

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Hillier v. Hillier*, 2023 NSSC 316

**Date:** 20231004

**Docket:** SBWD-099475

**Registry:** Bridgewater

**Between:**

Tresina Ellen Hillier

Applicant

v.

David Wayne Hillier

Respondent

**Judge:** The Honourable Justice Aleta Cromwell

**Heard:** May 29 and June 2, 2023, in Bridgewater, Nova Scotia

**Written Release:** October 4, 2023

**Counsel:** Kate Naugler for the Applicant  
Rubin Dexter for the Respondent

**By the Court:**

**Introduction**

[1] After providing notice to David Wayne Hillier on May 4, 2022, of her intention to retire, Tresina Ellen Hillier retired on December 31, 2022. Four months prior to her 58<sup>th</sup> birthday.

[2] Ms. Hillier seeks to terminate spousal support effective December 31, 2022. In the alternative, she seeks to vary the spousal support provisions set out in the Consent Corollary Relief Order (“Consent CRO”) to reduce her spousal support obligations and add a termination date.

[3] Mr. Hillier opposes the termination of spousal support as well as any reduction of spousal support payable by Ms. Hillier.

**Issues**

[4] In this decision, I will address the following issues:

- Has there been a material change in circumstances?
- If so, what variation is appropriate considering the change in circumstances?

**Background and Procedural History**

[5] The parties were married for over thirty years. They separated in October 2015 and were divorced by Divorce Order granted December 14, 2016. They have two adult children who, at the time of the separation were independent.

[6] Ms. Hillier is now 58 years of age. Mr. Hillier is now 60 years of age.

[7] For over ten years, Ms. Hillier was working as a Business Manager at an RV dealership. Her income was entirely commission based and varied from year to year depending on sales.

[8] During the marriage Mr. Hillier worked full-time as an auto body repair technician, working primarily as an auto body painter. Since May 2010, Mr. Hillier

has been unable to work because of a serious heart condition. Initially, he received short-term disability benefits for a period of 24 months, and a small severance package from his former employer.

[9] Since September 2010, Mr. Hillier has been in receipt of a Canada Pension Plan disability pension (“CPP Disability Pension”).

[10] Ms. Hillier has been paying spousal support to Mr. Hillier since September 15, 2016, initially in accordance with an Interim Consent Order granted October 28, 2016.<sup>1</sup>

[11] The Consent CRO issued February 28, 2017, followed a Settlement Conference held on December 6 & 14, 2016. The Consent CRO provides, in part, as follows:

**“Spousal Support**

1 Tresina Ellen Hillier shall direct to David Wayne Hillier, a spousal support payment in the amount of Four Thousand Dollars (\$4,000.00) per month, effective January 1, 2017, and continuing on each and every 1<sup>st</sup> day of the month thereafter until varied by an order of a court of competent jurisdiction. The parties are currently registered through the Maintenance Enforcement Program for the Province of Nova Scotia and shall continue to remain registered with the program.

**Retroactive Spousal Support**

2 Given the uncertainty of Tresina Hillier’s income from year to year, the parties shall, until varied by a court of competent jurisdiction, on or before the last day of June each year, conduct a retroactive review and recalculation of the quantum of spousal support payable using the parties Line 150 income, being their actual income, for the reviewed year and insuring that maintenance is in keeping with the Nova Scotia Spousal Support Advisory Guidelines “middle range”. It is acknowledged that the spousal support payment payable for the year 2017 as calculated on Tresina Hillier’s income for the year 2016 is more than the “middle range”. The review that is being conducted in June of any given year is for the previous year and that any funds

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<sup>1</sup> The Interim Consent Order granted by Justice Mona Lynch on October 28, 2016, provides the income in 2015 for Ms. Hillier as \$155,418.86 and Mr. Hillier as \$14,738.16. Ms. Hillier began paying spousal support commencing September 15, 2016, in the monthly amount of \$2,800.00 and she continued to pay the mortgage on the matrimonial home of \$555.90 bi-weekly and \$250.00 monthly on the Line of Credit.

due and owing by Tresina Hillier to David Hillier shall be paid within 60 days of the calculation.”

[12] At the time of the Consent CRO, Ms. Hillier was determined to have an income for 2016 of \$119,389.60. Mr. Hillier was determined to have an income for 2016 of \$14,837.16.

[13] The parties’ matrimonial property was divided in the Consent CRO. Mr. Hillier retained the matrimonial home, and he became responsible for payment of the mortgage and line of credit associated with the home. A second property, owned by the parties was sold and the net proceeds evenly distributed between them.

[14] In addition, Mr. Hillier retained the following property:

- 2011 Bennington Pontoon Boat SL
- 2011 Yamaha Motor
- 2011 Caravan Trailer
- 2001 Honda TRX400 4x4
- 2014 Ford F150 4x4 Super
- 2014 Arctic Cat Prowler XT 550 4x4
- 1973 Ford Gran Torino

[15] Both parties each retained three Registered Retirement Savings Plan (“RRSP”) accounts, the values of each account were not included in the Consent CRO. Ms. Hillier was responsible for two credit card debts, each in the approximate amount of \$5,000.00 and she did not retain any real property.

[16] Ms. Hillier, anticipating her retirement at the end of the year, filed her Notice of Variation Application on October 7, 2022, pursuant to subsection 17(4.1) of the *Divorce Act*, R.S.C. 1985, (2<sup>nd</sup> Supp.), c. 3.

[17] Ms. Hillier has continued to pay spousal support as agreed to in the Consent CRO of \$4000.00 per month and has paid the “top-up” amount for each year, including 2022.

[18] Initially, the “top-up” payments were modest but since the onset of the global pandemic in 2020, the “top-up” payments have increased significantly. In 2020, the “top-up” payment was \$4200.00 while in 2021 the “top-up” payment was \$42,096.00, a tenfold increase.

[19] Ms. Hillier filed on February 23, 2023, a Notice of Motion for Interim Relief (Family Proceeding) to suspend any enforcement sanctions imposed by the Maintenance Enforcement Program and suspend spousal support payments until such time as the Variation Application was heard. Given the timing of the Hearing, the Motion for Interim Relief was not heard.

[20] The contested hearing was held on May 29, 2023, and June 2, 2023. Each of the parties testified and filed several affidavits and other evidence totalling 19 exhibits.

[21] Preliminary motions were heard at the commencement of the hearing resulting in small portions of the affidavit evidence filed by the parties, struck.

## **Analysis**

[22] Section 17 of the *Divorce Act*, addresses jurisdiction to vary, rescind or suspend an order and provides, in part, at subsection 17(1)(a):

### **“Variation order**

**17 (1)** A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,

**(a)** a support order or any provision of one, on application by either or both former spouses; . . .”

[23] Pursuant to subsection 17(4.1) of the *Divorce Act*, Ms. Hillier must prove there has been a change in either parties “condition, means, needs or other circumstances” before variation may be considered. Subsection 17(4.1) of the *Divorce Act*, provides:

### **“Factors for spousal support order**

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

respect of that order, and, in making the variation order, the court shall take that change into consideration.”[Emphasis added.]

[24] The change “must have some degree of continuity, and not merely be a temporary set of circumstances” according to the *Droit de la famille – 091889*, 2011 SCC 64 at paragraph 35. Further, consideration must be given to the parties’ circumstances when the Consent CRO was granted, *Droit de la famille-091889* at paragraph 25.

[25] In *Daigle v. Daigle*, 2013 NSSC 205, Justice Jollimore, at paragraphs 8 to 18, provides a useful synopsis of the caselaw applicable to s. 17(4.1) of the *Divorce Act*.

[26] The objectives of a variation order for spousal support have been set forth in subsection 17(7) of the *Divorce Act*, as follows:

**“Objectives of variation order varying spousal support order**

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

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

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

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

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

[27] Mr. Hillier provides the case of *Hague v. Hague*, 2022 BCCA 325, at paragraph 30 for the two-stage analytical framework upon which to assess applications to vary or terminate spousal support. The two-stage analytical framework is as follows:

“1. Under s. 17(4.1) of the *Divorce Act*, before making a variation order, the court must be satisfied that there has been a change in ‘the condition, means, needs or other circumstances’ of either former spouse. This requires the applicant to establish a material change in circumstances since the making of the order sought to be varied.

2 Once the material change threshold is met, the court must determine what variation is appropriate in light of the change in circumstances. A court ‘should limit itself to making only the variation justified by the change.’”

[28] At paragraph 9 of the *Hague* decision, the *Spousal Support Advisory Guidelines: The Revised User’s Guide* (Canada, Department of Justice: April 2016) at p. 101 considers “early retirement” and says:

“When will retirement be described as “early”? The courts are not always clear. For our purposes, an “early” retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as “voluntary” and not necessary or reasonable, then it is likely that spousal support will not be changed.”

[29] In *Bracklow v. Bracklow*, [1999] 1 SCR 420, the Supreme Court analyzed the statutory objectives and held that they create three rationales for spousal support:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
2. Non-compensatory dependency-based support, to address the disparity between the parties, needs and means upon marriage breakdown.
3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties’ financial obligations to each other.

[30] *Boston v. Boston* [2001] 2 S.C.R. 413 has been provided by both parties to remind the court of the general rule against double recovery. The general rule is that where the payee spouse has already received the benefit of the equalization of the payor’s pension plan, it would generally be inequitable to require the payor to pay spousal support following retirement based on the portion of income from that same pension plan that had already been equalized.

[31] However, with every rule, there are exceptions as noted by Justice Major at paragraph 65 in *Boston*:

“Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay, where

the payee spouse has made 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. **Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation,...**[Emphasis added]

### **Threshold Issue - Has there been a material change in circumstances?**

#### *Position of Ms. Hillier*

[32] Ms. Hillier is not suggesting that her retirement was anything other than voluntary. She acknowledges that she bears the burden of demonstrating that her retirement qualifies as a material change in circumstances.

[33] Ms. Hillier says since the onset of the global pandemic in March 2020, that her employment changed drastically. She has worked increased hours due to the increased demand for RVs, reflected in her increase in income. She says that the increased work demands have negatively impacted her physical and mental health. Her energy levels have decreased as she has aged, and she would like to enjoy retirement and spend more time with her grandchildren.

[34] Ms. Hillier says throughout her career at the RV dealership, she received frequent calls on evenings and weekends from sales staff, the office manager, and the owner. She has consistently worked 50 weeks a year, with her employer only closing for two weeks during the Christmas season. She says she is burned out.

[35] She further says that during their marriage, the plan had always been to retire at age 55 and she worked almost three years longer than they had planned.

[36] She says once Mr. Hillier was unable to work and the household income was reduced by one-third, they sold the family home and downsized by moving to their cottage, but they continued to plan for retirement at age 55.

[37] The onset of the global pandemic exacerbated the demands of her employment, and Ms. Hillier says this qualifies as a material change, not anticipated by the parties when the Consent CRO was negotiated.

[38] Ms. Hillier says there has been a material change in circumstances and her application to vary should be allowed.



*Position of Mr. Hillier*

[39] Mr. Hillier says that Ms. Hillier's decision to retire early was not made in good faith but to avoid continued monthly spousal support payments along with the top-up payments.

[40] He denies the plan during the relationship was to retire at age 55 and instead claims that the plan was to work into their late fifties or early sixties, sell their home, move to their cottage, and spend a significant amount of time travelling abroad. He says that this plan changed when he was no longer able to work due to his heart condition and instead the plan was for Ms. Hillier to work until at least age 65.

[41] Mr. Hillier says in March 2022, he telephoned Ms. Hillier as they had not spoken in months. He says she told him at that time that he should "not be sitting on [his] fat ass" and she should not have to pay spousal support any longer. She suggested he sell the house or mortgage it to support himself and that if he did not do so, she would retire, and he would get nothing.

[42] Further, Mr. Hillier says that Ms. Hillier often said she would never quit her job with the RV dealership as the money was far too good and she enjoyed her work too much. He points to this as another reason to suggest that her voluntary retirement was because of her desire to end spousal support payments, a decision not made in good faith.

[43] Mr. Hillier says that there has been no material change in circumstances and Ms. Hillier's application to vary spousal support should be dismissed.

*Decision*

[44] Ms. Hillier does not have an employment pension, but she has retired from her employment prior to reaching the age of 65, absent health issues. Ms. Hillier has acknowledged, her retirement as voluntary but not necessarily early.

[45] There is no rule that I am aware of that one must work until the age of 65. Each circumstance will be different.

[46] Ms. Hillier has retired at the age of 57, and she has no plans to return to the workforce. The circumstances are not temporary, and they did not exist at the time of the Consent CRO.

[47] Although the parties may have contemplated Ms. Hillier's eventual retirement, the evidence is sufficiently unclear when that might happen. Her retirement was not addressed in the Consent CRO.

[48] The parties could not have contemplated at the time of the Consent CRO in December 2016 the onset of a global pandemic that significantly changed the work environment, not only for Ms. Hillier but for many workers in Nova Scotia and beyond.

[49] In April 2020, Ms. Hillier turned 55 years of age. She not only worked beyond age 55 but she worked for almost three years during challenging circumstances caused by the global pandemic. Ms. Hillier's evidence regarding the impact of the Covid-19 global pandemic was compelling. I am satisfied the decision to retire was made in good faith and was reasonable in all the circumstances. I base my conclusion on the following:

- Since March 2020 Ms. Hillier's work hours increased with only one week off in an entire year.
- Ms. Hillier's work environment changed from an office setting to working from home and attending at the office during the evenings. Her employer also experienced a shut down not only during the initial stages of the pandemic but from a lack of compliance with the rules, resulting in a further involuntary shut down.
- Objectively, the increase in her income in 2020, 2021 and 2022 reinforces her evidence of the increased work hours and demands of her employment resulting in strain, exhaustion and burn out.

[50] I accept Ms. Hillier's evidence the primary reason for her retirement was the impact on her employment due to the Covid-19 global pandemic and not motivated by a desire to stop payment of spousal support to Mr. Hillier.

[51] The evidence of both parties was that they continued to discuss the timing of Ms. Hillier's retirement because of Mr. Hillier's inability to work following his diagnosis in May 2010. Ms. Hillier's evidence was that they discussed her retirement at the outside date of age 60, while Mr. Hillier's evidence was that they discussed her continuing to work until she was at least 65 resulting from his inability to work.

[52] Regardless, of what they may have planned during their relationship, circumstances change. Mr. Hillier had a heart event and was no longer able to work beginning in May 2010; Ms. Hillier as the sole income earner took a new job in February 2012; the parties separated in October 2015; and recognizing the fluctuations in Ms. Hillier's income from year to year the Consent CRO entered in December 2016 provided for the "top-up".

[53] Although Mr. Hillier says they constantly discussed their financial situation and agreed that Ms. Hillier would need to work until she was at least 65 years of age, I do not accept his evidence in this regard. I do accept Ms. Hillier's evidence that prior to separation in October 2015 the parties continued to plan for her retirement at age 55. I base my conclusions on the following:

- Mr. Hillier's evidence in this regard was confusing. In his Affidavit sworn May 8, 2023, at paragraph 5, Mr. Hillier says depending on their finances, they planned to retire in their late fifties or early sixties. Mr. Hillier provided no specifics to indicate when they made those plans, although it is a fair inference those plans were made prior to separation in October 2015. At paragraphs 8 & 9 of that same Affidavit, Mr. Hillier says following his heart event and his inability to work, they constantly discussed their financial situation and during those discussions, they agreed "that our former plans of retirement and travel were off the table" and Ms. Hillier would need to continue to work until at least age 65.
- Mr. Hillier's evidence lacks specific details of those "constant" discussions. He only suggests that the discussions were after he was unable to work, so sometime after May 2010. During cross-examination, Mr. Hillier was asked what the retirement plan before separation was. He replied that they were going to try and retire early and travel, but that plan was when both were making good money. When asked what he meant by early retirement, he said prior to age 65, but when asked to consider his affidavit evidence at paragraph 5, that they planned to retire in their late fifties to early sixties, he said that this meant "between 55 and 60".
- On cross-examination when asked about the plan at the time of separation in 2015, Mr. Hillier said the plan was to retire in their late fifties to sixty.
- Ms. Hillier began working at the RV dealership in February 2012 after Mr. Hillier was unable to work due to medical reasons. When they were both

working full-time jobs in 2009, they had a combined income of approximately \$160,000. In 2015, prior to their separation, Ms. Hillier earned \$155,418.86 while Mr. Hillier was receiving a CPP Disability Pension of \$14,738.16. Ms. Hillier's income alone was comparable to the household income just prior to Mr. Hillier ceasing to work in May 2010. This suggests that retirement before age 60 remained a viable option even after the parties' separation and divorce.

- Following Mr. Hillier's diagnosis, the uncontroverted evidence was that they downsized. They sold their home and moved to their cottage. This suggests that the parties continued to plan to retire when Ms. Hillier was 55.

[54] Based on the evidence, Ms. Hillier's retirement was voluntary but, in my view, it was not early. The evidence is that Ms. Hillier worked until she was almost 58 years of age, during unprecedented times of a global pandemic when the demands of her job were increasingly stressful with increased demand and hours worked. Her decision to retire was reasonable given all the circumstances.

[55] I accept that Ms. Hillier's voluntary retirement is a material change.

### **What variation is appropriate considering the change in circumstances?**

#### *Position of Ms. Hillier*

[56] Ms. Hillier notified Mr. Hillier on May 4, 2022, of her intention to retire at the end of the year.

[57] Ms. Hillier says that since retirement her income is zero and she will have to rely entirely on her investments and savings to meet her needs. She says she can no longer afford to pay any spousal support to Mr. Hillier. She will earn from her investments, a post-retirement income of approximately \$47,000.00 annually before taxes and \$36,000.00 annually after taxes.<sup>2</sup>

[58] Although Ms. Hillier acknowledges it is not realistic for Mr. Hillier to re-enter the workforce, she suggests that he has the means to support himself with some adjustments to his lifestyle.

[59] Ms. Hillier says since January 1, 2017, she has paid in accordance with the Consent CRO more than \$425,000.00 in spousal support. She says both parties

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<sup>2</sup> Attached to Ms. Hillier's Affidavit sworn October 11, 2022, is a letter from her financial advisor, Derek Frail dated July 27, 2022.

received the benefit of the increased demands of her work reflected in the “top-up” payments to Mr. Hillier.

[60] Ms. Hillier seeks the termination of spousal support effective December 31, 2022, the date she retired and suggests that any ongoing spousal support obligation would cause her to draw from her retirement savings and be double recovery contrary to *Boston*.

[61] Alternatively, if spousal support is not terminated, she asks that her spousal support obligation be reduced based on her means now post-retirement.

[62] In her Affidavit sworn October 11, 2022, at paragraphs 14 & 15, Ms. Hillier suggests that Mr. Hillier verbally agreed in September 2020 that the “top-up” payments were no longer necessary during a conversation at their son’s wedding and further indicated during a telephone call in or around March 2022 that the “top-up” was no longer wanted or needed. She suggests this evidence supports her argument that spousal support should terminate effective December 31, 2022, as Mr. Hillier has the means to support himself without further spousal support payments from her.

*Position of Mr. Hillier*

[63] Mr. Hillier says that Ms. Hillier’s retirement does not justify the termination of spousal support and it would be unreasonable in the circumstances. He says it is not practicable that he attains self-sufficiency within a reasonable period based on his circumstances. He says he has a continued need for support, and he has suffered economic hardship from the breakdown of the marriage.

[64] Mr. Hillier suggests that, although the Consent CRO was silent as to the basis of Mr. Hillier’s original entitlement to spousal support, it was likely on a non-compensatory basis. He says there is no evidence of any contractual arrangement nor is there any evidence that Mr. Hillier made the kind of sacrifices during the marriage, such as giving up career opportunities to assume primary childcare and household responsibilities, that would otherwise attract spousal support on a compensatory basis.

[65] Mr. Hillier also disagrees that there was a verbal agreement between himself and Ms. Hillier to terminate the “top-up” payments commencing in 2020.

[66] As to the argument that any future payment of spousal support post-retirement would result in double recovery by Mr. Hillier, he says that double recovery in these

circumstances cannot be avoided. Mr. Hillier says double recovery should be permitted as an exception to the general rule as his entitlement to spousal support under the Consent CRO was based on need.

### *Decision*

[67] After determining that there has been a change in circumstances proven on a balance of probabilities by Ms. Hillier, I must determine what variation is appropriate considering the change in circumstances.

[68] In determining the amount of spousal support, I must consider each parties' condition, means, needs and other circumstances. I must also consider the economic advantages or disadvantages to the parties from the marriage or its breakdown, relieve any economic hardship arising from the breakdown of the marriage, and to the extent possible, promote the economic self-sufficiency of each party within a reasonable period.

[69] There is no suggestion that Mr. Hillier will be able to return to the workforce given the nature of his disability, which has been determined by the Social Security Tribunal as severe and prolonged. Mr. Hillier's income from his CPP Disability Pension has not materially changed since the divorce, but spousal support payments have significantly increased.

[70] At the time of the Consent CRO, the parties contemplated fluctuations in Ms. Hillier's income because it was commission based and driven by sales. If her income increased beyond \$119,389.60, it was contemplated that a "top-up" payment based on actual Line150 income would be calculated to adjust the spousal support paid in the previous year.

[71] If Ms. Hillier's income dropped below \$119,389.60, she would not be required to pay the "top-up" and no adjustment to spousal support would be required for the previous year.

[72] Since the granting of the Consent CRO, Ms. Hillier has paid spousal support and "top-up" payments to Mr. Hillier between January 1, 2017, and June 1, 2023, of \$424,140.00 as follows:

<b>Year</b>	<b>Ms. Hillier's Income</b>	<b>Mr. Hillier's Income (CPP + Total Spousal Support)</b>	<b>Monthly payment</b>	<b>Top-Up Payment</b>	<b>Total Spousal Support</b>

2015	\$155,418.86	\$14,738.16	N/A	N/A	N/A
2016	\$119,389.60	\$14,837.16	\$2,800.00 (4 months)	\$4817.80 + \$1000=\$58 17.80 (4 months)	\$51,053.40
2017	N/A	N/A	\$4,000.00	\$9240.00	\$57,240.00
2018	N/A	N/A	\$4,000.00	\$11,040.00	\$59,040.00 <sup>3</sup>
2019	\$145,380.33	\$15,596.04+\$59,040.00= \$74,636.04	\$4,000.00	\$8,676.00	\$56,676.00
2020	\$135,396.83 <sup>4</sup>	\$15,892.32+\$56,676.00= \$72,568.32	\$4,000.00	\$4,200.00	\$52,200.00
2021	\$222,016.34	\$16,051.20+\$52,200.00= \$68,251.20	\$4,000.00	\$42,096.00	\$90,096.00
2022	\$213,638.31	\$16,484.64+\$90,096.00= \$106,580.64	\$4,000.00	\$36,888.00	\$84,888.00
2023	\$0	\$17,556.12 <sup>5</sup> +\$84,888.00 =\$102,444.12	\$4,000.00 <sup>6</sup>	N/A	N/A

[73] Mr. Hillier acknowledges at the time of the Consent CRO that the debts and assets were equally divided between the parties. He also acknowledges since being notified by Ms. Hillier of her intention to retire, he has taken no proactive steps to plan for retirement and he has no retirement plan.

<sup>3</sup> Although the parties did not provide specific evidence of their respective incomes in 2017 or 2018, it can be inferred that Ms. Hillier's income was higher than \$119,389.60 as she made a "top-up" payment to Mr. Hillier in 2018 and 2019 reflective of her actual income in 2017 and 2018.

<sup>4</sup> For approximately six months because of the global pandemic, Ms. Hillier was unable to attend at the office during the day. She worked from home during the day and attended at the office during the evenings.

<sup>5</sup> Exhibit #17 is the Updated Statement of Income of David Wayne Hillier sworn March 23, 2023, with a projected annual income for Mr. Hillier of \$17,556.12.

<sup>6</sup> For 10 months from January to October 2023.

[74] Any hardship that Mr. Hillier may have experienced from the breakdown of the marriage has been addressed through the distribution of the matrimonial property at the time of their divorce in December 2016 and the substantial spousal support payments made by Ms. Hillier since that time.

*Property and Expenses of the Parties*

[75] Both parties filed sworn Statements of Property. Both parties have enjoyed the benefits of Ms. Hillier's increased salary. They have significant savings for retirement and they both travel internationally a couple of times a year.

[76] Mr. Hillier's Updated Statement of Property prepared on March 23, 2023, shows two RRSPs valued at \$282,632.00 and savings of \$7,375.18. Mr. Hillier was evasive when questioned on his bank accounts and he did not list property that he owned including the 2011 Pontoon Boat; the 2011 Yamaha Motor; the 2011 Caravan Trailer; and a 2019 ATV.<sup>7</sup> He also failed to provide a value for the matrimonial home that he retained at the time of the divorce or his 2019 Ford Ranger Truck. During cross-examination Mr. Hillier estimated that the matrimonial home was now worth \$420,000.00<sup>8</sup> and he no longer had the 2019 Ford Ranger truck as he purchased in mid-May 2023 a 2014 F-150 Truck for \$12,900.00.

[77] Mr. Hillier has also listed debts of \$60,936.23 which included a small credit card debt along with a line of credit that he assumed at the time of the divorce. He pays \$500.00 per month on the line of credit as noted in his Updated Statement of Expenses prepared on March 23, 2023.

[78] Ms. Hillier's Statement of Property dated April 14, 2023, show one RRSP and one LIRA account valued at \$675,741.86 and savings totaling \$36,414.60. Ms. Hillier owns no real property and rents her accommodations. She owns a 2018 Ford Escape that she purchased on June 18, 2021, for \$16,138.64. She has no debt.

[79] Since retirement, Ms. Hillier has used her savings to meet her spousal support obligations of \$4,000.00 per month.<sup>9</sup>

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<sup>7</sup> On cross-examination, Mr. Hillier valued the ATV at approximately \$6,700.00.

<sup>8</sup> Mr. Hillier says at the time of the divorce, the home was assessed at \$260,000.00.

<sup>9</sup> Ms. Hillier's Statement of Property filed October 7, 2022, shows savings and other accounts as of September 16, 2022 valued at \$125,304.55, while her Statement of Property filed April 14, 2023 showing savings and other accounts as of April 10, 2023 valued at \$36,414.60.



[80] Mr. Hillier has assets of approximately \$711,211.78<sup>10</sup> while Ms. Hillier has assets of approximately \$712,156.46.<sup>11</sup> Ms. Hillier will be expected to deplete her assets to continue to pay spousal support to Mr. Hillier now that she has retired and has no income while Mr. Hillier owns a home that has equity of *at least* \$360,000.00 and will provide tax-free money if sold.

[81] Ms. Hillier's Statement of Expenses, filed both prior to and since retirement, do not reflect a lifestyle of excess. Ms. Hillier's expenses are only slightly more than Mr. Hillier's and include her rent of \$1,479.00 per month. Her expenses are modest and since retirement those expenses have decreased as she no longer contributes to charitable organizations or to her savings. Her monthly expenses are approximately \$3,669.00, not including spousal support or the "top-up" payments. With no source of income, Ms. Hillier will have to draw down her savings and investments to pay her expenses.

[82] Although Ms. Hillier's ability to pay has been reduced since her retirement as she no longer has an income, she continues to have significant savings and investments.

[83] Mr. Hillier's Statement of Expenses show monthly expenses of \$3,459.22 in November 2022 and expenses of \$3,376.64 in March 2023. However, his expenses include the costs of the leased vehicle at \$640.00 per month but he no longer has this expense. Mr. Hillier also acknowledges that in January 2023, he purchased his partner a diamond ring which he described as a "promise ring" costing approximately \$2,000.00.

[84] Based on his income and expenses, Mr. Hillier continues to have a need for ongoing spousal support, at least in the short term. He will need to take immediate action to engage in financial planning, reorganize his finances and adjust to Ms. Hillier's retirement.

[85] Based on the evidence, I am satisfied that if there has been any disparity in the standards of living of the parties, it has been to the detriment of Ms. Hillier.

*Verbal Agreement to cease the "top-up" payments in 2020*

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<sup>10</sup> Including the matrimonial home that *he* values at \$420,000.00. In addition, Mr. Hillier has his vehicle, the pontoon boat, the Yamaha motor, the caravan trailer, and the ATV.

<sup>11</sup> In addition, Ms. Hillier has her vehicle and her household furnishings that she valued at \$3,000.00 in her Statement of Property.

[86] I am not satisfied there is sufficient reliable evidence to support a verbal agreement made in September 2020 between the parties to terminate the “top-up” payments. Although Mr. Hillier acknowledges he knew he would not receive the \$4,000.00 per month in spousal support for the rest of his life and he knew that spousal support would end, his evidence was clear that he did not agree that no “top-up” payment was owed for 2020. The evidence is only that the parties had a passing conversation. In addition, Ms. Hillier has continued to pay the “top-up” amounts for 2019, 2020, 2021 and 2022 while Mr. Hillier has continued to accept those payments without returning the matter to court to vary the Consent CRO.

[87] Ms. Hillier has paid the “top-up” payment for 2022 in the amount of \$36,888.00. I agree with Mr. Hillier that Ms. Hillier’s obligation to pay the “top-up” payment for 2022 accrued, in accordance with the Consent CRO entirely in 2022, prior to her voluntary retirement. Ms. Hillier has made the payment necessary of \$36,888.00 based on an actual Line 150 income of \$213,638.31. Therefore, I decline to credit Ms. Hillier with an over-payment in this regard.

[88] Although I am not satisfied that the parties had a verbal agreement to terminate the “top up” payments, the evidence does suggest that Mr. Hillier’s continued need for spousal support was greatly reduced because of the significant “top-up” payments made by Ms. Hillier in 2021 and 2022 and any economic hardship resulting from the marriage breakdown has also been greatly reduced.

#### *Double Recovery*

[89] The money that Ms. Hillier will receive from her investments was previously considered in the distribution of the matrimonial property and the circumstances are analogous to *Boston*. However, as noted in *Boston*, double recovery may be permitted where the spousal support order is mainly based on need.

[90] The Consent CRO does not address the basis for entitlement to spousal support. However, I am satisfied that entitlement in these circumstances is based on a non-compensatory claim. During the marriage both parties worked full-time positions, making approximately equal pay until Mr. Hillier had to stop work for health reasons in May 2010.

[91] Mr. Hillier continues to have a non-compensatory claim to spousal support as he has continued to qualify for a CPP Disability Pension, because of a disability that was determined to be severe and prolonged. Ms. Hillier did not suggest otherwise and admits that it is not realistic for Mr. Hillier to re-enter the workforce.

*Amount and Duration*

[92] Since her retirement, Ms. Hillier has continued to pay monthly spousal support payments of \$4,000.00 with payments due at the first of each month. By the time of this decision being released, Ms. Hillier will have paid an additional \$40,000.00 to Mr. Hillier since January 1, 2023. Payments that she has made from her savings.

[93] I am satisfied that an analysis of the condition, means, needs and other circumstances of the parties requires that Ms. Hillier's spousal support obligations be reduced and a termination date for spousal support be provided.

[94] I agree with Ms. Hillier that spousal support should be varied effective January 1, 2023, and the "top-up" payment terminated, as Ms. Hillier's income is no longer variable.

[95] When considering the income of Ms. Hillier post-retirement and the income Mr. Hillier receives from the CPP Disability Pension, I find an appropriate amount of spousal support that will put the parties in positions of approximately similar incomes is \$1,000.00 per month.<sup>12</sup>

[96] It is reasonable, in the circumstances, to allow Mr. Hillier a period to adjust to the decrease in spousal support and the eventual termination of spousal support. He must take steps to adjust his expenses and lifestyle and engage in financial planning for his future.

[97] In April 2025, Ms. Hillier will be 60 years old, and Mr. Hillier will be 62 years old. In the circumstances, a reasonable termination date for spousal support is April 30, 2025.

**Conclusion**

[98] In summary, my findings are as follows:

- There had been a material change in circumstances occasioned by Ms. Hillier's retirement effective December 31, 2022.

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<sup>12</sup> Ms. Hillier's Pre-Trial Brief dated May 19, 2023 provides Childview calculations based on income for Ms. Hillier of \$47,000.00 and income for Mr. Hillier of \$16,484.00. The low range of spousal support is \$954; the mid-range is \$1,113.00; and the high range is \$1,272.00.

- Mr. Hillier's ongoing entitlement to spousal support is on a non-compensatory basis.
- Mr. Hillier has demonstrated the need for ongoing spousal support from Ms. Hillier.
- Mr. Hillier disability that has been determined to be prolonged and severe precludes him from re-entering the workforce.
- If there was risk of double recovery, the circumstances in this matter established an exception to the double recovery principle as set out in *Boston*.
- Ms. Hillier has a continuing but limited ability to pay spousal support to Mr. Hillier.
- Ms. Hillier will pay, effective January 1, 2023, spousal support of \$1,000.00 a month to Mr. Hillier.
- Spousal support payments will terminate effective April 30, 2025.

[99] If the parties are unable to reach agreement on costs, I will accept written submissions from each party within one month of receipt of this decision.

Cromwell, J.