NOVA SCOTIA COURT OF APPEAL
Citation: *Whalen v. Whalen*, 2018 NSCA 37

Date: 20180502
Docket: CA 464185/CA 460889
Registry: Halifax

Between:

Susan Whalen

Appellant/Respondent

v.

Kenneth Whalen

Respondent/Appellant

Judges:	Farrar, Bourgeois, Van den Eynden, JJ.A.
Appeal Heard:	March 27, 2018, in Halifax, Nova Scotia
Held:	Appeals allowed without costs, per reasons for judgment of Farrar, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring
Counsel:	Jennifer Reid for Susan Whalen Kenneth Whalen, self-represented

Reasons for judgment:

[1] These two appeals arise from very unusual circumstances.

[2] Mr. Whalen filed a Variation Application on April 12, 2016, requesting a reduction of his spousal support payments, a termination date of his support obligations and a reduction in the amount of life insurance coverage he had to carry with Ms. Whalen as the beneficiary. He claimed a material change in circumstances resulting from health issues and a reduction in his income.

[3] On June 27, 2016, Ms. Whalen filed a Response to the Variation Application seeking to increase spousal maintenance.

[4] The parties had a 24 year relationship. They began cohabitating in 1976 and were married on February 27, 1981. They separated in May 2000. They have three children.

[5] In November 2001, the parties signed a comprehensive Separation Agreement. At the time of preparing the Separation Agreement, the parties were both represented by counsel.

[6] In the spring of 2007, they signed a second agreement. The agreement is quite short, and I will cite the applicable provisions:

> This is a revision to the Separation Agreement signed and agreed to by both the Wife and Husband in the matter of spousal support paid to the Wife and in this matter supersedes all previous agreements.
>
> **PERIODIC SPOUSAL SUPPORT**
>
> 1. The husband shall pay to the wife, as an allowance for her maintenance and support, periodic payments of $650.00 every two weeks. Both parties agree to file income tax returns consistent with the actual spousal support paid in each calendar year such that the Husband may fully deduct all payments and all such payments shall be taxable to the Wife.
>
> [. . .]
>
> **EFFECTIVE DATE**
>
> This Agreement shall be deemed to be effective upon the latest date of execution by the respective parties.

[7] Ms. Whalen executed the document on May 31, 2007. Mr. Whalen executed it on June 18, 2007.

[8] The variation application was heard before Justice Elizabeth Jollimore on January 23, 2017. Following the completion of the evidence, the matter was adjourned for final oral submissions by the parties. The original date for oral submissions had to be rescheduled. Eventually the date of February 17, 2017 was set to hear argument.

[9] However, on February 17, the judge entered the courtroom and gave a decision without hearing final oral submissions from the parties.

[10] She dismissed both Mr. Whalen's and Ms. Whalen's applications. An order to that effect was prepared by her, signed and issued on that day.

[11] After the judge gave her decision, counsel for Mr. Whalen brought to her attention that it was her understanding that the parties were there to do submissions on the evidence heard on January 23, 2017, and not to receive a decision.

[12] The judge was obviously concerned about the failure to allow the parties to make final submissions; she brought it to the attention of Associate Chief Justice Lawrence O'Neil. This prompted ACJ O'Neil to arrange a conference call between counsel for the parties on February 24, 2017. In that telephone conference call, ACJ O'Neil advised counsel that there may have been a procedural misstep and, although not exactly in these words, hoped that the parties could find a way to resolve it.

[13] On February 28, 2017, Mr. Whalen filed a Notice of Appeal to this Court.

[14] On March 2, 2017, Mr. Whalen's solicitor wrote to ACJ O'Neil as follows:

> This is further to counsels' teleconference with Your Lordship on February 24, 2017. Counsel have discussed possible solutions and have reached agreement. **Counsel are respectfully requesting permission from this Honourable Court and Your Lordship to re-run the Trial before another Justice. Counsel have agreed that no new material will be filed but the witnesses will be present and cross examined.** Counsel will then make submissions on the materials filed and the evidence presented by cross examination.
>
> Given the time required for the initial proceeding, I believe the matter will need to be scheduled for a day and a half to allow for cross examination and submissions.
>
> [Emphasis added]

[15] On March 10, 2017, Mr. Whalen filed a Notice of Discontinuance of his appeal.

[16] On April 4 and 5, 2017, the application was re-heard by Justice Beryl MacDonald. It is important to emphasize these were not new applications but the rehearing of the same applications which had already been decided by Justice Jollimore.

[17] Despite the original agreement that no new evidence would be filed, both parties introduced additional evidence with the consent of the other.

[18] It is apparent from the record that Justice MacDonald was not aware that this was a retrial. Upon being advised of that at the commencement of the hearing, she expressed some surprise. Justice MacDonald was also unaware that an order had been signed until she saw it in the file on April 10, 2017, the day she gave her decision.

[19] Justice MacDonald allowed Mr. Whalen's application and on April 20, 2017 issued an order setting out the following:

- The February 17, 2017 order of Justice Jollimore was vacated.
- Commencing January 1, 2016, Mr. Whalen's support payments would be reduced to $1,000 per month.
- Mr. Whalen's obligation to pay spousal support would terminate when Ms. Whalen turned 66 years of age on September 19, 2021.
- Mr. Whalen's requirement to maintain life insurance for the benefit of Ms. Whalen was reduced from $300,000 to $175,000.
- Ms. Whalen's application for an increase in spousal support and a retroactive recalculation of spousal support was dismissed.

[20] On July 12, 2017, Ms. Whalen filed a Notice of Appeal from the order of Justice MacDonald. To round out this procedural quagmire, Mr. Whalen then made a motion to withdraw the Notice of Discontinuance of his appeal: his motion was granted by Justice Cindy Bourgeois on July 27, 2017.

[21] This leaves us with two appeals: Ms. Whalen's appeal of Justice MacDonald's order and Mr. Whalen's appeal of Justice Jollimore's order.

[22] Ms. Whalen's central argument on her appeal is the court was *functus officio* to rehear the matter and Justice Jollimore's order should stand.

[23] Mr. Whalen is appealing Justice Jollimore's decision, primarily, based on a lack of procedural fairness.

[24] Although the parties raise other grounds of appeal, the two issues identified are dispositive of both appeals.

Issues

[25] I would restate the issues and address them in the following order:

1. Was the Supreme Court, Family Division, at the time of the hearing on April 4 and 5, 2017, *functus officio* as a result of a decision having been rendered and a final order having been issued by Justice Jollimore on February 17, 2017?
2. Did Justice Jollimore err in failing to give the parties an opportunity to make final submissions prior to rendering her decision?

Standard of Review

[26] Whether the Supreme Court, Family Division, was *functus officio* did not arise in the proceedings below. It arises for the first time on this appeal and, as such, does not give rise to a standard of review analysis.

[27] Similarly, the second issue is one of procedural fairness. As such, a standard of review analysis is not triggered. It falls on us to decide whether the procedure was fair to Mr. Whalen (*Homburg Canada Inc. v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 24, ¶66).

Analysis

Issue #1 Was the Supreme Court, Family Division, at the time of the hearing on April 4 and 5, 2017, *functus officio* as a result of a decision having been rendered and a final order having been issued by Justice Jollimore on February 17, 2017?

[28] *Functus officio* means that an adjudicator—including an arbitrator, administrative tribunal or court—cannot alter its own award except to correct

clerical mistakes or errors arising from an accidental slip or omission. The doctrine was considered by the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, an appeal from the Court of Appeal of Nova Scotia. The Supreme Court of Canada discussed the origin and the purpose of the doctrine:

> [77] A closer examination of the doctrine is helpful. *The Oxford Companion to Law* (1980), at p. 508, provides the following definition:
>
> > *Functus officio* (having performed his function). Used of an agent who has performed his task and exhausted his authority and of an arbitrator or judge to whom further resort is incompetent, his function being exhausted.
>
> [78] But how can we know when a judge's function is exhausted? Sopinka J., writing for the majority in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 860, described the purpose and origin of the doctrine in the following words:
>
> > The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division.
>
> [79] **It is clear that the principle of functus officio exists to allow finality of judgments from courts which are subject to appeal** (see also *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23). **This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal.** ...
>
> [Emphasis added]

[29] The doctrine is premised on the principle of finality:

> [65] …A final judgment or order cannot be set aside or varied by the judge who made it, or by a judge of the same court, after it has been drawn up and entered. (*Iverson v. Westfair Foods*, 1998 ABCA 337, ¶65).

[30] Simply put, except by way of appeal, no court or judge has power to rehear, review or alter an order once it has been issued. The headnote to *Re V.G.M. Hldg. Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), cited with approval in *Chandler v. Alberta Assn. of Architects*, [1989] 2 S.C.R. 848 at ¶12 explains:

> Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, **and neither he nor any other judge of equal**

> **jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.**
>
> [Emphasis added]

[31] This Court has reiterated that once a court issues its order, the parties can only get the matter reconsidered through an appeal to a higher court (*Rohrer v. Midland Doherty Ltd.*, [1985] N.S.J. No. 121 (C.A.) at ¶5).

[32] Applying these principles, although unfortunate for the parties, the court below became *functus officio* once the order of Justice Jollimore was entered on February 17, 2017. It was not open for it to rehear or retry the matter to correct a perceived procedural error. The appropriate remedy was an appeal to this Court.

[33] It is also important to highlight that there exists a general, well-worn legal principle that parties cannot, by consent, give a court jurisdiction which it does not possess at law. In *Township of Cornwall v. Ottawa and New York Railway. Co.* (1916), 52 S.C.R. 466 the Court held at p. 496:

> **Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot**. Where want of jurisdiction touches the subject matter of the controversy or **where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative.**
>
> [Emphasis added]

[34] Chief Justice Fitzpatrick reiterated this point in his dissent, writing at pp. 468-69:

> **It is perfectly clear that no consent of the parties can give to the court a jurisdiction which it does not possess**. In the case of *In re Aylmer*, at p. 262, Lord Esher M.R. said:
>
> —
>
> If on the other hand it is an attempt to give to the court a similar power resting on the consent of the parties, the well known rule applies that the consent of parties cannot give the court a jurisdiction which it does not otherwise possess.
>
> In the American and English Encyc. of Law and Practice, vol. 4, under the title "Appeal," it is said in a note on p. 44: —

> When an appeal should have been taken to an intermediate appellate court, consent cannot give the Supreme Court jurisdiction of it.
>
> **The statute having ordained the means by which an appeal may be brought against an assessment and prescribed the courts which shall have power to entertain such appeal, the parties cannot at their own pleasure agree on a different procedure. This is no mere question of formality or abbreviation of procedure**.

[Emphasis added]

[35] A year after *Ottawa and New York Railroad*, Chief Justice Fitzpatrick in *Giroux v. The King* (1917), 56 S.C.R. 63 stated at p. 67:

> Consent cannot confer jurisdiction but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject matter.

[36] In *R. v. Dudley*, 2009 SCC 58, the majority led by Justice Fish affirmed the principle from *Giroux* that jurisdiction could not be conferred by consent:

> 34 **It is true, as a matter of principle, that jurisdiction cannot be conferred by consent.** But this principle is subject to statutory attenuation, and Parliament has since 1997 expressly provided in s. 786(2) that the prosecutor and the defendant, by mutual consent, can renounce the six-month limitation period for summary convictions. From the defendant's point of view, this amounts to what may properly be characterized as a waiver of the benefit of prescription.
>
> 35 And it is not without interest that the Court, nearly a century ago, recognized in R. v. Giroux (1917), 56 S.C.R. 63 (S.C.C.), that "[c]onsent cannot confer jurisdiction but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject matter" (p. 67). In the context that concerns us here, the benefit of an expired limitation period may be regarded, at least since 1997, as a privilege that can be waived by the accused.

[Emphasis added]

[37] Moreover, in *Rogers Sugar Ltd. v. U.F.C.W., Local 832*, [1999] M.J. No. 342 (Man. Q.B.) Steel, J. explicitly linked consenting to jurisdiction with the concept of *functus officio*:

> 29 The doctrine of *functus officio* as it applies to judicial and quasi judicial decisions provides that while an arbitrator may retain jurisdiction to clarify his ruling, after the final decision has been rendered that ruling may not be revisited, altered or changed in any material way. **If an arbitrator purports to do so, then he will have acted in excess of his jurisdiction. The doctrine applies even if**

> **the parties consent since consent cannot clothe the arbitrator with jurisdiction he does not have. The principle is based on the policy ground which favours finality of proceedings.**
>
> [Emphasis added]

[38] In conclusion on this point, upon the issuance of the order the Supreme Court, Family Division became *functus officio*. It was not open to the parties to consent to have the court rehear the matter. As a result, I would allow this ground of appeal and set aside the decision and order of Justice MacDonald.

Issue 2 Did Justice Jollimore err in failing to give the parties an opportunity to make final submissions prior to rendering her decision?

[39] During the February 24, 2017 telephone conference with both counsel, ACJ O'Neil was very careful in choosing his words but he acknowledged that Justice Jollimore approached him following the February 17, 2017 decision. ACJ O'Neil advised that: "And what I can tell you is the presiding judge advised me that there may have been a procedural misstep at the end of the trial last Friday …". And although he did not comment on the impact of the failure to hear final submissions or the seriousness of it, he did comment that "I just know that the judge was concerned …". He also made the following comment:

> Okay. And my interest is ensuring that people have access to justice as a phraseology at minimal cost and inconvenience, and if there are momentary lapses that anybody feels may have impacted on a proceeding in a serious way, then the Court has to be concerned.

[40] I share ACJ O'Neil's concerns about the manner in which this application was conducted.

[41] Donald J.M. Brown, Q.C. in his text, *Civil Appeals* (Toronto: Thomson Reuters, 2017), vol. 1 (loose-leaf, updated 2018, Release 1) ch. 1 comments on the issues of fairness in the trial process:

> *Non-Compliance with Basic Participatory Requirements*
>
> 1:1211 *Per Se Fairness Errors*
>
> Where the basic requirements of the adjudicative process have not been complied with, appellate intervention will be necessary. For example, where there has been a straightforward error such as attributing the burden of proof to

> the wrong party, excluding evidence that is both relevant and material, refusing to permit cross-examination, **deciding a matter without allowing a party to make submissions**, or undertaking an evidence-gathering exercise *ex parte*, the usual result will be for the appellate court to set aside the decision and require the adjudicative process to be started anew.
>
> [Emphasis added]

[42] Mr. Brown continues (vol. 2) in his text concluding that an error in the process of a trial or in the decision-making process will almost always be characterized as one resulting in a substantial wrong or miscarriage of justice:

> 6:2120 *The Requirement of a Substantial Wrong or Miscarriage of Justice.*
>
> …However, unless the error is harmless or the result inevitable, an error in the *process* of the trial or in decision-making will almost always be characterized as one resulting in a substantial wrong or miscarriage of justice.

[43] Ms. Whalen's counsel in oral argument and in her factum, suggests that the failure to hear final submissions from the parties did not result in any miscarriage of justice. She points to the fact that both parties had filed pre-hearing submissions and, therefore, the parties had an opportunity to be heard.

[44] With respect, I disagree, particularly, as will be seen in the circumstances of this case. The importance of final submissions can best be illustrated by a review of this record. At the start of the hearing, the judge raised an issue with respect to submissions in Ms. Whalen's brief. She said the following:

> Looking at the brief that Ms. Whalen had filed, I had some question about paragraphs 37 and 39. Paragraph 37 says that:
>
> > "Ms. Whalen will not contest the arrears of 2016, that Mr. Whalen's spousal support be set at thirty-seven hundred, twenty-two dollars, thirty-one cents ($3,722.31)."
> >
> > And that, at paragraph 39, she then says:
> >
> > "She will not contest the 2016 arrears that the Applicant is seeking to set at nil."
> >
> > So, I wasn't sure what her position was with regard to 2016 arrears.

[45] A discussion ensued between the Court and Ms. Whalen's counsel which resulted in Ms. Whalen and her counsel leaving the courtroom to do a calculation. They re-entered the courtroom and indicated that they were now seeking arrears in

the amount of $8,450. The matter again arose during the cross-examination of Ms. Whalen where Ms. Hudson, counsel for Mr. Whalen, and the court had the following exchange:

> **MS. HUDSON**: And I guess, My Lady, I just want to be really clear because when I read My Friend's brief, I had no idea that the arrears – I mean, I went in this morning thinking the arrears were completely forgiven until Your Ladyship raised the issue.
>
> **THE COURT**: **No, the brief is – the brief is not clear.** It is quite clear from the brief – and I made the point with Mr. Chongatera when he walked in that he's got two paragraphs there that don't make sense. **One paragraph says one thing, the other paragraph says something that's completely the opposite.** Paragraphs 37 and 39 are inconsistent.
>
> [Emphasis added]

[46] With respect to the judge, there was no ambiguity or confusion with respect to the brief filed on behalf of Ms. Whalen. The applicable provisions referred to by the judge are as follows:

> 37. That said, Ms. Whalen will not contest the arrears of 2016. She agrees that for 2016 the Applicant's spousal support be set at $3,722.31.
>
> [. . .]
>
> 39. Ms. Whalen will accept $100,000 of the insurance. Ms. Whalen will also not contest the 2016 arrears that the Applicant is seeking to set at nil.

[47] Mr. Whalen had only paid spousal support of $3,722.31 for all of 2016. That was not in issue. It was acknowledged in Mr. Whalen's brief that he had underpaid for 2016. Mr. Whalen's pre-hearing brief makes very clear the relief he was seeking under the heading "Retroactive Spousal Support". It says the following:

> [67] Therefore, Mr. Whalen is respectfully seeking that his spousal support be retroactively varied to the amount he has paid for 2016. **He is seeking that for 2016 his spousal support obligation be set at $3,722.31** for the year. This would leave Mr. Whalen with no arrears owing.
>
> [68] Further, Mr. Whalen simply does not have the financial ability to pay the significant arrears that have accumulated since January 2016. It is respectfully submitted that given his financial circumstances these are not true arrears. The $650 bi-weekly or $1,408.33 per month is representative of a much higher income

> than what Mr. Whalen earned in 2016. **Therefore, Mr. Whalen is respectfully requesting that his arrears be forgiven and fixed at nil.**
>
> [Emphasis added]

[48] In summary, Mr. Whalen was asking that spousal support for 2016 be set at $3,722.31 and that his arrears for 2016 be fixed at nil.

[49] The wording in Ms. Whalen's brief actually tracks the wording of the relief requested by Mr. Whalen. It is exactly what was requested by Mr. Whalen, and appears to have been agreed by Ms. Whalen in her brief. The two clauses are not contradictory at all but complement each other.

[50] The lack of ability to present oral argument on this point deprived the parties of any opportunity to clarify their position with respect to the agreement that had been reached. As Ms. Hudson, counsel for Mr. Whalen, stated during the course of the hearing, she thought the issues of retroactive spousal support and arrears had been agreed and that the only issues on the table were the amount and duration of spousal support and the potential reduction of the insurance policy.

[51] Contrary to Ms. Whalen's counsel's argument on this appeal, the pre-hearing memoranda do not give me any confidence that final submissions were not necessary. It is readily apparent that the judge was confused on an issue where there was no confusion and the parties were not given an opportunity to address it.

[52] One of the grounds of appeal raised by Mr. Whalen is the failure by the judge to hold the parties to the agreement which they had reached. While it is tempting to accede to this argument, this would be unfair to Ms. Whalan as it would deprive her of the opportunity to address whether she is bound by what is contained in the pre-hearing brief.

[53] Spousal support and arrears were not the only issues that Mr. Whalen thought he had agreement on. As can be seen by ¶ 39 of Ms. Whalen's brief which I have cited above, she agreed to accept $100,000 as the amount of the life insurance policy. There is no ambiguity in the wording of the brief.

[54] If the terms in the brief were not enough, at the beginning of the hearing, Ms. Hudson, on behalf of Mr. Whalen, raised the issue of the reduction in the life insurance policy. She said:

> **MS. HUDSON**: Yes, My Lady. Just as a preliminary matter, I do believe the parties have reached agreement that Mr. Whalen's life insurance that he maintains for Ms. Whalen can be dropped to a hundred thousand, which leaves the question on the life insurance piece whether or not it would terminate if, of course, a termination date is set.

[55] Ms. Whalen's counsel did not raise any objection to Ms. Hudson's statement that there had been an agreement the life insurance policy could be reduced to $100,000. Again, the issue arose in Ms. Whalen's cross-examination that she had not, in fact, agreed that the insurance could be reduced to $100,000. There was a lengthy discussion between the parties on that point. Ms. Whalen's counsel indicated there were conditions associated with the reduction which he had failed to bring to the attention of the court when the agreement was placed on the record.

[56] This matter was not resolved on the record, and it is unclear what conditions Ms. Whalen's counsel was suggesting were attached to the reduction of the life insurance.

[57] This brings me to a very disturbing aspect of this case.

[58] Above, in ¶46, I cited paras. 37 and 39 of Ms. Whalen's pre-hearing brief which was before Justice Jollimore. The Appeal Book contains what purports to be the pre-hearing brief provided to the judge. It is identical in all material respects except for these two paragraphs. In the Appeal Book paras. 37 and 39 are changed in a material way as follows:

> 37. Ms. Whalen will contest the arrears of 2016. She does not agree for the 2016 applicant's spousal support to be set at nil.
>
> [. . .]
>
> 39. Ms. Whalen will accept $100,000 of the insurance on the condition that Mr. Whalen continues to pay support after she turns 65 years.

[59] Those conditions on the spousal support, arrears of spousal support, and insurance coverage were never before Justice Jollimore. They are a complete reversal from the original pre-hearing brief. Mr. Whalen and counsel for Ms. Whalen on appeal (who was not counsel at the application) were asked how this document found its way into the Appeal Book when it was never before the judge. Counsel for Ms. Whalen explained it was the pre-hearing brief provided to her by her client's former counsel. That may explain how it came to be in the Appeal Book. It does not explain how the document came to be altered between the time

of the application and this appeal. By saying this, I am not suggesting that Ms. Whalen's counsel on the appeal altered the document.

[60] Whether there was agreement on the issues, as set out in the original brief, is for another day.

[61] This illustrates how final submissions could have focused the court on the issues between the parties and addressed these matters that arose after the pre-hearing briefs were filed and before the decision was rendered. Perhaps most importantly, the judge's decision focuses almost entirely on the lack of evidence of the change in Mr. Whalen's income in 2015 or 2016 from his income at the time the amendments to the agreement were made in 2007. It was on this basis, and on this basis alone, that she dismissed the application. She did not address the other aspects of Mr. Whalen's application, that is, the reduction in the life insurance policy, the termination date for spousal support payments, or the arrears of spousal support.

[62] Ms. Whalen's counsel suggests that because the judge did not find a change in circumstances in Mr. Whalen's income, it was not necessary for her to address these issues. Once again, I must respectfully disagree. First of all, the judge did not say that was why she wasn't addressing those issues. The operative part of her decision says the following:

> I conclude that I have no sufficient evidence to allow me to vary spousal support or arrears based on the evidence that's before me, so I'm dismissing both applications.

[63] A determination of a change in circumstances was not required to address the issue of whether the parties had entered into an agreement on the issues of insurance, spousal support for 2016 and arrears of spousal support. Nothing is said about the life insurance policy, the calculation of the arrears owing, if any, or the reduction of the life insurance policy or termination of benefits.

[64] Leaving aside the issue of the agreements of counsel, it is not too much of a stretch to argue that since the 2007 amendment Mr. Whalen had been paying spousal support for almost 10 years and that, in and of itself, could represent a material change in circumstances which would justify a reduction in the life insurance policy. It is certainly arguable that it would not be necessary to have a policy in the amount of $300,000 as security for the future payment of spousal support given the passage of time.

[65] I say this not to suggest that the argument would win the day but rather to illustrate an argument that could have been made and considered by the judge to determine whether the insurance policy should be reduced.

[66] I would also point out the fact Ms. Whalen or her counsel was, at least at one point, prepared to agree to a reduction in the life insurance policy to $100,000 with or without conditions, certainly suggests that it was not necessary to remain at $300,000 to provide her with security for payment of spousal support.

[67] This was by no means a straightforward trial. The positions of the parties changed from the time of filing their pre-hearing briefs. Indeed, the positions changed from the beginning of the application to the evidentiary portion of the proceedings. There were live issues about whether agreements had been reached.

[68] It was imperative that the parties be given an opportunity to present their positions and their theories of the case to the judge prior to a decision being rendered. Failure to do so was a miscarriage of justice.

[69] It is not necessary for Mr. Whalen to show that the result would have been different had there been a chance for final submissions; but rather, it is the process of the trial and the failure to allow the parties to make their submissions that gives rise to the miscarriage of justice.

[70] For these reasons, I would allow this ground of appeal.

Remedy

[71] This is a very unfortunate circumstance which was created through no fault of either of the parties. I am left with no other alternative but to order a new trial before a judge of the Family Division other than O'Neil, A.C.J.; Jollimore, J. or MacDonald, J.

Costs

[72] Neither side sought costs, therefore, I would not award any.

Conclusion

[73] I would allow Ms. Whalen's appeal of Justice MacDonald's decision; I would also allow Mr. Whalen's appeal of Justice Jollimore's decision.

Farrar, J.A.

Concurred in:

Bourgeois, J.A.
Van den Eynden, J.A.