

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

**Citation:** *Crosby v. Crosby (Westhaver)*, 2025 NSSC 372

**Date:** 20251125

**Docket:** Bwt No. 1201-071590

**Registry:** Bridgewater

**Between:**

Shawn Andrew Crosby

Applicant

v.

Karen Anne Crosby (Westhaver)

Respondent

**Judge:** The Honourable Justice Aleta Cromwell

**Heard:** September 15 and 16, 2025, in Bridgewater, Nova Scotia

**Written Release:** November 25, 2025

**Counsel:**

Peter D. Crowther for the Applicant  
Heidi Foshay Kimball, K.C. for the Respondent  
Suman Jha Muller, co-counsel for the Respondent

**By the Court:**

**Introduction**

[1] Shawn Andrew Crosby's employment was terminated in 2023 following a decision by his employer to reduce the workforce. He has remained unemployed since that time. Although he acknowledges his continued obligation to pay spousal support, he says his income has been greatly reduced. He seeks to reduce his spousal support obligation effective April 1, 2023, and address an overpayment of support.

[2] Karen Anne Crosby (Westhaver) opposes the reduction of spousal support. She says no material change has been shown as Mr. Crosby's loss of employment was a temporary set of circumstances, easily remedied by him securing employment. However, if a material change can be shown, she seeks to impute income to Mr. Crosby for his intentional unemployment and address an underpayment of support.

**Issues**

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

- Has there been a material change in circumstances since the granting of the support order?

- Has Ms. Westhaver proven, on a balance of probabilities, Mr. Crosby is intentionally unemployed?
- If a material change is found, what variation to the support order is appropriate?
- Has there been an under or overpayment of support?

## **Background**

[4] In October 2018, the parties separated after twenty-four years of marriage. A Consent Corollary Relief Order was granted January 28, 2020 (the “CRO”). At that time, there were no dependent children of the marriage.

[5] Mr. Crosby is now fifty-five years of age. For more than twelve years, Mr. Crosby worked for an American software company. Initially, he was employed in Canada but in 2019, he relocated to Indianapolis, Indiana. He continues to reside in Indianapolis with his partner.

[6] On January 4, 2023, Mr. Crosby’s employer reduced the workforce by 10% and his role was terminated. He was relieved of all job duties and placed on a non-working notice period, receiving his full salary, until his termination date of March 24, 2023. Following his last day of employment, he received twenty-six weeks of

his annual base salary in a lump sum payment. In addition, he received his annual bonus at 70%, and the deposit of any unvested stock options.

[7] Since his termination date of March 24, 2023, Mr. Crosby has been unemployed while trying to start a photography business. He has also implemented plans to build a storytelling platform using his passion for photography and his experience developing software.

[8] Ms. Westhaver is fifty-three years of age. During the marriage, she worked as an orthopedic technician, until she was diagnosed with blood cancer (multiple myeloma with amyloidosis) leading to other complications. She underwent a stem cell transplant that was unsuccessful.

[9] Since September 2011, Ms. Westhaver has been unable to work. She is prescribed medications to treat conditions arising from her diagnoses including diabetes, cysts, severe eye infections, chronic pain and weakness, significant fatigue, and peripheral neuropathy. She administers daily chemotherapy treatments at home. Her income comes from a Canada Pension Plan disability pension, long-term disability payments, dividends, investment income, and spousal support.

[10] The CRO provides, in part, as follows:

- Mr. Crosby's annual employment income, consisting of salary, bonus and restricted stock units (RSUs) was found to be \$560,999.00 CAD.
- Ms. Westhaver's annual income was found to be \$31,079.00.
- Mr. Crosby must pay spousal support to Ms. Westhaver in the amount of \$8,000.00 CAD per month, commencing February 1, 2020, payable on the first day of the month.
- The support figure of \$8,000.00 per month was agreed on the basis Ms. Westhaver received 31% of the total combined family net income.
- The amount of spousal support would increase by 2% per year on February 1, commencing in 2021.
- Spousal support was not tax deductible to Mr. Crosby nor taxable to Ms. Westhaver because Mr. Crosby was a resident of the United States of America.
- Spousal support would be reviewed in the event of a material change in circumstances, including, if there was a significant decrease in Mr. Crosby's income.

## **Procedural History**

[11] After losing his job, Mr. Crosby filed his Notice of Variation Application on May 2, 2023, pursuant to subsection 17(4.1) of the *Divorce Act*, R.S.C. 1985, (2<sup>nd</sup> Supp.), c. 3. (the “*Divorce Act*”).

[12] Since filing the Variation Application, Mr. Crosby has continued to pay spousal support of \$8,237.50 per month.

[13] Mr. Crosby filed on November 7, 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 decided.

[14] The motion was heard on January 8, 2024, and I provided an oral decision on January 15, 2024, denying the motion to suspend or reduce Mr. Crosby’s spousal support until a final hearing could be held.

[15] A Settlement Conference was held on January 29, 2024, but no settlement was reached between the parties.

[16] Ms. Westhaver filed her Response to Variation Application on April 29, 2024.

[17] The matter was referred to Case Management on June 24, 2024, given the estimated trial time and possibility of expert evidence from Mr. Crosby. Further

Case Management Conferences were held on October 21, 2024, and December 20, 2024.

[18] Pre-trial Conferences were held on March 26, 2025, and July 18, 2025, before me.

[19] The hearing was held on September 15 and 16, 2025. Each of the parties testified and filed several affidavits and other evidence.

[20] Preliminary motions were heard at the commencement of the hearing. A Notice of Motion to Strike (Affidavit) was filed September 3, 2025, by Mr. Crosby to strike portions of the affidavit evidence filed by Ms. Westhaver on October 3, 2023, along with a motion from Mr. Crosby to admit as an exception to the hearsay rule foreign public documents.

[21] The motion to strike portions of the affidavit filed by Ms. Westhaver was denied while the motion to admit the American government publications as evidence of the job market were admitted as a public document exception to the hearsay rule.

[22] Both parties filed pre-trial briefs, and oral submissions were provided. At my invitation, counsel for Ms. Westhaver filed the *Spousal Support Advisory Guideline* (“SSAG”) reports she referenced in her oral submissions along with the SSAG reports

with a 5% and 10% imputation of investment income to Ms. Westhaver. Counsel for Mr. Crosby also file post-trial written submissions.

## **Analysis**

### **Issue #1 – Has there been a material change in circumstances since the granting of the support order?**

#### Position of Mr. Crosby

[23] Mr. Crosby says there has been a material change in circumstances since the granting of the CRO due to the termination of his employment in 2023 and the subsequent reduction in his annual income in the years since. He also relies on clause 5 of the CRO which provides for a review in the event of a material change in circumstances, including if there is a significant decrease in his income.

#### Position of Ms. Westhaver

[24] Ms. Westhaver says there has been no material change in circumstances as Mr. Crosby only experienced a temporary set of circumstances when he lost his job which would easily be remedied by securing employment, which he has failed to do. She also suggests that clause 5 of the CRO only permits either party to make a variation application in the event of a significant decrease in Mr. Crosby's income and a material change in circumstances would still need to be proven by Mr. Crosby.

### The Law

[25] The *Divorce Act*, addresses jurisdiction to vary, rescind or suspend a support order retroactively or prospectively on application by either or both former spouses: subsection 17(1)(a) of the *Divorce Act*.

[26] The parties agree, Mr. Crosby 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* and *Droit de la famille – 091889*, 2011 SCC 64 at paragraph 66.

[27] The change “must have some degree of continuity and not merely be a temporary set of circumstances” according to the *Droit de la famille* at paragraph 35.

[28] Further, consideration must be given to the parties’ circumstances when the CRO was granted: *Droit de la famille* at paragraph 25. See also *Klefenz v. Klefenz*, 2019 NSCA 6 at paragraph 24.

### Decision

[29] For some individuals, the loss of a job may be a temporary set of circumstances, and they may easily find another job commensurate with their qualifications and experience.

[30] However, for Mr. Crosby, I am satisfied the loss of employment was not a temporary set of circumstances. Mr. Crosby's particular circumstances include:

- He has a business diploma from 1992 but no university degree.
- For the previous thirty years, he worked in the software and technology industry.
- He was fifty-two years of age when his employment was terminated.
- He was employed for over twelve years with the same employer.
- He did not apply for the position with his former employer. Instead, the company where he was working was purchased by his former employer and he was retained.
- Since 2019 he has resided and worked in Indianapolis, Indiana.
- Since 2022, he has permanent residence status in the United States of America.

- During the twelve years he was employed with his former employer, he received two promotions with increased earnings and benefits.

[31] Given Mr. Crosby's circumstances, I accept that finding employment, in the same industry with a similar level of income, in another country will take a reasonable amount of time. In these circumstances, I am satisfied that his loss of employment was not a temporary set of circumstances.

[32] I am further satisfied, based on the evidence, Mr. Crosby has demonstrated a material change in circumstances since the granting of the CRO in January 2020 for two reasons:

- Mr. Crosby's employment was unexpectedly terminated in 2023 resulting in a reduction in his income. Had the circumstances existed in 2020, different terms related to spousal support would have resulted.
- Clause 5 of the CRO explicitly affords a review of spousal support if there is a significant decrease in Mr. Crosby's income as demonstrated when he unexpectedly lost his job in 2023. The potential for Mr. Crosby to experience a significant decrease in income was clearly

contemplated in 2020 at the time of the CRO as a scenario triggering a review of spousal support.

**Issue #2 - Has Ms. Westhaver proven, on a balance of probabilities, Mr. Crosby is intentionally unemployed?**

Position of Ms. Westhaver

[33] Ms. Westhaver says, if a material change in circumstances is found, income should be imputed to Mr. Crosby for intentional unemployment. She says, based on the evidence, Mr. Crosby was planning to leave his job to launch a photography business. Furthermore, she says his efforts to find employment have been unreasonable and he has pursued a career as a photographer without earning any employment income.

Position of Mr. Crosby

[34] Mr. Crosby denies that he is intentionally unemployed. He says, despite his diligent efforts, he has been unable to find employment in the software and technology field with the same level of income that he previously had. In part he says because he does not have the proper educational requirements of a university degree.

The Law

[35] Although there is no specific provision regarding the imputation of income for spousal support purposes, courts have relied on the *Federal Child Support Guidelines*, SOR/97-175 (the “*Guidelines*”) for the principles for imputing income for spousal support purposes: *Richards v. Richards*, 2012 NSCA 7 at paragraph 29.

[36] Under the *Guidelines*, discretion is provided to a court, to impute income in appropriate circumstances which may include where the spouse is intentionally under-employed or unemployed provided it does not arise because of the needs of a child or the payor’s reasonable educational or health needs: subsection 19(1)(a) of the *Guidelines*.

[37] In *Standing v. MacInnis*, 2020 NSSC 304 at paragraph 21, Justice Theresa Forgeron summarized the law of imputation of income. The burden of establishing that income should be imputed rests with the person claiming it should be. Courts must exercise authority to impute income judiciously, based on evidence and not arbitrarily. The goal of imputing income is to determine a fair and reasonable assessment of income, and it is not meant to be punitive.

### Decision

[38] Mr. Crosby has been unemployed since receiving notice in January 2023 that his employer was reducing the workforce and he was losing his job. Despite his

efforts to launch a photography business and his plans to build a business with his storytelling platform, he receives no income from these businesses.

[39] Between January 2023 and November 2023, Mr. Crosby travelled extensively, taking approximately seventeen trips, some which were previously scheduled before he was advised of his termination.

[40] Mr. Crosby began looking for employment in September 2023 and provided evidence of one job application during that month and no further efforts to apply for employment until January 2024.

#### *Lack of Education*

[41] Mr. Crosby suggests, despite diligent efforts, he has struggled to find similar employment in the field of technology and software, in part because he does not have a university degree.

[42] In January 2024, Mr. Crosby applied unsuccessfully for a similar position as Senior Director, Technical Support Engineering with his former employer with a salary between \$250,000 to \$309,000 USD with a 25 % annual bonus. However, Mr. Crosby failed to follow up with the employer after applying online for the

position and he did not provide to the court the job posting with the qualifications for the position.

[43] Ms. Westhaver, in her evidence, provided several job postings, including two job postings (a Solutions Engineer and a Strategy and Analytics Senior Lead) from Mr. Crosby's former employer which she suggests he was qualified to pursue. In several of the postings, including both postings related to Mr. Crosby's former employer, the qualifications listed a bachelor's degree *or equivalent experience*.

[44] Therefore, although I accept, in some fields, a lack of a university degree may be a barrier to finding employment, I reject Mr. Crosby's suggestion in this case for three reasons. Firstly, over the previous thirty years, without a university degree, Mr. Crosby has obtained employment commensurate with his qualifications and experience along with increasingly senior positions within the software industry. Secondly, while working with his last employer, for over twelve years, he was promoted twice to more senior positions within the company, again without a university degree. Thirdly, evidence provided by Ms. Westhaver of similar job postings suggest that an employer may consider equivalent experience despite an applicant not having a university degree.

*Diligent efforts to obtain employment*

[45] The evidence provided by Mr. Crosby is limited regarding his efforts to find employment within his field of expertise.

[46] Mr. Crosby filed a spreadsheet where he tracked his job applications between September 2023 and July 2024. The spreadsheet shows the following:

- Mr. Crosby did not begin looking for a job until September 2023.
- In September 2023, he only applied for one position.
- Between January and July 2024, he applied for approximately forty-five jobs.
- He applied in January 2024 for a senior director position with his most recent employer.
- He stopped tracking his applications after July 2024 when he determined the spreadsheet was an “onerous administrative activity” which he described as “tedious”.

[47] As part of his separation package from his previous employer, Mr. Crosby was offered six months of outplacement assistance through RiseSmart. Despite this offer, Mr. Crosby provided little evidence that he meaningfully engaged this service. He says he spent time retraining in the field of photography and obtaining mentoring

and coaching from the outplacement service provided by his former employer. Furthermore, on cross-examination, he says he engaged a professional recruiter. However, he provided no further details as to the name of the recruiter, when the services were retained or the scope of the services provided. As a result, I place little weight on this evidence to demonstrate he has made diligent efforts to obtain employment commensurate with his qualifications and experience.

[48] Ms. Westhaver provided evidence, a blog by Mr. Crosby, to suggest that he was not interested in obtaining employment in the field of technology and software and instead he had planned to leave his employment to pursue a photography business.

[49] The blog was posted by Mr. Crosby on his photography website on April 3, 2023. In the posting, Mr. Crosby indicates he was preparing to leave his employment to pursue a photography career. He clarified, during the hearing, he planned to retire when he turned fifty-five years of age at the end of September 2025 to pursue photography, but his employment was terminated eighteen months earlier than he had planned.

[50] Mr. Crosby is fifty-five years of age with extensive experience in the software and technology field. I am satisfied that employment opportunities commensurate with his qualifications and experience remain available.

[51] Based on the evidence before the court, I have concluded that Mr. Crosby has not made reasonable efforts to obtain employment. Instead, he has focussed his efforts on building his photography business along with the development of his storytelling platform without remuneration.

[52] Mr. Crosby is intentionally unemployed without reasonable excuse. I say this for five reasons:

- Since learning of his termination in January 2023, his efforts to find employment in a similar field were minimal.
- He had previously determined that he would leave the software industry and open a photography business when he turned fifty-five years of age at the end of September 2025.
- He failed to meaningfully engage in outplacement assistance offered by his former employer for the purpose of finding employment in the field of technology and software. He instead used the outplacement

assistance offered to obtain mentoring and coaching to retrain in the field of photography.

- He failed to follow up with his former employer when he applied for a similar position with them.
- His primary focus was on his photography business, developing a business plan and writing lines of code to launch a storytelling platform without remuneration.

**Issue # 3 - What variation is appropriate considering the change in circumstances?**

Position of Mr. Crosby

[53] Although Mr. Crosby says after losing his job his income was significantly reduced, he nonetheless acknowledges his ongoing obligation to provide support to Ms. Westhaver.

[54] If income is imputed to him for intentional unemployment, Mr. Crosby suggests using the documents filed from the U.S. Bureau of Labor Statistics showing the national median salary for a Computer and Information Systems Manager in the United States of \$165,000 USD (converted to CAD of \$227,562.00).

[55] Finally, Mr. Crosby disagrees with the suggestion by Ms. Westhaver that the increase in his investment income acquired post-separation should be included when determining his income for spousal support purposes.

#### Position of Ms. Westhaver

[56] Ms. Westhaver suggests using Mr. Crosby's 2022 income of \$377,768.00 USD (converted to CAD of \$514,000.00) and her income of \$41,852.00 in 2023 to calculate ongoing spousal support.

[57] Ms. Westhaver says when imputing income to Mr. Crosby, that either a 5% or 10% rate of return on his investments should be used and included in his income. This would result in additional income imputed to Mr. Crosby between \$50,000 to \$100,000 per year where his investments have increased by approximately \$1,000,000.00 since the CRO was granted.

#### The Law

[58] 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.”

[59] Ms. Westhaver has provided the recent case of *Mills v. Desroches*, 2025 NSSC 89 decided under the *Parenting and Support Act* by Justice Christine Doucet for a discussion of the statutory objectives of spousal support where a former spouse is permanently disabled and economic self-sufficiency is unattainable.

[60] In making a variation order, the court must take into consideration the change in the condition, means, needs or other circumstances of either former spouse: subsection 17(4.1) of the *Divorce Act*.

[61] Ms. Westhaver provided additional case law to suggest that “means” not only includes actual income a spouse is earning but also capital and income earning capacity: *Jenkins v. Jenkins*, 2012 NSSC 117 at paragraph 18 and *Strang v. Strang*, [1992] 2 S.C.R. 112 at paragraph 15.

[62] Mr. Crosby provides cases from Ontario and Alberta and suggests once a change in circumstances has been established, the *Spousal Support Advisory*

*Guidelines* (the “SSAG”) apply although he also provides two cases from Ontario to suggest the court may decide to adjust spousal support in accordance with the percentage reduction in the payor’s income.

[63] I am reminded that when considering an application to vary a spousal support order where a material change of circumstances has occurred, a court should limit itself to making only the variation justified by that change: *Klefenz v. Klefenz* 2019 NSCA 6 at paragraph 24.

[64] Ms. Westhaver has provided the Supreme Court of Canada case of *Boston v. Boston* [2001] 2 S.C.R. 413, to acknowledge the general rule against double recovery but also to remind the court there are exceptions to the general rule. Double recovery cannot always be avoided and may be permitted based on need: *Boston* at paragraph 65.

### Decision

[65] The parties were married for over twenty-four years, and Mr. Crosby has paid spousal support for less than six years. In the face of his ongoing support obligations, it is not reasonable for Mr. Crosby to focus on building a photography business and storytelling platform without remuneration.

*Income of the Parties*

[66] Mr. Crosby's total compensation package with his former employer included not only a salary, but restricted stock units, and an annual bonus. Mr. Crosby confirmed in his evidence that employees in 2023 would receive 70% of their bonus.

[67] Mr. Crosby filed sworn Statements of Income to suggest his income was as follows:

- In May 2023, his income was \$157,404.60 CAD shown by his Earning Statement from his previous employer for the period ending March 31, 2023.
- In May 2025 it was \$10,598.00 from dividends.

[68] However, Mr. Crosby did not file with the court his US Tax Returns for 2022 or 2023, only his W2 for 2022 showing an income of \$377,768.00 USD.

[69] The Earning Statement for the period ending May 31, 2023, shows total earnings of \$254,725.47 USD (approximately \$346,503.06 CAD). Those total earnings consisted of restricted stock options (\$70,119.45), salary (\$50,643.06), and severance for twenty-six weeks (\$133,645.00) but does not include the annual bonus.

[70] Ms. Westhaver, filed sworn Statements of Income to suggest her income was as follows:

- In September 2023, her income, without spousal support was \$37,561.08 (with spousal support, her income was \$136,411.08).
- In March 2025, her income, without spousal support was \$38,117.28 (with spousal support, her income was \$136,967.28).

[71] Ms. Westhaver provided her 2020 Income Tax Return, her 2021 Tax Return Summary along with her Notices of Assessment for 2022, 2023 and 2024 showing her total income to be \$31,764.30; \$44,755.31; \$41,852.00; \$40,475.00; and \$51,469.00, respectively. Her main source of income without spousal support is her disability benefits.

#### *Property and Expenses of the Parties*

[72] Clause 2 of the CRO acknowledges the support figure of \$8,000 per month was agreed on the basis that Ms. Westhaver would receive 31% of the total combined family net income of the parties.

[73] In accordance with Clause 10 of the CRO, the matrimonial home was sold and the proceeds split equally between the parties.

[74] The CRO also provides for other property division but the values for various accounts, vehicles, pensions, debts etc. were not included in the CRO.

[75] Mr. Crosby does not own any real property, nor does he have an employment pension. He equally shares his expenses with his partner.

[76] Following the granting of the CRO, Ms. Westhaver purchased a home built in 1958 with eighty acres of farmland. She also retained her employment pension pursuant to the terms of the CRO. She has not re-partnered.

[77] In April 2023, Mr. Crosby's Statement of Property shows his assets totalling \$1,270,604.30 CAD with debts totalling \$62,400.00 CAD.

[78] In May 2025, Mr. Crosby's Updated Statement of Property shows his assets totalling \$1,499,302.96 CAD with debts totalling \$5,171.22 CAD.

[79] Mr. Crosby's expenses decreased from \$13,632.73 CAD in April 2023 to \$4,750.00 USD in May 2025.

[80] Despite losing his job in 2023 and relying on savings, investments, and personal capital to meet his expenses, Mr. Crosby's net worth, has increased by more than \$250,000.00 CAD while also paying spousal support of almost \$100,000 per year.

[81] Although Ms. Westhaver refused to have her home appraised at the request of Mr. Crosby, she did provide information regarding the home including:

- The purchase price in November 2021 of \$403,000.00.
- Insurance documents showing the cost to rebuild the home would be \$410,550.
- 2024 and 2025 property assessment notices for the home of \$345,400 and \$346,600, respectively.
- Repairs completed on the home of approximately \$220,000.00 following a flood and other maintenance related issues.

[82] In September 2023, Ms. Westhaver's Statement of Property shows her assets, including her home, totalling \$892,489.93 plus net pensionable earnings of \$46,029.75 annually as of December 31, 2021, with debts, including her mortgage totalling \$356,969.99.

[83] In March 2025, Ms. Westhaver's Updated Statement of Property shows her assets, including her home, totalling \$890,209.81 plus net pensionable earnings of \$46,029.75 annually as of December 31, 2021, with debts totalling \$337,096.57.

[84] Ms. Westhaver's net worth has increased by approximately \$17,500.00.

[85] Ms. Westhaver's expenses marginally increased from \$8,305.07 in September 2023 to \$8,490.87 in March 2025.

[86] Ms. Westhaver's monthly income, excluding spousal support, combined with her expenses leave her in a deficit of approximately \$6,000.00 per month. Ms. Westhaver is financially dependent on the spousal support.

[87] Based on an analysis of the income, expenses, assets and debts of the parties, Mr. Crosby continues to have an ability to pay spousal support despite not earning any employment income, while Ms. Westhaver continues to have a need for ongoing spousal support.

[88] Furthermore, I am satisfied that if there is any concern of double recovery that an exception to the general rule is warranted in the circumstances, based on Ms. Westhaver's ongoing need and inability to work.

*Amount*

[89] For the previous twelve years between November 2010 and March 2023, Mr. Crosby was employed with a US technology corporation. He has consistently earned more than \$500,000.00 CAD per year since at least February 2019 when he was

promoted to Senior Director of Software Engineering and relocated to Indianapolis, Indiana. His position was not a generic IT position.

[90] Between January 2023 and mid-September 2023, Mr. Crosby earned \$254,725.47 USD including restricted stock units. This amount included twenty-six weeks of severance received in a lump sum from March 24, 2023, which was his termination date, until September 22, 2023. As a result, the appropriate variation date is October 1, 2023, when Mr. Crosby ceased receiving any employment income.

[91] I am further satisfied based on the evidence including Mr. Crosby's history of employment and resulting income that his earning capacity is higher than the median national salary for a Computer and Information Systems Manager in the United States of \$227,562.00 CAD as he suggests.

[92] Ms. Westhaver has no greater earning capacity than she has disclosed given her inability to work because of her long-standing cancer diagnosis and other related complications. Her earning capacity has remained stable since 2020.

[93] When considering the quantum of spousal support, I have considered Mr. Crosby's earning capacity along with his assets and debts, including his investment income, when exercising my discretion to set spousal support.

[94] I am satisfied following an analysis of the condition, means, needs and other circumstances of the parties that Mr. Crosby's spousal support obligation should be reduced effective October 1, 2023.

[95] I find in all the circumstances; Mr. Crosby should have income imputed to him of \$400,000.00 with Ms. Westhaver's income of \$41,852.00, based on her 2023 income tax disclosure.

[96] I further recognize any *SSAG* calculations must consider the spousal support payments are not tax deductible to Mr. Crosby and are not taxable to Ms. Westhaver.

[97] In all the circumstances, a fair and reasonable assessment of the change in Mr. Crosby's condition and means and Ms. Westhaver's ongoing needs, I find, based on the *SSAG*, and considering the tax effect, an appropriate amount of spousal support is \$7,500.00 per month effective October 1, 2023.

#### **Issue #4 - Has there been an under or overpayment of support?**

##### Position of Mr. Crosby

[98] Since losing his job in 2023, Mr. Crosby has continued to make his monthly support payments of \$8,237.50 at the beginning of each month. He seeks

reimbursement from Ms. Westhaver of any amounts he has paid since April 1, 2023, over and above his ongoing support obligation as determined by the court.

Position of Ms. Westhaver

[99] Ms. Westhaver says Mr. Crosby has not accurately increased his monthly payments by 2% each year as required by the CRO. She says he has underpaid support since February 1, 2022. She seeks the payment of arrears.

Decision

[100] Since the granting of the CRO, Mr. Crosby has paid monthly spousal support of at least \$8,000.00 to Ms. Westhaver. In accordance with clause 3 of the CRO an adjustment of 2% each February, commencing in 2021 was required.

[101] With an increase of 2% per annum, commencing February 1, 2021, Mr. Crosby should have paid monthly support as follows:

- Commencing February 1, 2021- \$8,160.00 per month
- Commencing February 1, 2022 - \$8,323.20 per month
- Commencing February 1, 2023 - \$8,489.66 per month
- Commencing February 1, 2024 – \$8,659.45 per month

- Commencing February 1, 2025 -\$8,832.64 per month

[102] However, despite increasing his support payments, Mr. Crosby did not properly adjust his monthly payments.

[103] Since February 1, 2022, and each month thereafter, Mr. Crosby has paid \$8,237.50 in support to Ms. Westhaver resulting in an underpayment of support between February 1, 2022, and September 30, 2023. Therefore, there is an underpayment of support by Mr. Crosby to be calculated which is payable to Ms. Westhaver.

[104] However, Mr. Crosby has also overpaid support to Ms. Westhaver based on his now monthly support obligation of \$7,500.00 per month effective October 1, 2023. Therefore, there is an overpayment of support by Mr. Crosby to be calculated which is payable by Ms. Westhaver.

[105] With this decision, I expect that counsel and the parties can now calculate the under and overpayment and determine how to achieve the repayment of that amount given the ongoing support obligation of Mr. Crosby.

## **Conclusion**

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

- There has been a material change in circumstances occasioned by Mr. Crosby's loss of employment effective October 1, 2023.
- Mr. Crosby is unemployed without valid excuse.
- Mr. Crosby has a continuing ability to pay spousal support to Ms. Westhaver.
- Ms. Westhaver has a corresponding need for spousal support from Mr. Crosby.
- Commencing October 1, 2023, and the first of the month thereafter, Mr. Crosby will pay, spousal support of \$7,500.00 a month to Ms. Westhaver.
- Mr. Crosby underpaid spousal support to Ms. Westhaver between February 1, 2022, and September 30, 2023.
- Mr. Crosby overpaid spousal support to Ms. Westhaver since October 1, 2023.

[107] Counsel for Mr. Crosby will draft the Order arising from this decision.

[108] Given the mixed success of the parties on the issues before the court, I decline to order costs. Each party will bear their own costs.

Cromwell, J.