Sobey School of Business at Saint Mary's University. She now works for an IT company.

[148] The parties' other child also has two degrees: a Bachelor of Arts and a Law Degree. That child worked in the summer during his university education. The parties funded all of their son's university and living expenses during both of his degrees except for the money he earned in the summers. The son lived at home during both of his degrees which he completed subsequently without a gap in between. The parties paid all expenses associated with their son's participation in

an exchange program in Brisbane, Australia during his final semester of law school.

[149] I have considered the daughter's MBA tuition costs which have been particularised and her other expenses which have not been particularized, her contribution to her costs by working before and during her MBA, her funding by work and student loans all but \$5,000 of her MBA expenses by herself, the parties funding two degrees for their other child and the parties' means to contribute to her MBA costs in amounts greater than the \$5,000 provided by Mr. Matheson.

[150] I find the parties' daughter again became a child of the marriage during her MBA and was entitled to financial support from her parents. Ms. Matheson says their daughter has a \$30,000 student loan and that I should order she and Mr. Matheson to each pay half. I decline to use the student loan as a reference point for determining parental contribution as I do not have particulars of the amount of that loan. I have evidence that the parties' daughter incurred tuition expenses of \$26,774 during her MBA. It is appropriate to apportion her tuition expense between the parties in proportion to their incomes. Mr. Matheson's proportionate share of the parties combined incomes was 70% in 2016, and 67% in 2017. His proportionate share of his daughter's 2016 tuition expense of \$7,590 was \$4,900 and his proportionate share of her 2017 tuition expense of \$19,184 was \$12,853.28,

for a combined proportionate share of \$17,753.28. Mr. Matheson provided \$5,000 to his daughter in 2017 which will be credited against his contribution for a total further contribution by Mr. Matheson to his daughter of \$12,753.28. Ms. Matheson must pay \$9,020.72 to her daughter as Ms. Matheson's proportionate share of her daughter's tuition.

6 Is Ms. Matheson responsible for half of the CRA debt?

[151] Finally, Ms. Matheson seeks relief regarding a CRA debt.

[152] Mr. Matheson's 2012 Statement of Property disclosed an income tax debt (described as a "Contingent Liability") owing to CRA in the amount of \$57,797.02.

[153] The Minutes of Settlement addressed the parties' matrimonial assets and debts generally and addresses CRA's reassessment of Mr. Matheson's 2006 and 2007 income tax liability ("CRA debt") as follows:

41. The Husband has been reassessed by Canada Revenue Agency (CRA) for reassessment of 2006 and 2007 Income tax liability; however, this is under appeal. The parties agree that in the event that the Husband is assessed for Income tax liability for these years, after appeal, that the Wife shall be responsible for one-half of such liability, as it will be considered a matrimonial debt, and the Wife shall reimburse the Husband immediately in the amount of one-half of any final amount that is determined to be owing after appeal and paid by the Husband to CRA, if any. The Husband hereby authorizes and directs Independent Business Consultants to provide any and all relevant information pertaining to the appeal as requested by the Wife. The Wife has the option of paying up to one-half of the outstanding amount at any time.

42. The parties also confirm that there is contingent debt with Colin MacKenzie, and in the event that either party is called upon to pay any amount to

Colin MacKenzie it shall be considered a matrimonial debt and shared equally in the same manner.

43. Subject to the foregoing, the parties acknowledge that each is responsible and indemnifies the other in respect of those debts in their respective names and warrants that they have not incurred, and neither shall hereafter incur any liability on the credit of the other.

44. For further clarification, subject to the foregoing the Husband shall be solely responsible for any further indebtedness, if any, associated with his investments with Synergy, and be solely entitled to any proceeds recouped.

[154] Ms. Matheson says when the Minutes of Settlement was negotiated Mr.

Matheson was “scanty on details” concerning the CRA debt and did not provide details to confirm it was actually a matrimonial debt. She says the lack of information continued, and Mr. Matheson has failed to establish the debt is matrimonial.

[155] Ms. Matheson seeks an order that she is not responsible for half of a CRA debt incurred during the marriage. Ms. Matheson seeks an order that the CRA debt is not a matrimonial debt despite its reference in the Minutes of Settlement.

[156] Mr. Matheson says the CRA debt was finally quantified in 2019 at \$40,884.33 which he paid in October of 2020. Mr. Matheson says Ms. Matheson agreed in the Minutes of Settlement to pay half of the CRA debt and she should be held to her agreement. He says Ms. Matheson owes him \$20,442.00

[157] In addition to apportioning responsibility for the CRA debt the Minutes of Settlement (in paragraph 45) confirmed that all other debts had been divided between the parties:

45. Subject to the terms of this Agreement and any rights given by either party by a Will executed after the effective date of this Agreement, the parties hereby release and discharge the other from any liability with respect to the matters set out herein and agree that:

a. All of their property and responsibility for debts have been divided between the parties to their mutual satisfaction. Even if an unequal division of assets and debts has occurred, the parties consent to this division as a division of property within the meaning of the *Matrimonial Property Act* of Nova Scotia or any successor legislation.

b. All rights and obligations of the parties whether arising during cohabitation or on separation are governed by this Agreement. Subject to the terms of this Agreement, the parties each release and discharge all rights and obligations he or she may have under any laws or jurisdiction.

[158] Paragraph 41 of the Minutes of Settlement actually states, “The Husband has been reassessed by Canada Revenue Agency (CRA) for reassessment of 2006 and 2007 Income Tax liability”. Ms. Matheson’s obligation to repay half of the tax liability is limited to those two years.

[159] Mr. Matheson tendered a CRA Account Summary dated November 13, 2020 (the “Account Summary”). That document does not confirm that his 2006 and 2007 income tax liability was \$40,884.33. That document confirms that CRA debited his tax account in April of 2020, a year after he says his tax liability was determined, with an amount of \$88,465.83 and is described by CRA as “Disputed amount

reinstated”. There is no reference to the year or years to which the “Disputed amount” relates. The Account Summary then lists twenty-four debits and credits (some dating as far back as 2009) and a payment of \$44,884.33 which results in a zero-balance owing.

[160] The Account Summary identifies a credit against the “Disputed amount” of \$37,240.13 in respect of a 2007 Notice of Assessment and \$4,197.26 in respect of a 2005 Notice of Assessment. Mr. Matheson was unable to explain these credits. These credits for 2007 and 2005 raise questions as to what tax years the remaining uncredited balance of the “Disputed amount” relates.

[161] Based on the evidence before me I am not satisfied that Mr. Matheson’s 2006 and 2007 tax liability was \$40,884.33.

[162] While I am not satisfied as to the amount of Mr. Matheson’s 2006 and 2007 tax liability, I am satisfied that Ms. Matheson agreed to pay half of that liability in an amount which she knew was undetermined. Ms. Matheson was granted the right to secure information regarding the tax liability appeal. Mr. Matheson was not obliged in the Minutes of Settlement to provide any further or ongoing information with respect to the CRA debt to Ms. Matheson. I accept that he did provide Ms. Matheson with updates regarding the possible liability from time to time and

provided information regarding the assessment and appeal in November of 2022.

Mr. Matheson consented to a Production Order for the CRA file and signed an authorization for CRA to provide information to Ms. Matheson's lawyer. I have not been provided any authority or basis upon which I can say that any lack of information or responsiveness by the Independent Business Consultant referred to in paragraph 41 of the Minutes of Settlement is Mr. Matheson's responsibility.

[163] I am unable to accept Ms. Matheson's claim that I should hold that the CRA debt is not a matrimonial debt because of Mr. Matheson's alleged lack of full disclosure. The evidence does not establish that Mr. Matheson withheld information from Ms. Matheson. Further, the Minutes of Settlement have a "Full Disclosure" acknowledgement and a confirmation that the party understood his or her rights and obligations under the Minutes of Settlement.

[164] The CRA debt is a debt for which the parties were equally responsible. I will not, at this point, order Ms. Matheson to pay half of \$40,884.33. I order Ms. Matheson to pay half of the CRA debt in respect of 2006 and 2007 once that amount is established to her satisfaction or, failing agreement, once I have determined that amount.

[165] I retain jurisdiction to hear further evidence from the parties regarding Mr. Matheson's 2006 and 2007 CRA debt.

7 Conclusion

[166] My findings and orders are summarized as follows:

- a. Ms. Matheson's claim for prospective spousal support payable after Mr. Matheson's April 1, 2021, retirement is denied.
- b. Mr. Matheson is ordered to pay Ms. Matheson retroactive spousal support in the discounted amount of \$34,476 within 30 days of this decision.
- c. Both parties are ordered to contribute to their daughter's MBA expenses in the following amounts: Ms. Matheson shall pay \$9,020.72; Mr. Matheson shall pay \$12,753.28. The parties are ordered to pay the funds directly to their daughter with a copy of proof of payment to the other party. Payment to the daughter and proof of payment shall be tendered with 30 days of this decision.
- d. Ms. Matheson is directed to pay half of the CRA debt in respect of 2006 and 2007 once that amount is established to her

satisfaction or, failing agreement, once I have determined that amount.

[167] If either party seeks costs, and the parties cannot agree, the parties shall file their cost submissions within one month of this decision.

Daniel Ingersoll, J.