**Marinangeli v. Marinangeli**

**66 O.R. (3d) 40**
**[2003] O.J. No. 2819**
**Docket No. C36639**

**Court of Appeal for Ontario**
**O'Connor A.C.J.O., Weiler and Rosenberg JJ.A.**
**July 11, 2003**

Family law -- Support -- Child support -- Variation -- Minutes of settlement executed in late 1996 providing for variation of child support in event of material change in circumstances -- Father stating in contemporaneous sworn financial statement that he did not anticipate any material changes to information contained in statement -- Father cashing in stock options shortly after executing minutes of settlement -- Father's income increasing substantially in year following execution of minutes of settlement -- Exercise of stock options and increase in income constituting material changes in circumstances -- Father having implicit obligation under minutes of settlement to notify mother of those changes -- Trial judge not erring in increasing child support and in making increases retroactive to 1997 -- Trial judge erring in ordering father to pay child support in Federal Child Support Guidelines amount from beginning of 1997 when Guidelines did not come into effect until May 1997 -- Federal Child Support Guidelines, SOR/97-175.

Family law -- Support -- Spousal support -- Variation -- Minutes of settlement executed in late 1996 providing for variation of spousal support in event of material change in circumstances -- Husband stating in contemporaneous sworn financial statement that he did not anticipate any material changes to information contained in statement -- Husband cashing in stock options shortly after executing minutes of settlement -- Husband's income increasing substantially in year following execution of minutes of settlement -- Exercise of stock options and increase in income constituting material changes in circumstances -- Husband having implicit obligation under minutes of settlement to notify wife of those changes -- Trial judge not erring in increasing spousal support and in making increases retroactive to beginning of 1997.

The parties separated in 1992 after a 19-year marriage, during which the wife initially supported the husband through university and professional training, and then became a full- time homemaker. After four years of negotiations, the parties signed Minutes of Settlement that provided that the husband was to pay child support for the parties' one child in the amount of $2,000 per month and spousal support in the amount of $6,000 per month. The parties agreed that there would be full disclosure between them in all matters affecting the welfare of the child. The Minutes explicitly provided for

variation of child or spousal support in the event of a material change in circumstances. The husband's financial statement, sworn on the day the Minutes were executed, disclosed his income as $307,925. The portion of the financial statement showing his property indicated that he had phantom stock units, that is, notional units of stock taxed at full rates based on underlying stock performance. They had a value as at the date of separation of $76,361, and there was a notation on the financial statement that it would be "double dipping" to include this property as subject to an order of support. In addition, stock options were listed as a "contingent asset through employer since 1993, approximately 45,000 options, only 15,500 have vested, value unknown as depends upon when options cashed and value of stock at the time". The sworn financial statement contained a declaration that the husband did not anticipate any material changes in the information set out in it. The day after signing the Minutes, the husband cashed in $27,850 worth of stock options. A little over two months later, he cashed in options totalling $225,186. Moreover, his income increased considerably in 1997. He did not advise the wife that he had cashed in stock options or that his annual compensation had increased. The wife initiated proceedings in 1999 to vary spousal and child support. At the time of the trial, the wife's net worth was $120,000. She had no special qualifications and felt she was unable to work outside the home. The husband's net worth was approximately $2.5 million. By 2001, his bonus and salary had increased to $890,039. His current wife worked outside the home. The trial judge found that the profit the husband realized on his stock options and the substantial increase in his income from employment constituted material changes in circumstances and that the husband was implicitly obliged to notify the wife of each material change in circumstances. With respect to child support, he found that there was no clear and compelling evidence for departing from the Federal Child Support Guidelines figures. With respect to spousal support, he found that, if the wife had returned to work post-separation, due to her limited education and lack of recent work experience, she would not have been able to achieve financial independence in any practicable sense. He also found that the husband's post-settlement enrichment was attributable in part to the contribution made by the wife during the course of the marriage, and that an increase in spousal support and an award of retroactive support were justified. The trial judge ordered the husband to pay child and spousal support retroactive to the beginning of 1997. The husband appealed.

Held, the appeal should be allowed in part.

While the trial judge misapprehended some evidence, his errors were not sufficiently palpable and important, nor did they have a sufficiently decisive effect, so as to justify appellate intervention.

The trial judge did not err in characterizing the husband's exercise of stock options as income. The granting of options to the husband was not a non-recurring event, and continued on a regular basis as part of his compensation. The receipt of some of the

husband's compensation was deferred from the time the options were first granted in 1993 until he cashed in some of them in 1996 and 1997. The fact that he deferred receipt of some of his compensation by waiting until late 1996 and 1997 to exercise his options did not mean that their essential characteristic as income changed. The trial judge accepted the husband's evidence that the reason further options had not been exercised since 1997 was that he hoped to realize a greater profit from them by holding them for a longer period of time. The fact that he chose not to take his compensation on a regular basis but to defer taking it in the hopes of realizing a greater amount did not mean that the amounts realized should be excluded in considering the husband's support obligations. The exercise of the options was simply the taking of deferred income at a particular time. The gain the husband realized from his options in 1997 was an appropriate factor for the trial judge to consider in making an order for spousal support and child support generally.

The trial judge did not err in not excluding the profit from the gain on the phantom stock as income. The general rule against double dipping did not apply to the phantom stock bonus.

A "material change in circumstances", in the context of the Minutes of Settlement in this case, did not mean a change that was not foreseeable as part of the ordinary course of living at the time the Minutes were signed. On the contrary, it was clearly intended that foreseeable events such as an increase or decrease in income could amount to a material change in circumstances. The husband's financial statement showed the options as a contingent asset whose value was unknown and depended upon when the options were cashed in. Without knowing the parameters for the exercise of the options, the wife had no way of ascertaining the likelihood that the husband would cash in options within the next few months after the Minutes were signed. The nature of the information about the options provided by the husband before the Minutes were signed made the wife dependent on him for information about their value when they were exercised, and she was content with this. The treatment afforded the options did not mean that their realization would have no impact on support; it only meant that the parties were content to deal with that impact if and when the options were exercised. The trial judge did not err in characterizing the option income as a material change in circumstances. Even if the husband's exercise of his options was not a material change in circumstances, his increase in salary and the coming into force of the Guidelines were material changes in circumstances that entitled the trial judge to consider the profit from the options in determining the quantum of support.

It was open to the trial judge to imply a term in the Minutes of Settlement that the husband had a duty to disclose material changes in his financial circumstances at least during the period before the wife would first have access to his income tax returns in 1998. The husband's pre-settlement representations and the almost immediate

significant improvement in his financial position after the Minutes were signed provided the factual basis upon which to found such a duty. One of the documents that formed part of the factual matrix when the Minutes were signed was the financial statement. That document indicated that the husband had stock options that were a contingent asset whose value was unknown. The disclosure in the financial statement respecting the stock options was indicative that the parties did not intend the value of the options to be taken into account in respect of support at the time they entered into the agreement, but only if and when they were exercised. Read together and as a whole, the Minutes and financial statement were indicative of an intention that the husband would disclose a change in his financial circumstances that would affect the physical comfort of the child, and that adjustments would be made to spousal and child support on an annual basis beginning in 1998. It was obvious to the trial judge that the policy of encouraging negotiation and settlement of family law matters would be undermined if the court were to approve the husband's non- disclosure of his changes in circumstances within such a short time after signing the Minutes. The protracted negotiations over four years, the husband's representation of his financial situation, the disclosure respecting the options combined with the very short time frame after signing the Minutes within which the options were exercised, and the fact that the wife had no means of accessing this information, were all factors supporting the trial judge's conclusion that the husband had an implicit obligation to disclose his change in circumstances in order to give business efficacy to the agreement.

The trial judge did not err in exercising his discretion to award retroactive child and spousal support. However, he erred in awarding the Guidelines Table amount of child support prior to the coming into force of the Guidelines in May 1997, in light of the differences in the pre-Guidelines approach to awarding child support. Prior to the coming into force of the Guidelines, a narrower view of children's needs existed. The payee spouse generally prepared and introduced into evidence a proposed budget for the child's needs, and there was an onus on the payee spouse to justify the budgeted amount. Under the Guidelines, children have a presumptive right to an amount of support based on the payor spouse's income. The trial judge did not err in the quantum of support he awarded, except with respect to the award of child support prior to the coming into force of the Guidelines.

APPEAL from a judgment of Paisley J. (2001), 2001 CanLII 28062 (ON SC), 54 O.R. (3d) 179, 16 R.F.L. (5th) 326 (S.C.J.) varying child and spousal support.

*Arnold v. Washburn* (2001), 2001 CanLII 21149 (ON CA), 57 O.R. (3d) 287, 20 R.F.L. (5th) 236, [2001] O.J. No. 4996 (QL), 152 O.A.C. 364 (C.A.), affg (2000), 2000 CanLII 22732 (ON SC), 10 R.F.L. (5th) 1, [2000] O.J. No. 3653 (QL) (S.C.J.) [Leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 82], consd

*Miglin v. Miglin*, 2003 SCC 24, 224 D.L.R. (4th) 193, 302 N.R. 201, 34 R.F.L. (5th) 255, [2003] S.C.J. No. 21 (QL), distd

Other cases referred to *Bell v. Glynn*, [2000] B.C.J. No. 1505 (QL), 2000 BCSC 1119 (S.C.); *Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 SCC 43, 201 D.L.R. (4th) 1, 271 N.R. 248, 17 R.F.L. (5th) 4; *Brett v. Brett* (1999), 1999 CanLII 3711 (ON CA), 44 O.R. (3d) 61, 173 D.L.R. (4th) 684, 46 R.F.L. (4th) 433 (C.A.), affg (1996), 1996 CanLII 8095 (ON SC), 24 R.F.L. (4th) 224 (Ont. Gen. Div.); *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711, 21 O.A.C. 321, 40 D.L.R. (4th) 385, 77 N.R. 161, 41 C.C.L.T. 1; *Drygala v. Pauli* (2002), 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711, 219 D.L.R. (4th) 319, 29 R.F.L. (5th) 293 (C.A.); *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, 44 O.R. (3d) 736n, 177 D.L.R. (4th) 1, 246 N.R. 45, 50 R.F.L. (4th) 228; *G. (L.) v. B. (G.)*, 1995 CanLII 65 (SCC), [1995] 3 S.C.R. 370, 127 D.L.R. (4th) 385, 186 N.R. 201, 15 R.F.L. (4th) 201; *Hickey v. Hickey*, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, 138 Man. R. (2d) 40, 172 D.L.R. (4th) 577, 240 N.R. 312, 202 W.A.C. 40, [1999] 8 W.W.R. 485, 46 R.F.L. (4th) 1; *Hoar v. Hoar* (1993), 1993 CanLII 16106 (ON CA), 45 R.F.L. (3d) 105 (Ont. C.A.); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 219 Sask. R. 1, 211 D.L.R. (4th) 577, 286 N.R. 1, 272 W.A.C. 1, [2002] 7 W.W.R. 1, 30 M.P.L.R. (3d) 1, 2002 SCC 33, 10 C.C.L.T. (3d) 157, [2002] S.C.J. No. 31 (QL); *King v. Low*, 1985 CanLII 59 (SCC), [1985] 1 S.C.R. 87, [1985] N.W.T.R. 101, 16 D.L.R. (4th) 576, [1985] 3 W.W.R. 1, 44 R.F.L. (2d) 113 (sub nom. *King v. B; K. (K.) v. L. (G.)*); *Lafferty v. Lafferty* (1973), 1973 CanLII 1950 (ON CA), 12 R.F.L. 345, [1973] O.J. No. 572 (QL) (C.A.); *Linton v. Linton* (1990), 1990 CanLII 2597 (ON CA), 1 O.R. (3d) 1, 42 O.A.C. 328, 75 D.L.R. (4th) 637, 41 E.T.R. 85n, 30 R.F.L. (3d) 1 (C.A.), affg (1988), 1988 CanLII 4680 (ON SC), 64 O.R. (2d) 18, 49 D.L.R. (4th) 278, 29 E.T.R. 14, 11 R.F.L. (3d) 444 (S.C.); *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619, 69 Alta. L.R. (3d) 341, 170 D.L.R. (4th) 577, 237 N.R. 334, [1999] 7 W.W.R. 681, 49 B.L.R. (2d) 1, 44 C.L.R. (2d) 163, 3 M.P.L.R. (3d) 165; *MacDonald v. MacDonald* (1997), 1997 ABCA 409 (CanLII), 57 Alta. L.R. (3d) 195, [1998] 6 W.W.R. 86, 209 A.R. 178, [1997] A.J. No. 1262 (QL) (C.A.), supp. reasons (1998), 64 Alta. L.R. (3d) 125, [1999] 2 W.W.R. 277, 40 R.F.L. (4th) 397, [1998] A.J. No. 631 (QL), 1998 ABCA 183, 216 A.R. 340 (C.A.); *MacDougall v. MacDougall*, 1973 CanLII 1940 (ON SC), [1973] O.J. No. 618 (QL), 11 R.F.L. 266 (H.C.J.); *Martel Building Ltd. v. Canada* (2000), 2000 SCC 60 (CanLII), 186 F.T.R. 231n, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, 262 N.R. 285, 36 R.P.R. (3d) 175, 2000 SCC 60, 3 C.C.L.T. (3d) 1; *Meiklejohn v. Meiklejohn* (2001), 2001 CanLII 21220 (ON CA), 19 R.F.L. (5th) 167 (Ont. C.A.), revg (2000), 2000 CanLII 22582 (ON SC), 6 R.F.L. (5th) 360 (Ont. S.C.J.); *Paras v. Paras*, 1970 CanLII 370 (ON CA), [1971] 1 O.R. 130, 14 D.L.R. (3d) 546, 2 R.F.L. 328 (C.A.); *Prud'homme v. Prud'homme*, 2002 SCC 85, 221 D.L.R. (4th) 115, 297 N.R. 331, 37 M.P.L.R. (3d) 1, [2002] S.C.J. No. 86 (QL); *Quesnel v. Nadon-Quesnel* (2001), 2001 CanLII 28259 (ON SC), 24 R.F.L. (5th) 89 (Ont.

S.C.J.); *R. v. R.* (2002), 2002 CanLII 41875 (ON CA), 58 O.R. (3d) 656, 211 D.L.R. (3d) 403, [2002] O.J. No. 1095 (QL), 24 R.F.L. (5th) 96 (C.A.); *S. (L.) v. P. (E.)* (1999), 1999 BCCA 393 (CanLII), 67 B.C.L.R. (3d) 254, 175 D.L.R. (4th) 423, 50 R.F.L. (4th) 302 (C.A.) [Leave to appeal to S.C.C. refused (1999), 252 N.R. 194n]; *Simon v. Simon* (1999), 1999 CanLII 3818 (ON CA), 46 O.R. (3d) 349, 182 D.L.R. (4th) 670, 1 R.F.L. (5th) 119 (C.A.), revg (1997), 1997 CanLII 12384 (ON SC), 33 R.F.L. (4th) 310 (Ont. Gen. Div.) [Leave to appeal to S.C.C. refused (2000), 224 N.R. 198n]; *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, 125 Sask. R. 81, 119 D.L.R. (4th) 405, 173 N.R. 321, 81 W.A.C. 81, 6 R.F.L. (4th) 161; *Wright v. Zaver* (2002), 2002 CanLII 41409 (ON CA), 59 O.R. (3d) 26, 211 D.L.R. (4th) 260, 24 R.F.L. (5th) 207 (C.A.), affg (2000), 2000 CanLII 22395 (ON SC), 49 O.R. (3d) 629, 7 R.F.L. (5th) 212 (S.C.J.)

Statutes referred to *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), ss. 15, 17; *Family Law Act*, R.S.O. 1990, c. F.3, s. 56(4)(a)

Rules and regulations referred to Federal Child Support Guidelines, SOR/97-175 [as am.], ss. 3(2), 7, 13(1), 17, Sched. III

Authorities referred to Fridman, G.H.L., The Law of Contract in Canada, 3rd ed. (Scarborough: Carswell, 1994)

Harold Niman, for appellant.
Jacqueline M. Mills, for respondent.

The judgment of the court was delivered by

WEILER J.A.: --

## I. OVERVIEW

[1] The appellant, Mr. Marinangeli, appeals the order of Paisley J. that he pay child and spousal support to the respondent, Mrs. Marinangeli, retroactive to the beginning of 1997, based on material changes in his circumstances within the meaning of the Minutes of Settlement (the "Minutes") between the parties. The appeal raises two main issues. The first is whether the trial judge seriously misapprehended the evidence. The second is whether he erred in ordering that support be retroactive to 1997 on the basis that the appellant had an implicit obligation under the Minutes to disclose two material changes in his circumstances and that he did not do so. Subsidiary issues include whether the appellant's profit resulting from the realization of certain stock options should have been considered as income for purposes of

ascertaining support in 1997 and whether that profit constituted a material change of circumstances.

[2] The appellant submits that he should only be obligated to pay child support in accordance with the Guidelines from August 1998, when the respondent's lawyer wrote a letter to the appellant's lawyer referring to the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"), that had come into force in May 1997 and requesting the appellant's tax return for 1997. Prior to that, the appellant had been paying child and spousal support pursuant to Minutes entered into in October 1996 that took effect on January 1, 1997. He was not in default respecting any support payments. The appellant agrees that from and after August 1998 he should pay the amount of [child] support contained in the Tables of the Guidelines, but objects to paying the expenses for the child's private school in addition to this amount.

[3] In relation to spousal support the appellant's position is that he should not be obligated to pay increased support until the date the application for spousal support was filed in February 1999. He also submits that the trial judge erred in awarding the quantum of spousal support he did.

[4] For the reasons that follow, I would hold that although the trial judge did misapprehend some evidence, his errors were not sufficiently palpable and important nor did they have a sufficiently decisive effect so as to justify appellate intervention. In relation to spousal and child support I would hold that the profit realized by the appellant from the exercise of his stock options was income and constituted a material change in circumstances under the Minutes. This is not a case like *Miglin v. Miglin*, 2003 SCC 24, 224 D.L.R. (4th) 193, [2003] S.C.J. No. 21 (QL), where the parties had entered into a separation agreement providing for a full and final release of all future obligations. Rather, in this case the parties expressly agreed in the Minutes that spousal and child support could be varied if there was a material change in circumstances. I would further hold that it was within the trial judge's discretion to award retroactive support as the criteria for making such an award are met. I would allow the appeal only with respect to the award of retroactive child support prior to May 1, 1997, before the Guidelines came into force. In all other respects I would dismiss the appeal.

## II. BACKGROUND FACTS

[5] The parties were married in August of 1973 and separated in October of 1992 after a 19-year marriage.

[6] At the time of their marriage the respondent, then 22 years old, was employed as a secretary. In the early years of their marriage the respondent supported the appellant while he attended university. He completed his B.A., M.B.A. and obtained his C.A.

designation. The appellant also contributed by working part-time. In 1983, the parties agreed that the respondent would no longer work outside the home but would become a full- time homemaker. There is one child of the marriage, Rachel, born in 1984.

[7] In June of 1993, litigation between the parties commenced. The case was about to be tried when Minutes were signed in October of 1996. Both parties were represented by counsel.

[8] Although certain terms of the Minutes were incorporated into a judgment, the spousal support, child support and life insurance provisions were not. The relevant portions of the Minutes are as follows:

> -- The parties share joint custody of Rachel with her primary residence in the respondent's home (para. 1).
>
> -- The parties agree there will be full disclosure between them in all matters affecting the welfare of the child (para. 3).
>
> -- Commencing January 1, 1997, the appellant will pay $2,000/ month for the support of Rachel (para. 6). Pursuant to para. 7, the parties acknowledge that they have been made aware of the proposed amendments to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) with respect to the treatment of child support and agree that the child support is to be deductible/taxable notwithstanding the passage of such legislation.
>
> -- The appellant agrees to pay the cost of tuition, books, uniforms, school trips and all related activity fees associated with Rachel's attendance at Havergal College (para. 8).
>
> -- The appellant is also responsible to pay the cost of Rachel's post-secondary education to the completion of one degree or until she becomes 22 years of age (para. 9).
>
> -- Commencing January 1, 1997, the appellant will pay $6,000/ month for the support of the respondent (para. 10).
>
> -- The respondent is entitled to earn income or supplement her income by up to $25,000 annually without this income constituting a material change in her circumstances (para. 19).
>
> -- The amount of child and spousal support will be indexed at one-year intervals commencing January 1, 1998, in accordance with the All Items Consumer Price Index for the City of Toronto with base year 1981 equal to

100. Once the information is obtained, any shortfall in payments that have accumulated will be immediately paid by the appellant (paras. 14 and 15).

-- The issues of joint custody, spousal and child support, the amounts of the life annuity policy, and life insurance may be varied if there is a material change in circumstances (para. 16).

-- Provision is made for medical and dental expenses, and life insurance.

[9] In accordance with the Minutes, the respondent received property comprised of the matrimonial home having an equity value at the time of $90,000, and a 1990 Acura valued at $20,000. The appellant paid off the second mortgage on the matrimonial home worth approximately $38,300, a third mortgage and the respondent's legal fees of $25,000 (the appellant stated he had also paid off outstanding joint loans and credit card debt of over $38,000 after the parties separated).

[10] Prior to signing the Minutes on October 11, 1996, the parties had attended a pre-trial conference in May of that year. The appellant's pre-trial conference memorandum indicated that he anticipated a decrease in his income. The anticipated decrease was due to the fact that the appellant, at that time a senior vice-president with the Toronto Dominion Bank, had deferred bonuses dating back to 1992-1993, that ended in 1996. All other things being equal his income would then be reduced.

[11] The appellant's financial statement sworn October 10, 1996 disclosed his income as $307,925, including a deferred bonus from 1993 of $24,500 and phantom stock bonuses totalling about $21,000. The portion of the financial statement showing his property indicates that he had phantom stock units, that is, notional units of stock taxed at full rates based on underlying stock performance. They had a value as at the date of separation of $76,361 and there is a notation on the financial statement that it would be "double dipping" to include this property as subject to an order of support. In addition, stock options are listed as a "contingent asset through employer since 1993, approximately 45,500 options, only 15,500 have vested, value unknown as depends upon when options cashed and value of stock at the time".

[12] The sworn financial statement contained the usual declaration, "I do not anticipate any material changes in the information set out above."

[13] On October 11, 1996, the day after signing the Minutes, and before the support provisions in the Minutes came into force on January 1, 1997, the appellant cashed in $27,850 worth of stock options. He testified that he did this in order to fund part of his obligations under the Minutes. In addition, the appellant cashed in options totalling $225,186 in late December of 1996, that settled in early 1997. According to the appellant's affidavit filed in these proceedings, his employment income for 1997

included gains of $477,503 from stock options and $595,340 from phantom options (referred to collectively as options), for a gain of over $1 million during the 14 months after the agreement was signed. The motivating forces behind the appellant's decision to cash the options were the increase in price in the shares of the Toronto Dominion Bank and his need for funds. The appellant used the funds he received from the exercise of options to further fund the settlement he had made with the respondent, to purchase a recreational property, and to pay taxes. He also used the funds to purchase TD bank stock because, contrary to his stated expectation, his income increased and he is required as part of his employment to hold twice his yearly salary in TD bank stock. The appellant also received an increase in his base salary of about $6,000 in 1997 to $166,000 and his bonus for the year at $200,000 was almost double what it had been in 1996. The total of these two amounts, $366,000, was about $60,000 more than his salary plus bonuses in 1996. The appellant also continued to receive further stock options as part of his compensation.

[14] The appellant did not advise the respondent that he had cashed in stock options or that his annual compensation had increased. The parties agree that the earliest the respondent could have requested the appellant's tax return for 1997 was May of 1998. On August 19, 1998, the respondent's lawyer wrote to the appellant's lawyer advising she had been consulted with respect to the impact of the Guidelines that had come into force on May 1, 1997 and requested a copy of the appellant's 1997 income tax return (as well as the 1996 tax return). When counsel for the appellant replied on October 23, 1998, he did not enclose the appellant's tax return. Instead, he requested the respondent's tax return. Eventually, tax returns were exchanged and these proceedings were commenced in February of 1999.

[15] The appellant is presently Executive Vice-President and Chief Financial Officer of the TD Bank Financial Group. He was approximately 51 at the date of trial April 30, 2001 and had remarried in 1995. His spouse works outside the home. By 2001, the appellant's salary and bonus had increased to $890,039. His net worth was approximately $2.5 million without including the condominium and the cottage he had purchased and placed in his second wife's name, and excluding, as well, the value of his pension and stock options.

[16] At the time of the trial the respondent's net worth was approximately $120,000. The trial judge found that although the matrimonial home increased in value substantially, her debts did as well. She was two years in arrears with respect to taxes owing to Revenue Canada; the property taxes on her home were in arrears, her bank line of credit was near its limit; she had borrowed money from her aged mother; her home was in need of substantial repair and she was in need of dental care. She attempted to return to school after separation but found it too difficult. She had been in therapy on and off since the parties' separation. At the time Minutes were signed in October of 1996 she was living with a man who was unable to contribute much to her

support. As of the date of trial the relationship had ended. The respondent was now over 50, had no special qualifications, and felt she was unable to work outside the home.

## III. THE TRIAL JUDGE'S REASONS

[17] The trial judge's reasons are reported at (2001), 2001 CanLII 28062 (ON SC), 54 O.R. (3d) 179, 16 R.F.L. (5th) 326 (S.C.J.). The trial judge ordered that spousal support be increased from $6,000 a month under the Minutes to $12,000 a month for 1997; $8,000 a month for 1998; $9,500 a month for 1999 and $10,500 a month from January 1, 2000. He ordered that child support be $104,613 for 1997; $22,288 for 1998; $42,769 for 1999; and $54,142 for 2000. For 2001, monthly child support payments were increased from $2,000 a month to $5,841.90 per month or $70,102.80 a year. The amounts ordered for child support were the Guideline amounts and were to be paid in addition to the private school fees the appellant was obliged to pay pursuant to the Minutes.

[18] The trial judge found as follows:

> -- Mr. Marinangeli had two material changes in circumstances after he signed the Minutes. The first was the profit he realized on his options in 1997. The second was when his income from employment substantially increased.
>
> -- Mr. Marinangeli was implicitly obliged to notify Mrs. Marinangeli of each material change in circumstances because he represented that he anticipated a reduction in his income prior to signing the Minutes, the material changes occurred within a very short time afterwards and it would be unreasonable to expect Mrs. Marinangeli to commence a variation application shortly after the minutes were executed to determine whether the appellant's circumstances had changed. Mrs. Marinangeli had no reason to commence such an application given Mr. Marinangeli's statement as to his anticipated income, the recent settlement and the fact the parties had just engaged in four years of litigation.
>
> -- While the date of filing an application may be a practical norm from which to order an increase in support, it would be unfair to deny Mrs. Marinangeli the benefit of the material changes in circumstances that had occurred. Even when her request for disclosure was made, in August 1998, Mr. Marinangeli's response to that request was delayed for four months. The policy of encouraging negotiation and settlement of family law matters would not be enhanced if the court were to approve what would be in effect a harsh limitation period with respect to arrears of support. In this case the result of that approach would be a windfall to Mr. Marinangeli. Mr. Marinangeli would not suffer any hardship by being ordered to pay support in accordance with

the Guidelines from the beginning of 1997. Even although the Guidelines were not in effect when the options were exercised, they provide an appropriate measure of the fair level of child support payable by Mr. Marinangeli.

-- In relation to child support, there was no "clear and compelling evidence" for departing from the Guideline figures. Counsel for Mr. Marinangeli conceded that the table amount should be applied from the date the application was commenced. A childcare budget was not required. It would be an exercise in imagination. Mr. Marinangeli had not rebutted the presumption in favour of awarding the applicable table amount for child support. Although Mr. Marinangeli would be obliged to continue to provide for the child's private schooling pursuant to the Minutes, child support should not be less than the amount specified by the Guidelines. The support would have been used and would be used appropriately to meet the child's present and future needs. Mrs. Marinangeli was entitled to an appropriate level of discretionary spending for Rachel consistent with Mr. Marinangeli's earnings. Mrs. Marinangeli had indicated a wish to save money in the event that the child decided to pursue a career as a psychiatrist. The Minutes only provided for Mr. Marinangeli to pay for one university degree or until she attained the age of 22.

-- With respect to spousal support, if Mrs. Marinangeli had returned to work post-separation, due to her limited education and lack of recent work experience, she would not have been able to achieve financial independence in any practicable sense; at the most she would have been able to contribute to her support to some degree. Mrs. Marinangeli was devoted to her parental responsibilities, a role Mr. Marinangeli had encouraged during marriage. There was little merit in the argument that Mrs. Marinangeli had failed to do what she could have done to achieve self-sufficiency. The argument that Mrs. Marinangeli's budgeted needs are met when the child support is taken into consideration ". . . fails to adequately address the contribution that Mrs. Marinangeli made during this lengthy marriage, and the advantage Mr. Marinangeli gained by being able to continue his education while Mrs. Marinangeli contributed to his support, and then by being able to devote himself to his career advancement while Mrs. Marinangeli assumed childcare responsibilities for Rachel". Mr. Marinangeli's post-settlement enrichment is attributable in part to the contribution made by Mrs. Marinangeli during the course of their marriage. The increase in spousal support and award of retroactive support was justified. The amounts awarded took into account the indirect benefits of increased child support and allowed for financial contributions by Mrs. Marinangeli's cohabitant during the time he lived with her.

## IV. ANALYSIS

A. Did the Trial Judge Materially Misapprehend the Evidence?

*i. Standard of review*

[19] There is no issue as to the standard of review. Appellate courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong: *Hickey v. Hickey*, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577. More recently, in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL), the Supreme Court held that absent the judge at first instance committing an error of law by failing to apply the correct legal standard, appellate intervention in a judge's findings of fact is only appropriate where there has been a "palpable and overriding error" and that the standard of review for inferences of fact is also "palpable and overriding error".

[20] In a subsequent decision, *Prud'homme v. Prud'homme*, 2002 SCC 85, 221 D.L.R. (4th) 115, [2002] S.C.J. No. 86 (QL), the Supreme Court held that the *Housen* rule does not preclude an appellate court from identifying errors in the findings of fact, where those errors are sufficiently palpable and important, and have had a sufficiently decisive effect, that they would justify intervention and review on appeal. It is not sufficient, however, to identify errors in the details of the findings of fact made by the judge of first instance if the overall characterization of the effects of the facts is correct in law.

*ii. Material misapprehension of the evidence*

[21] The appellant alleges that the trial judge misapprehended the substance of the evidence in several respects. The trial judge referred to the application as being an interim application. It was not. On reading the reasons of the trial judge as a whole it is clear, however, that he was well aware that he was not dealing with an interim application for support. For example, the trial judge ordered different amounts for spousal support for 1997, 1998 and 1999, which he could not have done on an interim application. He did not misapprehend the nature of the application.

[22] The trial judge did, however, misapprehend the evidence in other respects as alleged. He misapprehended the date when the appellant represented that his income would not increase but would, instead, decrease. The trial judge's reasons, at para. 12, indicate that the appellant, ". . . agreed that his pretrial memorandum, filed shortly before the minutes of settlement were executed indicated that he anticipated a reduction in his income in subsequent years". At para. 20 of his reasons, the trial judge stated, "Furthermore, in that just prior to the execution of the minutes of

settlement, Mr. Marinangeli had taken the position that he anticipated a reduction in his income, there was no reason for Mrs. Marinangeli to believe otherwise. I weigh Mr. Marinangeli's pre-settlement statement heavily in that regard." The statement respecting a reduction in income was made in the appellant's pre-trial memorandum, which was filed in May 1996, whereas the Minutes were signed in October 1996. However, the appellant's statement of financial affairs sworn the day before the Minutes were executed confirmed that he did not anticipate any material changes in the information given as to his income or property. The appellant's counsel concedes that s. 56(4)(a) of the *Family Law Act*, R.S.O. 1990, c. F.3, effectively renders all domestic contracts, such as separation agreements, agreements of the utmost good faith with respect to financial matters, at least until the agreement is signed. As a result, the fact that Mr. Marinangeli represented that his income would modestly decrease at the pre-trial in May 1996 as opposed to the day before the agreement was signed in October 1996 is of no import because he had an ongoing duty of disclosure at least until the Minutes were signed: See *Quesnel v. Nadon-Quesnel* (2001), 2001 CanLII 28259 (ON SC), 24 R.F.L. (5th) 89 (Ont. S.C.J.).

[23] The trial judge further misapprehended the date the Minutes were signed when he stated they were signed in 1997; they were signed at the end of October 1996. However, January 1, 1997 was the date the provisions in the Minutes respecting child and spousal support came into force and in my view nothing turns on the trial judge's misstatement.

[24] In addition, the trial judge misapprehended the extent of the financial gain the appellant realized from his options the day after the Minutes were signed when he stated the appellant realized a financial gain of $1 million. The day after the Minutes were signed in October the appellant exercised options for a $27,000 profit, and in late December he exercised further options that settled in early January just after the support provisions in the Minutes came into force for a further profit of about $225,000. In all, about $1 million profit from options was realized in 1997.

[25] In my opinion, however, the trial judge's misapprehensions as to the dates the gains from the options were realized do not affect the central part of his finding. That finding is that very shortly after the Minutes were signed the appellant cashed in options that resulted in his income significantly increasing, not modestly decreasing, as he had represented. I would hold that the trial judge's misapprehensions of evidence were not sufficiently palpable and important and did not have a sufficiently decisive effect so as to justify appellate intervention. I would dismiss the first ground of appeal.

[26] The facts seem to be relatively clearly established overall. The real issue is whether the trial judge's characterization of the effects of those facts is correct in law

and whether he erred in principle in exercising his discretion to award retroactive child and spousal support as he did.

B. Did the Trial Judge Err in Awarding Retroactive Child and Spousal Support?

*i. The trial judge's characterization of the exercise of options as income and inclusion of the profits for purposes of assessing child and spousal support*

[27] The appellant testified that his options were an accepted means of compensation intended to keep the bank competitive in retaining its senior executives. The trial judge accepted this evidence and held that as these options were acquired as part of the appellant's remuneration from employment they should be treated as income for the purpose of assessing both spousal and child support.

[28] As I have indicated, the Guidelines came into force in May 1997. The treatment of option income for the purpose of assessing child support under the Guidelines after that date is clear. Options granted as an employee benefit are to be valued and added to a spouse's income for the year in which the options are exercised under Schedule III and s. 13(1) of the Guidelines. Once the value of the option has been determined the court has a discretion to exercise under s. 17. If, as a result of the exercise of the options, the court is of the opinion that the spouse's income results in an amount that is not fair to the paying spouse, for example, because this is a one-time payment, the court can look at the spouse's income over the last three years and determine an amount that is fair and reasonable in light of the receipt of a non-recurring amount during those years.

[29] The appellant submits that the trial judge ought to have excluded the gain the appellant realized from the exercise of his options for purposes of assessing child support as was done in *Arnold v. Washburn* (2000), 2000 CanLII 22732 (ON SC), 10 R.F.L. (5th) 1, [2000] O.J. No. 3653 (QL) (S.C.J.), affd (2001), 2001 CanLII 21149 (ON CA), 57 O.R. (3d) 287, 20 R.F.L. (5th) 236 (C.A.), leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 82 (QL). In *Arnold, supra*, Rutherford J. held that he had a discretion to exclude the profit realized from the exercise of stock options under the Guidelines because that income was unlikely to recur in the future. The Court of Appeal upheld the decision on the basis that the trial judge exercised his discretion to determine the spouse's income under s. 17 of the Guidelines and the exercise of discretion revealed no error in principle. Speaking for the court, Carthy J.A. stated at para. 8, "[w]ith some reservation, I am prepared to assume that the stock option income was properly characterized as a non-recurring amount in the circumstances of this case." The court, at para. 9, did say that the trial judge "could have attributed the share of income or some portion of it for Guideline purposes, but chose not to". The court agreed with the trial judge at para. 23, that there was a "huge imbalance in the

money power of the parties, which can and may well be operating unfairly to the applicant". Excluding the stock option amount from Mr. Washburn's income, the amount of child support under the Guidelines was inappropriately low and there was a large discrepancy between the lifestyles the children would enjoy with each party. Because two of the children were over the age of majority and, under s. 3(2), the court had a discretion to order support in an amount different than the amount in the Guideline Table, the court increased the amount of support for these children. The court commented, at para. 23, that, "[t]here is no doubt that this $3 million [from the exercise of options] added substantially to the husband's financial ability to contribute to the children's support." *Arnold*, *supra*, does not really assist the appellant as, in the end, the profit from the exercise of the options, although not treated as income, was used to arrive at the appropriate amount of support that the payor spouse should pay for child support. I note that in *MacDonald v. MacDonald* (1997), 1997 ABCA 409 (CanLII), 209 A.R. 178, 57 Alta. L.R. (3d) 195 (C.A.), the Alberta Court of Appeal held that the exercise of stock options should form part of a payor's income as it enhanced the payor's ability to pay support.

[30] While the courts have differed in their approach when dealing with non-recurring income, the recurring theme is that the child of the marriage should benefit from a sudden increase in lifestyle and money available to the family.

[31] I now turn to a consideration of whether the exercise by the appellant of his stock options in 1996 and 1997 should have been considered as income for purposes of child support prior to the enactment of the Guidelines as amended and for purposes of spousal support. In my opinion the trial judge did not err in principle in including the gain from the options as income. (In some circumstances, such as when options have been accumulated during marriage, it may be appropriate to treat them as property rather than income: see *Bell v. Glynn*, [2000] B.C.J. No. 1505 (QL), 2000 BCSC 1119 (S.C.). If treated as an asset, as stated by the Supreme Court of Canada in *Miglin*, supra, at para. 94, "[v]aluation of an asset necessarily takes into account its characteristics including its potential income, capital appreciation and risks." Either way options cannot be ignored.)

[32] The granting of options to the appellant continues on a regular basis as part of his compensation. The appellant's financial statement for April 2001 showed that the number of options that had vested had grown to 92,900 from 15,500 in October 1996; while the number of unvested options was 92,650 from 30,000. (Options that are unvested cannot be exercised, that is, they cannot be used to buy stock, until a particular date in the future.)

[33] Options are comprised of two components, a cash component and a time component. If the price at which the option can be exercised is less than the price of the underlying stock, the option has a cash value. For example, if the option gives the

holder the right to purchase stock at $25 and the stock is priced at $35, the option has a cash value of $10. That is the cash component of the option. The fact that the option can be exercised to purchase stock for a particular time period at a set price, in some cases many years, also has value. That is the time component of the option and it decreases as the time for exercising the option goes by. There is an interrelationship between the two components.

[34] The appellant chose to exercise some of his options in 1996 and 1997. What this means is that the receipt of some of the appellant's compensation was deferred from the time the options were first granted in 1993 until he cashed some of them in 1996 and 1997. The fact that the appellant deferred receipt of some of his compensation by waiting until late 1996 and 1997 to exercise his options does not mean that their essential characteristic as income changed. The trial judge accepted the appellant's evidence that the reason further options have not been exercised since 1997 is that the appellant hopes to realize a greater profit from them by holding them for a longer period of time. The appellant's evidence means that he has assumed the risk that, as the time component for exercising the options declines, the cash component of the options will increase. The fact that the appellant chooses not to take his compensation on a regular basis but to defer taking it in the hopes of realizing a greater amount does not mean, however, that the amounts realized should be excluded in considering the appellant's support obligations. The exercise of the options is simply the taking of deferred income at a particular time. In this case, the gain the appellant realized from his options in 1997, approximately $1 million, was an appropriate factor for the trial judge to consider in making an order for spousal support and for child support generally. I also note that option income generally receives more favourable treatment for income tax purposes than regular income.

*ii. Payor's income and the issue of "double dipping"*

[35] The appellant further submits that a portion of the trial judge's order respecting support for 1997 is "double dipping" in the sense that the value of some of the phantom stock was equalized and therefore already taken into account when the parties separated. The appellant's position is that the value of the phantom stock should therefore have been excluded from his income.

[36] The issue of double dipping generally arises in respect of pensions that have been equalized. When a payor spouse retires the spouse often seeks a reduction of spousal support obligations because his income has been materially reduced and post-retirement income is largely derived from the value of the asset that has already been equalized. The argument is that when the capital value of the asset has been divided the income stream should not be subject to division again.

[37] In *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413, Major J. concluded at para. 63 that it is generally unfair to allow the payee spouse to receive the benefit of the pension both as an asset and then again as a source of income, especially where the payee spouse has received capital assets she retains to increase her estate. A payee spouse is under an obligation to generate income from the assets received upon separation. Compensatory support should not be awarded out of property that has already been equalized. Once a spouse's need for support is established and in order to avoid double recovery, the court, where practicable, should focus on that portion of the payor's income and assets that were not included as part of the equalization or division of net family property. Major J. acknowledged, however, that double dipping cannot always be avoided. If the payee spouse has received the matrimonial home as part of an equalization payment upon separation, it may be unreasonable to expect her to generate investment income from this asset. Recognizing that support payments should provide a level of income sufficient to maintain a lifestyle that is comparable to that enjoyed during marriage by allowing the spouse to remain in the home contributes to this goal. Further, where spousal support is based mainly on need, rather than compensation, double recovery may be permitted. He concluded, at para. 63, "[d]ouble recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists."

[38] A further elaboration of the principles respecting double dipping is articulated in *Meiklejohn v. Meiklejohn* (2001), 2001 CanLII 21220 (ON CA), 19 R.F.L. (5th) 167 (Ont. C.A.), where Rosenberg J.A. held that a court will not automatically exclude consideration of a payor's pension income from his or her ability to pay support because the capital value of the pension has been included in the equalization accounting. While it may be generally unfair that the income stream from an asset that has already been equalized be considered in determining support, there are a number of circumstances where a court is justified in awarding support from pension income although the value has already been included in equalization. There were a number of factors that led Rosenberg J.A. to conclude that the rule against double dipping did not apply to the case before him. A significant portion of the value of the pension accrued after separation; spousal support was based on need; the wife had limited ability to earn income; she had received only a modest amount from the equalization of the property and the wife's share of the assets was tied up in the matrimonial home from which she had no ability to generate income. Based on the persisting economic hardship from the marriage or its breakdown, he ordered support out of the pension.

[39] In this case, there are a number of factors that lead me to conclude that the general rule against double dipping does not apply to the phantom stock bonus. At the time of separation the phantom stock was worth $76,000. At the time the appellant filed his financial statement on October 10, 1996, the phantom stock was worth

$135,000. Thus, a significant portion of the profit from the phantom stock arose after separation. Unlike the situation where the payor spouse retires and has to rely on a decreased income, the appellant's income increased. The respondent is not hoarding her capital at the expense of the appellant. She received a modest amount from the equalization of property and that property was almost entirely comprised of the matrimonial home. The home is providing shelter for herself and her daughter in accordance with the lifestyle to which they were accustomed during marriage. The home is not an income- producing asset. The trial judge found that the appellant was unable to contribute to her self-support in a meaningful way and she was in debt. She demonstrated need and suffered economic hardship from the marriage or its breakdown. Having regard to these factors, the trial judge did not err in considering the phantom stock bonus as part of the appellant's income.

[40] Inasmuch as the parties separated in 1992 and the options are shown as being received from 1993 onwards, these options would not have been subject to an equalization payment and no issue of double dipping arises in relation to them.

[41] I would dismiss the submission that the trial judge's order be reduced on account of double dipping.

*iii. The trial judge's characterization of the option income and increase in salary, plus bonus, as a material change in circumstances pursuant to the minutes*

[42] In this case, no issue is raised respecting the conditions under which the agreement was negotiated. No misrepresentation is alleged. Unlike in *Miglin, supra*, the respondent does not seek to set aside a provision of the agreement reflected in the Minutes. It is not suggested that enforcement of the agreement no longer reflects the original intention of the parties or that it is no longer in substantial compliance with the Act. What the respondent seeks, instead, is to enforce the provision of the Minutes that support may be revised where there has been a material change of circumstances. Thus, the court should afford the agreement great weight. In enforcing the agreement this court must interpret the meaning of the words "a material change of circumstances" as used in the Minutes of Settlement.

[43] For ease of reference, I have reproduced the relevant portion from para. 16 of the Minutes below:

> . . . child and spousal support . . . may be varied if there is a material change in circumstances.

[44] The appellant submits that the words "a material change in circumstances" in the Minutes should be given the same meaning as in *Miglin, supra*. That is, a material

change is one that was not foreseeable as part of the ordinary course of living at the time the Minutes were signed. The respondent agreed she knew the appellant had options and that they were valuable. The appellant submits that at the time the agreement was signed it was foreseeable that he would exercise the options at different times in the future and their exercise did not represent a significant departure from the range of reasonable outcomes anticipated by the parties at the time the agreement was signed. (See *Miglin*, *supra*, at para. 91.) In support of this submission the appellant relies on *Miglin*, *supra*, at para. 89, where the court stated:

> We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention. That said, we repeat that a judge is not bound by the strict *Pelech* standard to intervene only once a change is shown to be "radical". Likewise, it is unnecessary for the party seeking court-ordered support to demonstrate that the circumstances rendering enforcement of the agreement inappropriate are causally connected to the marriage or its breakdown. The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

[45] The comments of the Supreme Court in *Miglin*, *supra*, were intended to address the situation where the parties chose to release one another from all future support obligations by a one-time payment of lump sum support. Since no future adjustments were envisaged, the parties were expected to consider such foreseeable future changes in the ordinary course of living as an increase or decrease in income before arriving at the amount of the one time payment [Note 1].

[46] This is not a situation like *Miglin*, *supra*. In this case, the parties demonstrated an intention that the amount of spousal support should change if there was a material change of one party's circumstances in the sense that a party's income increased or

decreased. For example, in para. 18 of the Minutes, the parties agreed that the appellant's ". . . retirement from active employment may constitute a material change in circumstances sufficient to justify an application for variation of the quantum of spousal support . . .". In para. 19 the parties agreed that, "The Respondent may earn income or supplement her income with up to $25,000 annually without this income, in and of itself, constituting a material change in the Respondent's circumstances." The implication is that if the respondent earned more than $25,000, this could be a material change in circumstances that would lead to a reduction of the appellant's support obligations. Read in context and as a whole, the provision in the separation agreement relating to a material change in circumstances did not exclude foreseeable events such as an increase or decrease in income, but the opposite.

[47] The appellant also submits that the exercise of his options was not a material change in circumstances as that term is defined in *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, 119 D.L.R. (4th) 405 and *G. (L.) v. B. (G.)*, 1995 CanLII 65 (SCC), [1995] 3 S.C.R. 370, 127 D.L.R. (4th) 385, namely, [that] had the alleged change been known, the support provision would not likely have been different. The appellant says the respondent knew he had options and that they were valuable at the time the Minutes were signed and thus their exercise would not have resulted in a different support provision.

[48] I disagree. First, the appellant's financial statement shows the options as a contingent asset whose value is unknown and depends upon when the options are cashed. Since the appellant himself could not say what value his options had at the time he entered into the Minutes or what their value would be until they were cashed, it ill befits him now to say that the respondent should have known. Second, the parameters for the exercise of the options were not provided in the appellant's financial statement so the respondent had no way of ascertaining the value of the options in relation to the price of the underlying stock. Although the appellant's financial statement disclosed that 15,500 options had vested, it did not disclose the exercise price of the options, their expiry date or when the balance of the 30,000 options would vest, their exercise price and expiry date. Without knowing the parameters for the exercise of the options, the respondent had no way of ascertaining the likelihood that the appellant would cash in options within the next few months after the Minutes were signed. The nature of the information about the options provided by the appellant before the Minutes were signed made the respondent dependent on him for information about their value when they were exercised, and she was content with this. The treatment afforded the options does not mean that their realization would have no impact on support; it only means the parties were content to deal with that impact if and when the options were exercised.

[49] Finally, the appellant submits that the exercise of his options is not a material change in circumstances because their exercise lacks continuity. I agree that a change

in circumstances must be something that has some measure of continuity: *Lafferty v. Lafferty* (1973), 1973 CanLII 1950 (ON CA), 12 R.F.L. 345, [1973] O.J. No. 572 (QL) (C.A.). I disagree that the options, in this case, lack continuity. There is continuity in the frequency with which the options are awarded and continuity in the sense that the options may be exercised over a period of time. If options are exercised all at once it does not mean they lack continuity, only that the taking of profit, or income, has been deferred continuously from the grant and vesting of the options until their exercise. I would dismiss the appellant's argument that the exercise of the options was not a material change in circumstances.

[50] In 1997, the appellant's salary and bonus increased by nearly 20 per cent over the cumulative total for 1996 [Note 2]. This increase was also a material change in circumstances. Moreover, a material change in circumstances with respect to child support occurred when the Guidelines came into force in May of 1997. The coming into force of the Guidelines creates a right to bring pre-existing orders or agreements for child support before the court and the court does not retain a residual discretion not to vary the amount of support: see *Wright v. Zaver* (2002), 2002 CanLII 41409 (ON CA), 59 O.R. (3d) 26, 24 R.F.L. (5th) 207 (C.A.).

[51] It would be artificial to restrict the analysis respecting support to the financial effect of the particular change in circumstances that triggered the application for support without inquiring into all the factors that may impact on quantum. Thus, even if the appellant's exercise of his options was not a material change in circumstances, the appellant's increase in salary and the coming into force of the Guidelines were material changes in circumstances that entitled the trial judge to consider the profit from the options in determining the quantum of support.

*iv. The trial judge's characterization of the appellant's non-disclosure as the breach of an implicit obligation to disclose in the circumstances*

[52] The trial judge held that while the Minutes are silent as to whether the appellant had an obligation to disclose the exercise of his options and increase in salary, that obligation was implicit given the agreement that spousal and child support could be varied in the event of a material change in circumstances and the circumstances of this case.

[53] The appellant submits that the respondent had a duty to make inquiries if there had been a change in circumstances and that the onus was on her to obtain the information justifying a change in circumstances and that the trial judge erred in implying a term of disclosure.

[54] Given the circumstances of this case I am satisfied that it was open to the trial judge to imply a term that the appellant had a duty to disclose material changes in his

financial circumstances at least during the period before the respondent would first have access to the appellant's income tax returns in May 1998. The appellant's pre-settlement representations and the almost immediate significant improvement in the appellant's financial position after the minutes were signed provide the factual basis upon which to found such a duty.

[55] The trial judge did not specifically state on what legal basis he concluded the obligation to disclose a material change in circumstance was implied. One of the bases for implying a term in a contract is the presumed intention of the parties: see *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711, 40 D.L.R. (4th) 385 per Le Dain J., on behalf of the majority, at paras. 51-54. A contractual term may be implied based on the presumed intention of the parties where it is necessary to give business efficacy to the contract or where it meets the "officious bystander" test: *M.J.B. Enterprises Ltd v. Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619, 170 D.L.R. (4th) 577, at paras. 27-29. It is not clear whether these are two separate tests, but Iacobucci J. held that what is important in both formulations is a focus on the intentions of the actual parties: *M.J.B. Enterprises*, *supra*, at para. 29.

[56] It may also be worthwhile mentioning that ordinary contract law principles do not entirely govern support obligations. In *Miglin*, *supra*, the court rejected the appellant's submission that a separation agreement was binding and could only be set aside on the basis of unconscionability or on the application of some other strict contractual principle. Instead, the Supreme Court commented at para. 77:

> [C]ontract law principles are not only better suited to the commercial context but it is implicit in s. 15 of the 1985 Act that they were not intended to govern the applicability of private contractual arrangements for spousal support.

[57] Thus, the Supreme Court recognized in *Miglin*, *supra*, that the self-interest that prevails in ordinary commercial relationships does not meet the unique concerns that arise in the post-divorce context.

(a) Presumed intentions of the parties where necessary to give business efficacy

[58] In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, 2000 SCC 60, the Supreme Court implied a term based on the presumed intention of the parties that the tender calling authority had to be fair and consistent in its assessment of bids on the basis that such a term was necessary to give business efficacy to the tendering process. Speaking for the majority, Iacobucci and Major JJ. held at para. 88 that, "This implication [of a duty of fairness] has a certain degree of obviousness to it to the

extent that the parties, if questioned, would clearly agree that this obligation had been assumed."

[59] The discussion as to implied terms must therefore begin with a consideration of the intention of the parties to the extent such intention can be ascertained from the Minutes and surrounding documentation.

[60] Paragraph 3 of the Minutes provides: "The parties agree that there will be full disclosure between them in all matters affecting the welfare of the child and that they will confer as often as necessary regarding any matter requiring discussion [emphasis added]." The effect of the words "welfare of the child" is not to be measured in money only or physical comfort only; it also includes the moral and religious welfare of the child, physical well-being and ties of affection: *King v. Low*, 1985 CanLII 59 (SCC), [1985] 1 S.C.R. 87, 16 D.L.R. (4th) 576. That said, the appellant's undertaking of full disclosure of "all matters affecting the welfare of the child" encompassed monetary matters that would affect the child's level of physical comfort and an undertaking to confer about such matters.

[61] I also note that the Minutes envisaged an annual accounting with respect to the maintenance of a life insurance policy on the appellant's life and an annual adjustment in the amount of spousal and child support payable. Paragraphs 24 to 27 of the Minutes require the appellant to designate the respondent as his beneficiary under a life insurance policy so long as he is obligated to pay support and require the appellant to deliver proof on an annual basis that the policy is in good standing. The Minutes also provide in para. 14 that the amount of child and spousal support payable is to change at one-year intervals commencing on the first day of January 1998, in accordance with the Consumer Price Index for the City of Toronto. Paragraph 15 of the Minutes further provides, in part:

> The parties acknowledge that there will likely be a delay in the availability of this information from Statistics Canada and agree that once the information is obtained, any shortfall in payments that may have accumulated will be immediately paid by the Petitioner.

Thus, once the information respecting the size of the increase in the Consumer Price Index became known the Minutes envisaged a retroactive payment of support.

[62] One of the documents that forms part of the factual matrix when the Minutes were signed is the financial statement. As previously noted, that document indicated that the appellant had stock options that were a contingent asset whose value was unknown. The disclosure in the financial statement respecting the stock options is indicative that the parties did not intend the value of the options to be taken into account in respect of support at the time they entered into the agreement, but only if

and when they were exercised. (This conclusion is reinforced when contrasted with the position taken on the financial statement with respect to phantom stock. In relation to the phantom stock, the appellant's position was that they should be excluded from consideration on the basis they had already been equalized and a current valuation of the phantom stock was provided.)

[63] Read together and as a whole, the Minutes and financial statement are indicative of an intention that the appellant would disclose a change in his financial circumstances that would affect the physical comfort of the child and that adjustments would be made to spousal and child support on an annual basis beginning in 1998.

[64] The underlying rationale for implying a term of business efficacy is that it is necessary to make the transaction effective. In other words, if such a term was not implied, the very rationale for entering into the Minutes would be undermined. In the case of tendering contracts, bidders would not go to the expense and time of preparing a tender if the tender calling authority did not have an implied obligation to treat bidders fairly and equally. Here, it was obvious to the trial judge that the policy of encouraging negotiation and settlement of family law matters both under the *Divorce Act* and the Guidelines would be undermined if the court were to approve the appellant's non-disclosure of his changes of circumstances within such a short time after signing the Minutes. The lengthy protracted negotiations over four years, the appellant's representation as to his financial situation, the disclosure respecting the options combined with the very short time frame after signing the Minutes within which the options were exercised, the fact that the appellant controlled the timing of the realization of his income from the options that had vested, and the fact the respondent had no means of accessing this information, are all factors supporting the trial judge's conclusion that the appellant had an implicit obligation to disclose his change in circumstances in order to give business efficacy to the agreement.

[65] Before a court will imply a term based on the doctrine of "business efficacy" and the presumed intention of the parties, there are additional factors that must be met, as set forth by Professor G.H.L. Fridman, in his book The Law of Contract in Canada, 3rd ed. (Scarborough: Carswell, 1994) at p. 475. To be implied a term must be (a) reasonable and equitable; (b) capable of clear expression; and (c) not contradictory of an express term in the contract. I propose to address each of these considerations in turn.

(b) Reasonable and equitable

[66] After four years of litigation, the trial judge held that it would be unreasonable to require the respondent to initiate an application to vary spousal support almost immediately after the Minutes had been signed. Existing property and past earnings may usually be the best guide to future earnings but, as here, that is not always the

case. The trial judge held that the respondent was entitled to rely on the appellant's representation. The appellant's representation that he did not "anticipate any material changes" is essentially forward looking. That is because the payment of support is generally in the future. The earliest date that the Minutes envisaged an adjustment to support was in January 1998 and the earliest the respondent could have been expected to request the appellant's tax return was in May 1998. She had no independent means of ascertaining the information for herself. The implication of a term relating to disclosure in the interim was reasonable.

[67] In relation to spousal support, the trial judge held that the respondent was entitled to some compensatory support and awarding support only from the date of the application for support would be a windfall to the appellant. In other words, the trial judge was of the opinion the appellant would be unjustly enriched if the profit from the exercise of the options was excluded from consideration. In relation to child support, I note the appellant's undertaking in para. 3 of the Minutes. The implication of the term was equitable.

(c) Capable of clear expression

[68] The implication of the implied term may be expressed as follows: In the particular circumstances of this case the payor spouse has an obligation to disclose a material change in his financial circumstances at least until the appellant would have access to the respondent's tax returns in May 1998. As I have indicated, those circumstances were that the appellant represented he did not anticipate any material changes to the information on the financial statement he had sworn, the Minutes envisaged an increase in support based on a material change in circumstances and contained certain obligations of disclosure, the changes in circumstances occurred within such a short time after the Minutes had been signed that the respondent could not reasonably have been expected to ask the appellant if his circumstances had changed, and the respondent could not have known the information through independent inquiry.

(d) Not contrary to express terms in the agreement

[69] As discussed above, the implication of an implied term is not contrary to any express term in the agreement.

[70] In sum, I would hold that the implication, by the trial judge, of a term relating to disclosure met the requirements for implying a term in an agreement on ordinary contract principles.

[71] I must now deal with whether the trial judge properly exercised his discretion to award retroactive spousal and child support on the basis that it was "fit and just" in the circumstances.

*v. The trial judge's award of retroactive support*

[72] The decision to award retroactive support is one to be exercised sparingly. In relation to child support the term retroactive may be somewhat of a misnomer since the obligation to pay support arises immediately upon the birth of the child and continues regardless of whether or when the payee spouse brings an action for support: *S. (L.) v. P. (E.)* (1999), 1999 BCCA 393 (CanLII), 67 B.C.L.R. (3d) 254, 175 D.L.R. (4th) 423 (C.A.). In *S. (L.), supra,* Rowles J.A. provides a very helpful summary of the criteria for making or declining to make an award of retroactive support under the *Divorce Act*, at paras. 66 and 67, as follows:

> A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.
>
> Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

[73] The factors described by Rowles J.A. were made in the context of child support but they are in the main also applicable to spousal support. I propose to address the various factors below. Globally, these factors are aimed at discerning the fairness of a retroactive award of support. Following this, I will consider the appropriateness of the quantum of spousal and child support awarded.

(a) Need and a corresponding ability to pay

[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. In addition, there is jurisprudence to the effect that a spouse is entitled to an increase in the standard of living such as would have occurred in the normal course of cohabitation: see *MacDougall v. MacDougall* (1973), 1973 CanLII 1940 (ON SC), 11 R.F.L. 266, [1973] O.J. No. 618 (QL) (H.C.J.) per Henry J. See also *Linton v. Linton* (1990), 1990 CanLII 2597 (ON CA), 1 O.R. (3d) 1, 75 D.L.R. (4th) 637 (C.A.). At the same time the court must guard against redistributing the payor's capital in the guise of support.

[75] The trial judge found that the respondent was unable to contribute in any real way to her own support. The evidence supports the trial judge's conclusion that the respondent's earning capacity was impaired by the marriage, her parenting responsibilities and the breakdown of the marriage. Her ability to earn income has been, and continues to be, affected by her parenting responsibilities while the appellant's career and financial consequences have not been impaired. In addition, I see no error in the trial judge's decision that the respondent was entitled to support based on need. It is clear that the award is designed not only to redress the economic consequences of the breakdown of the marriage, but also to compensate the respondent for her efforts in assisting the appellant to obtain the education that has enabled him to become the successful person he is. Having regard to these considerations, the award of retroactive spousal support is not made as a guise for redistribution of capital.

[76] In relation to child support, the trial judge was aware of the need to consider the factor of redistribution of capital in relation to his award. He quoted from the decision of Bastarache J. in *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, 177 D.L.R. (4th) 1, at para. 41, agreeing with the sentiment of Abella J.A., that courts should not be too quick to find that the Guideline figures enter the realm of wealth transfers.

[77] The purpose of child support, as stated by this court in *Drygala v. Pauli* (2002), 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711, 219 D.L.R. (4th) 319, is to assist the custodial parent in meeting the day-to- day expenses of raising children. A party seeking retroactive child support must provide evidence of need during the period in question: *Drygala, supra*; *Brett v. Brett* (1999), 1999 CanLII 3711 (ON CA), 44 O.R. (3d) 61, 173 D.L.R. (4th) 684 (C.A.); *Hoar v. Hoar* (1993), 1993 CanLII 16106 (ON CA), 45 R.F.L. (3d) 105 (Ont. C.A.). The respondent's evidence at trial relating to her financial situation after the Minutes provided the evidentiary basis of need for herself and the child. The objectives of the Guidelines include the establishment of a fair standard of support for children which ensures they benefit from the financial means of their parents and ensures consistent treatment of parents

and their children who are in similar circumstances. The facts demonstrate that the appellant has ample ability to pay. I see no error in the trial judge's decision to award retroactive child support in accordance with the Guidelines once they came into effect. It is consistent with the governing principles and can be justified on the evidence.

(b) Improper conduct by the payor spouse

[78] At the time the Minutes were signed in October of 1996 the appellant swore that he did not anticipate any material changes in the information he had given. This included the statement that the value of his options was unknown. The appellant began to cash in some of his options the next day. About the time the Minutes came into force in January of 1997 the appellant had exercised some $250,000 worth of options. In the circumstances, the appellant's statement that he did not know the value of any of his options is of some concern. I have also held that in this case the appellant had an implied duty to disclose material changes of his circumstances. The appellant's failure to disclose the gains from his options in 1996 and 1997 and his increase in salary and bonus breached this duty and was therefore improper.

(c) Need to encroach on capital or incur debt

[79] The trial judge stated that the respondent's ". . . debt has increased each year. She is two years in arrears with respect to taxes owing to Revenue Canada, which is demanding payment, the property taxes on her home are in arrears, her bank line of credit is near its limit, she has borrowed money from her aged mother, her home is in need of substantial repair and she is in need of dental care". The trial judge did not find that the debts were the result of irresponsibility on the respondent's part. The debts are indicative of the respondent's need for support for both herself and her child.

(d) Excuse for delay in bringing the application

[80] Here the delay was occasioned by the fact that the respondent was not aware of the appellant's material changes in circumstances or [their] timing nor could she have independently discovered this information. The respondent had no reason to expect that the appellant would not comply with his obligation in para. 3 of the Minutes. She could not reasonably have been expected to request the appellant's 1997 income tax return until May of 1998.

(e) Notice to the payor spouse of an intention to pursue support

[81] The appellant had notice of the respondent's intention to pursue child support from the date that the request for the appellant's income tax returns was made in August 1998. Since the earliest date when the respondent could reasonably have been

expected to ask for the appellant's income tax return was May of 1998, the request in August is within the ambit of reasonableness.

[82] The issue of retroactive spousal support was not pleaded and only arose during the hearing of the application. Although no formal order amending the Notice of Application was made, the trial judge heard full argument on the issue. No prejudice would have been occasioned to the appellant if a formal amendment to the pleadings had been made. It was not until the respondent had knowledge of the appellant's income that she was in a position to request increased spousal support. While there was some delay on the part of the respondent in requesting increased spousal support once she became aware of the appellant's income, this delay occasioned no prejudice. The major portion of the delay after the Minutes were signed arose prior to the respondent becoming aware of the appellant's circumstances and was due to his non-disclosure.

(f) Unreasonable burden on the payor spouse

[83] There is no evidence to suggest that the appellant's ability to make ongoing support payments as they become due is prejudiced by the retroactive lump sum awards of support.

[84] The appellant has not shown any palpable and overriding error in the trial judge's findings nor has he shown any error in principle with respect to the exercise of the trial judge's discretion to award retroactive child and spousal support.

*vi. Quantum of support and duration of retroactive support*

[85] In relation to child support, the trial judge awarded retroactive support for all of 1997 in accordance with the Guidelines. The appellant submits that this was an error in principle as the Guidelines did not come into force until May 1, 1997. The appellant also submits that the trial judge erred in principle in awarding the Table amount in the Guidelines while maintaining payment by the appellant of the child's private school fees under the Minutes.

[86] It may be helpful to review the proper approach to be used when a court makes an award of child support under the Guidelines in respect of a parent earning more than $150,000 a year. That approach is ably described by Laskin J.A. in *R. v. R.* (2002), 2002 CanLII 41875 (ON CA), 58 O.R. (3d) 656, 211 D.L.R. (3d) 403 (C.A.), at paras. 38 and 39 as follows:

> Section 26.1(2) of the *Divorce Act* affirms that "[t]he guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children

of the marriage in accordance with their relative abilities to contribute to the performance of that obligation."

Against that legislative regime, the Supreme Court's decision in *Francis v. Baker* provides further guidance in determining how much high income parents should pay in child support. *Francis v. Baker* established the following general principles:

> -- Trial judges have discretion either to increase or decrease the table amount if they consider that amount inappropriate and instead to order an amount that they consider appropriate.
>
> -- The table amount, however, is presumed to be the appropriate amount. A parent seeking an order different from the table amount bears the onus of rebutting the presumption in s. 3 of the Guidelines and must do so by "clear and compelling evidence". The sheer size of the table amount is not by itself an "articulable reason" for departing from it.
>
> -- Although the considerations relevant to an appropriate child support order will differ from case to case, the courts must at least have regard to the objectives of the *Divorce Act* and the Guidelines, and to the factors expressly listed in s. 4(b)(ii) of the Guidelines. The legislative objectives are intended to ensure "that a divorce will affect the children as little as possible" and the factors in s. 4(b)(ii) further that intent by emphasizing "the centrality of the actual situation of the children".
>
> -- Child support should meet a child's reasonable needs. For children of wealthy parents, reasonable needs include reasonable discretionary expenses. A paying parent who claims the table amount is inappropriate must, therefore, demonstrate that budgeted child expenses are so high that they "exceed the generous ambit within which reasonable disagreement is possible", in short that the budgeted expenses are unreasonable. Table amounts that so far exceed a child's reasonable needs that they become a transfer of wealth between the parents or spousal support under the guise of child support will be inappropriate.

[87] Although the trial judge was aware that the Guidelines did not come into force until May of 1997, he chose to award support in accordance with the Guidelines for all of 1997. While the trial judge may have been entitled to exercise his discretion to award retroactive support in accordance with the Guidelines after they came into force, in my opinion he erred in principle in extending the Guideline amounts to the

time period prior to the enactment of the legislation. This is because prior to the Guidelines a narrower view of children's needs existed. The payee spouse generally prepared and introduced into evidence a proposed budget for the child's needs. The court considered and approved the various budget items then awarded support based on the formula in *Paras v. Paras*, 1970 CanLII 370 (ON CA), [1971] 1 O.R. 130, 14 D.L.R. (3d) 546 (C.A.). The practical effect of this approach was to place an onus on the payee spouse to justify the budgeted amount for the child's needs.

[88] Under the Guidelines, children have a presumptive right to an amount of support based on the payor spouse's income. Child-care budgets are unnecessary in many cases and none was provided here. Beginning with *Francis v. Baker*, *supra*, a more expansive approach to what was appropriate for the children of high income earners was adopted. That approach was, in part, based on a recognition that a certain level of discretionary spending for children of wealthy parents was not inappropriate. This approach was followed in such cases as *Simon v. Simon* (1999), 1999 CanLII 3818 (ON CA), 46 O.R. (3d) 349, 182 D.L.R. (4th) 670 (C.A.) and in *R. v. R.*, *supra*. Prior to the coming into force of the Guidelines, the approach to awarding child support did not readily lend itself to recognition of large discretionary amounts of spending for a child. Having regard to the differences in the approach to awarding child support prior to May of 1997, it was an error in principle for the trial judge to award the Table amount prior to the coming into force of the Guidelines in May of 1997. I agree with the appellant that the trial judge should not have awarded the Guideline amount prior to May of 1997. Instead of the $104,613 he awarded for 1997, I would order that the appellant pay support based on the Table amount in the Guidelines from the beginning of May 1997 or 8/12 of $104,613, which is $69,740 rounded off. Prior to that I would not order any retroactive child support be paid as no budget for the child was filed for the period from January 1 to April 30, 1997. I am of also of the opinion that this amount met the need of the child in that the amount is fairly consistent with the $70,102.80 the trial judge ordered the appellant to pay for 2001. It is also consistent with the award made in *R. v. R.*, *supra*, on a per-child basis.

[89] I must now deal with the appellant's submission that the trial judge erred in obligating him to pay the Table amount in addition to the payments for the child's private school fees in the Minutes. In effect the appellant's submission is that payment of the Table amount should be reduced by the amount of the private school fees he is paying.

[90] Under s. 7 of the Guidelines, the court has discretion to order that an additional amount of child support be paid to cover all or a portion of special or extraordinary expenses for a child. Extraordinary expenses include extraordinary expenses for primary and secondary school education or for any education programs that meet the child's particular needs. The guiding principle in applying s. 7 is the sharing of the

expense by the parties in proportion to their respective incomes after deducting from the expense the contribution, if any, from the child. The appellant submits that the trial judge failed to consider this principle in ordering that he pay the private school fees under the Minutes in addition to the Table amounts.

[91] I appreciate that when the trial judge ordered the appellant to pay the Table amount under the Guidelines, consideration had to be given to his obligation to pay private school expenses under the Minutes. The trial judge expressly did so. He held that the appellant had not established on clear and compelling evidence that deviation from the Guidelines was in the child's best interest. The appellant has not shown that the trial judge erred in principle or that the amount of child support is inappropriate in the sense that it exceeds the generous ambit within which reasonable disagreement is possible as required in *Francis v. Baker*, *supra*, at para. 49. I would not give effect to the appellant's submission that the amount of child support should be reduced by the payment of the private school fees.

[92] Having regard to the trial judge's reasons respecting spousal support I see no error in principle, nor has the appellant shown that the award is clearly wrong.

## V. DISPOSITION

[93] To summarize, in relation to the issue of misapprehension of the evidence, I would hold that the trial judge's misapprehensions of the evidence did not have a sufficiently decisive effect on his characterization of the effect of the facts so as to justify appellate intervention. I would hold that the trial judge did not err in (1) characterizing the appellant's exercise of options as income; (2) not excluding the profit from the gain on the phantom stock from income; (3) characterizing the option income and appellant's increase in salary plus bonus as material changes pursuant to the Minutes; (4) characterizing the appellant's non-disclosure of the gains from his options and increase in salary as the breach of an implicit obligation in the circumstances; (5) exercising his discretion to award retroactive spousal and child support; and (6) the quantum of support he awarded, except with respect to the award of child support prior to the coming into force of the Guidelines on May 1, 1997. For the reasons I have given, I would allow the appeal in respect of the award of child support prior to May 1, 1997, and instead of the amount of $104,613 awarded I would order that the sum of $69,740 be paid. In all other respects I would dismiss the appeal.

## VI. COSTS

[94] Having regard to the fact that the respondent has been largely successful on this appeal, I would order that costs be paid to the respondent on a partial indemnity basis fixed in the amount of $35,000 all inclusive.

Appeal allowed in part.

Notes

Note 1: Because the agreement had not been incorporated into a support order, the Supreme Court held this was an initial application for support under s. 15 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and rejected the importation of the "material change" test from s. 17, which deals with a variation of support. Instead, the Supreme Court held that, generally, a two-stage process applies when a party who has entered into a separation agreement seeks support under the *Divorce Act*. The first stage is the time of formation of the agreement and the second is the time of the application. In the first stage, the court should review the context and circumstances in which the agreement was negotiated and consider whether there is any reason to discount it, such as whether one party took advantage of the other's vulnerability. Where the court is satisfied that the conditions under which the agreement was negotiated were satisfactory, the court should consider whether the substance of the agreement is in substantial compliance with the overall objectives of the *Divorce Act*. If so, the court should afford the agreement great weight. In the second stage, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

Note 2: If the appellant's deferred bonus from 1993 which was included in his 1996 income is excluded, the increase was approximately 28 per cent.