

**SUPREME COURT OF CANADA**

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| **Citation:** L.M.P. *v.* L.S., 2011 SCC 64, [2011] 3 S.C.R. 775 | **Date:** 20111221  **Docket:** 33749 |

**Between:**

**L.M.P.**

Appellant

and

**L.S.**

Respondent

- and -

**Women’s Legal Education and Action Fund and**

**DisAbled Women’s Network Canada**

Intervener

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Rothstein and Cromwell JJ.

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| **Joint Reasons for Judgment:**  (paras. 1 to 61)  **Concurring Reasons:**  (paras. 62 to 100) | Abella and Rothstein JJ. (Binnie, LeBel and Deschamps JJ. concurring)  Cromwell J. (McLachlin C.J. concurring) |

L.M.P. *v.* L.S., 2011 SCC 64, [2011] 3 S.C.R. 775

L.M.P. *Appellant*

v.

L.S. *Respondent*

and

Women’s Legal Education and Action Fund and

DisAbled Women’s Network Canada *Interveners*

**Indexed as: L.M.P. *v.* L.S.**

2011 SCC 64

File No.: 33749.

2011:  April 20; 2011:  December 21.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Rothstein and Cromwell JJ.

on appeal from the court of appeal for quebec

*Family law — Support — Spousal support — Variation — Material change in circumstances — Court order incorporating terms of separation agreement — Husband applying to reduce and terminate spousal support order on basis of change in his financial circumstances and wife’s failure to become self‑sufficient since the date of order — What is proper approach to application for variation of spousal support order under s. 17(4.1) of the Divorce Act where support terms of agreement have been incorporated into an order? — Whether approach differs from initial applications for spousal support under s. 15.2 — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 15.2 and 17.*

Shortly after the parties married in 1988, the wife was diagnosed with multiple sclerosis and has not worked since then. During the marriage, the husband pursued his career while the wife looked after the household and children. After the parties separated in 2002, they entered into a comprehensive agreement that was incorporated into a court order in 2003. Under its terms, the wife was to receive spousal support in the amount of $3,688 per month, indexed. The order did not specify a termination date for spousal support. In 2007, the husband brought a variation application under s. 17 of the *Divorce Act* seeking a reduction and, ultimately, a cancellation of spousal support on the grounds that there was a change in his financial circumstances and that the wife should seek employment. The trial judge rejected the husband’s claim that his financial circumstances had changed, but concluded that the wife was able to work outside the home. As a result, an order was made reducing, then terminating her spousal support as of August, 2010. The trial judge made no finding about whether there had been a material change of circumstances. The Court of Appeal rejected the wife’s appeal, concluding that her failure to become self‑sufficient over time gave rise to a material change in circumstances.

*Held*: The appeal should be allowed and the original 2003 order should be restored.

*Per* Binnie, LeBel, Deschamps, Abella and Rothstein JJ.: The *Divorce Act* authorizes courts to vary spousal support terms either on an initial application for support under s. 15.2, or on an application to vary an existing court order under s. 17. It authorizes courts to make an initial order which may be at odds with the terms of the agreement if those terms do not comply with the objectives of the Act. The two‑stage test outlined in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, addresses the direction in s. 15.2(4)(*c*) that on an initial application for support, a court shall consider “any order, agreement or arrangement relating to support of either spouse”. Unlike the situation in *Miglin*, however, this appeal concerns an application under s. 17 to vary a spousal support order where there had been a spousal support agreement prior to the s. 15.2 order. Section 17 authorizes a court to vary, rescind or suspend prior orders, defines the factors allowing for variation, and sets out the objectives such a variation should serve. Notably, unlike on an initial application for spousal support under s. 15.2(4)(*c*), which specifically directs that a court consider “any order, agreement or arrangement relating to support of either spouse”, s. 17(4.1) makes no reference to agreements and simply requires that a court be satisfied “that a change in the condition, means, needs or other circumstances of either former spouse has occurred” since the making of the prior order or the last variation. The different language employed by Parliament in ss. 15.2 and 17 was recognized by the majority in *Miglin* as requiring a different approach to initial and variation applications. While the objectives of the variation order are virtually identical in s. 17 to those in s. 15.2 dealing with an initial support order, the factors to be considered in ss. 17(4.1) and 15.2(4) are significantly different. Under either s. 15.2 or s. 17, the parties’ mutually acceptable agreement is not ignored, but its treatment will be different because of the different purposes of each provision.

The proper approach under s. 17 to the variation of existing orders is found in *Willick v. Willick*, [1994] 3 S.C.R. 670,and *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370, where it was held that a court must be satisfied that there has been a material change in circumstances since the making of the prior order or variation, meaning a change that, “if known at the time, would likely have resulted in different terms”. The threshold variation question is the same whether or not a spousal support order incorporates an agreement, namely, has a material change of circumstances occurred since the making of the order? The terms of the prior order are presumed to have been in compliance with the objectives of the Act at the time the order was made. A term stating that a specific type of change will — or will not — give rise to a variation, informs the court’s application of the *Willick* test. An agreement containing only general terms, such as a general statement of finality, provides little guidance in practice on whether or not a particular event or circumstance was contemplated by the parties or what consequences they would have ascribed to it. Once a material change in circumstances has been established, the variation order should properly reflect that change and the objectives set out in s. 17(7).

In this case, the trial judge erred in conducting a *de novo* hearing on the issue of the wife’s ability to work and in concluding that she should become economically self‑sufficient without making a finding about whether there had been a material change in the wife’s circumstances since the 2003 order. The Court of Appeal also erred in determining that the wife had the capacity to work, and that this, coupled with the passage of time, amounted to a material change of circumstances. Upon examination of the actual circumstances of the parties at the time the order was made and the terms of the order, it is apparent that there has been no material change of circumstances since the making of the order and that there was therefore no basis on which to vary it under s. 17(4.1). At the time of the order, the wife had multiple sclerosis and was not expected to seek employment outside the home. There has been no material change in circumstances since that time.

*Per* McLachlin C.J. and Cromwell J.: When, as here, parties have reached a comprehensive, final separation agreement and its provisions are incorporated into a court order, those provisions must be given considerable weight in a subsequent variation application in relation to spousal support, in accordance with principles established in *Miglin*. The agreement plays a central role on an application to vary and the *Miglin* principles are highly relevant to this exercise. In order to meet the threshold for variation under s. 17 of the *Divorce Act*, a court must satisfy itself that a “material change” in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order. In order to be “material” a change must be one that: (1) relates to something that was not either expressly addressed by the parties in the agreement or that cannot be taken as having been in their contemplation; and (2) results in the support provision, considered in the context of the entire agreement, no longer being in substantial compliance with the objectives of the Act as a whole. *Miglin* directs that *all* of the objectives of the Act and the broader objectives of finality, certainty and autonomy must be considered.

Once the terms of a final agreement are incorporated into a court order, they are assumed to have met the statutory requirements at the time and the correctness of that order is not reviewed during the variation proceeding.  While the court has discretion with respect to variation and is not strictly bound by the terms of the parties’ agreement, that agreement is an “important factor” in exercising the discretionary power to vary. *Miglin* affirmed that unimpeachably negotiated agreements should receive considerable weight provided that they represent the intentions and expectations of the parties and substantially comply with the objectives of the *Divorce Act*. This principle applies equally to a variation application as to an initial application for spousal support. Moreover, the statutory objectives of ss. 15.2 and 17(4.1) are virtually identical and any “differences in language” are very minor and provide no foundation for keeping the analyses under these two provisions “distinct” in relation to the weight to be given to the parties’ agreement. While the “change” threshold specified in s. 17 does not apply to initial orders under s. 15.2, this difference in the statutory language provides no basis for the conclusion that the weight to be given the parties’ agreement is different on variation applications than on initial applications, as a careful reading of *Miglin* bears out. Rather, the parties’ agreement is critical evidence of what they actually or ought reasonably to be taken to have contemplated at the time. On an application to vary a support order that incorporates support provisions of the parties’ comprehensive, final separation agreement under s. 17, the court must balance the goal of preserving autonomy and certainty with ensuring the support arrangements are in substantial compliance with the overall objectives of the Act. If a material change is identified, the agreement is also to be considered in determining what variation is justified. Judges making variation orders under s. 17 should limit themselves to making the appropriate variation and should not make a fresh order unrelated to the existing one.

Here, the Court of Appeal erred in finding that there had been a material change since the making of the spousal support order that would justify a variation. The parties reached a comprehensive agreement that they intended would be a final settlement of all of the outstanding issues between them. As it provided for spousal support that was not time-limited or subject to any review mechanism and was indexed, the fact that the wife would not seek employment outside the home cannot be viewed as a circumstance that departed from the reasonable outcomes anticipated by the parties in framing the agreement.

**Cases Cited**

By Abella and Rothstein JJ.

**Applied:** *Willick v. Willick*, [1994] 3 S.C.R. 670; *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370; **considered:**  *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303; **distinguished:**  *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 892; **referred to:***Moge v. Moge*, [1992] 3 S.C.R. 813; *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40; *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920; *Hickey v. Hickey*, [1999] 2 S.C.R. 518.

By Cromwell J.

**Applied:** *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303; **considered:**  *Willick v. Willick*, [1994] 3 S.C.R. 670; *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370; **distinguished:**  *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R. 892; **referred to:**  *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307; *Kehler v. Kehler*, 2003 MBCA 88, 177 Man. R. (2d) 135; *L. (H.) v. L. (M.H.)*, 2003 BCCA 484, 19 B.C.L.R. (4th) 327; *Ambler v. Ambler*, 2004 BCCA 492, 5 R.F.L. (6th) 229; *Spencer v. Spencer*, 2005 SKQB 116, 261 Sask. R. 150; *Turpin v. Clark*, 2009 BCCA 530, 4 B.C.L.R. (5th) 48; *Droit de la famille — 103038*, 2010 QCCA 2074, [2010] R.D.F. 647; *Templeton v. Templeton*, 2005 ABCA 133, 363 A.R. 392; *Kemp v. Kemp*, [2007] O.J. No. 1131 (QL); *Stones v. Stones*, 2004 BCCA 99, 195 B.C.A.C. 41; *Innes v. Innes* (2005), 199 O.A.C. 69.

**Statutes and Regulations Cited**

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), ss. 15.2 [ad. S.C. 1997, c. 1, s. 2], 17.

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McLeod, James G. Annotation to *Dolson v. Dolson* (2004), 7 R.F.L. (6th) 25.

Mnookin, Robert H. “Divorce Bargaining: The Limits on Private Ordering” (1985), 18 *U. Mich. J.L. Ref.* 1015.

Payne, Julien D., and Marilyn A. Payne. *Canadian Family Law*, 3rd ed. Toronto: Irwin Law, 2008.

Pineau, Jean, et Marie Pratte. *La famille*. Montréal: Thémis, 2006.

APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Morissette and Hilton JJ.A.), 2010 QCCA 793 (CanLII), SOQUIJ AZ-50629973, [2010] Q.J. No. 3531 (QL), 2010 CarswellQue 15612, affirming in part a decision of Courteau J., 2009 QCCS 3389 (CanLII), SOQUIJ AZ-50567722, [2009] Q.J. No. 7617 (QL), 2009 CarswellQue 7646. Appeal allowed.

*Miriam Grassby* and *Sylvie Leduc*, for the appellant.

*Donald Devine* and *Tamar Ajamian*, for the respondent.

*Anne‑France Goldwater* and *Robert Leckey*, for the interveners.

The judgment of Binnie, LeBel, Deschamps, Abella and Rothstein JJ. was delivered by

Abella and Rothstein JJ. —

Introduction

1. This appeal concerns a cross-application by L.S. to vary a court order dated May 13, 2003, requiring him to pay spousal support to his former wife, L.M.P. The question before us is how to approach an application for variation of a spousal support order under s. 17(4.1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), where the support terms of an agreement have been incorporated into the order. It also requires us to consider if the approach differs from initial applications for spousal support under s. 15.2.
2. The wife asks this Court to overturn the decision of the trial court and Quebec Court of Appeal, which had varied the amount of support in the original 2003 order and held that the husband’s support obligations would cease as of August 31, 2010. The trial and appeal courts accepted the husband’s argument that spousal support should be terminated because the wife is capable of working and has an obligation to become self-sufficient.
3. For the reasons that follow, we would allow the appeal. We agree with the wife that there has been no material change of circumstance since the order was made and that there was therefore no basis on which to vary it under s. 17(4.1) of the *Divorce Act*.

Background

1. Shortly after the parties married in 1988, the wife learned that she had multiple sclerosis. The husband was at all times aware of her condition, both during and after their marriage. The wife has not worked since her diagnosis, and has been receiving permanent disability benefits from her former employer’s health insurance plan. Throughout the marriage the husband pursued his career outside the home, while the wife looked after the household and children. The parties separated in April 2002 and were divorced on May 13, 2003.
2. On April 30, 2003, the parties entered into a “Consent to Judgment on Provisional Measures and Accessory Measures”. Each was represented by counsel when they entered into this comprehensive agreement dealing with the issues arising from their separation. The order dated May 13, 2003, incorporated the agreement. Among its terms, the order included a provision for indexed spousal support payable by the husband to the wife in the initial amount of $3,688 per month.
3. The preamble to the order states that the parties took into account the criteria set out in s. 15.2(4) of the *Divorce Act* and those set out in s. 15.2(6). The order does not specify a termination date for the payment of spousal support, nor does it make any reference to the wife seeking employment.

Judicial History

1. The present dispute arose in 2007 when the wife applied under s. 17 of the *Divorce Act* to vary the order, seeking a retroactive and prospective increase of child support in accordance with the Quebec Child Support Guidelines. In response, the husband brought a motion to vary, also under s. 17 of the *Divorce Act*, seeking both a reduction and, ultimately, a cancellation of spousal support on the grounds that there was a change in his own financial circumstances. This argument was rejected by the trial judge. The husband also argued that the wife was able to work outside the home and ought to make efforts to find employment. He did not argue that this was a change since the time of the original order, but rather appears to have argued that the wife was always capable of working outside the home, even during the marriage.
2. The trial judge, Courteau J., stated that the task before her was to “determine if [the wife] is able to work outside the home and if she should attempt to do so”. Both parties led expert evidence with respect to the wife’s ability to work. The wife’s expert was of the view that she was unable to work; the husband’s expert came to the opposite conclusion. The trial judge found that the experts agreed that “there has been little or no progression of the illness since the initial episodes, 19 years ago”. She also concluded that the wife’s condition was not as serious as she made it out to be. She was therefore able to work outside the home. The trial judge made no finding about whether this represented a material change of circumstance.
3. Despite the absence of such a finding, the trial judge reduced spousal support from $4,294.48 per month to $3,000 per month from July 23, 2009, until February 28, 2010. A further reduction to $2,000 per month was ordered from March 1, 2010, until August 31, 2010. No spousal support was ordered after that date. The trial judge ordered that if the wife wanted spousal support after that date, she would have the burden of showing the court what efforts she had made to seek employment.
4. The wife appealed, arguing that the trial judge erred in varying spousal support without having found a material change of circumstance as required by s. 17 of the *Divorce Act*. Writing for a unanimous court, Rochon J.A. rejected the wife’s appeal and ruled that even if the trial judge had not explicitly mentioned the existence of a material change, her approach respected the requirements of s. 17. He accepted the trial judge’s finding that the wife was able to work and concluded that there was no basis for interfering with it.
5. Rochon J.A. also held that the passage of time, accompanied by a failure to become (or to attempt to become) self-sufficient can give rise to a material change of circumstances. The absence of a time limitation in the support agreement incorporated into the order could not relieve the payee of her obligation to become self-sufficient.
6. As a result, a material change of circumstance could be inferred and the trial judge had made no error when she reduced and terminated the spousal support.
7. Even though he dismissed the wife’s appeal, Rochon J.A. nonetheless concluded that the trial judge’s second reduction in support (to $2,000 per month) should not have been ordered. In his view, a reduction to $3,000 per month until the termination of support on August 31, 2010, was appropriate.

Analysis

1. For sound policy reasons, family law permits and encourages separating spouses to work out their own arrangements through the use of separation agreements (Berend Hovius and Mary-Jo Maur, *Hovius on Family Law: Cases, Notes and Materials* (7th ed. 2009), at p. 783). Agreements are desirable because individuals should largely be free to order their lives as they wish; because “the parties themselves are in the best position to evaluate the comparative advantages of alternative arrangements”; and because a negotiated settlement avoids the significant personal and financial costs of litigation (Robert H. Mnookin, “Divorce Bargaining: The Limits on Private Ordering” (1985), 18 *U. Mich. J.L. Ref.* 1015, at pp. 1018-19).
2. At the same time, contract law principles are not rigidly applied in the family law context. Because a separation may result in dramatic life changes and emotional stress, Parliament has decided through the *Divorce Act* that these circumstances give rise to the possibility that the ability of separating spouses to realistically and objectively assess their current and future needs and preferences can be impaired. It also goes without saying that the economic terms of spousal support agreements can affect third parties, such as the children of the relationship. For these reasons, the *Divorce Act* authorizes courts to vary the spousal support terms, either on an initial application for support under s. 15.2, or on an application to vary an existing court order under s. 17, whether or not that order incorporates a spousal support agreement.
3. Under the 1968 *Divorce* *Act*, spousal support agreements, while not immune from variation by the courts, were not easily disturbed. This limited approach found expression in the *Pelech* trilogy which reflected the self-sufficiency and “clean break” theories of spousal support then prevailing, emphasized finality and certainty, and required that there be a radical change in circumstances that is causally connected to the marriage before the terms of an agreement could be varied (*Pelech v. Pelech*, [1987] 1 S.C.R. 801, *Richardson v. Richardson*, [1987] 1 S.C.R. 857, and *Caron v. Caron*, [1987] 1 S.C.R. 892).
4. The replacement of the 1968 legislation with the 1985 *Divorce Act* led this Court in *Moge v. Moge*, [1992] 3 S.C.R. 813, to reject the clean break theory of support that underlay the decisions in the *Pelech* trilogy. This revised conceptual framework for support led this Court in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, to reject the narrow *Pelech* standard of allowing a variation from a spousal support agreement only in circumstances where a radical change connected to the marriage could be shown.
5. Bastarache and Arbour JJ., for the majority in *Miglin*, acknowledged the importance of taking a fairly negotiated agreement into account:

. . . we believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the *Divorce Act* as a whole should receive considerable weight. [para. 4]

But they adopted a less exacting threshold for when courts could vary spousal support agreements in an initial application for support under s. 15.2 than had prevailed under the *Pelech* trilogy, concluding that its strict standard was no longer applicable and was “not appropriate in the current statutory context” (paras. 47 and 89). The new test they delineated required instead that the applicant “clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties’ intentions at the time of execution and the objectives of the Act” (para. 88).

1. Significantly, the Court also concluded that “the importance given to self-sufficiency and a ‘clean break’ in the jurisprudence relying on the [*Pelech*] trilogy is not only incompatible with the new Act, but too often fails to accord with the realities faced by many divorcing couples” (para. 39). The *Divorce Act*, they therefore concluded, creates a statutory override in s. 15.2 which authorizes courts to make an initial order which may be at odds with the terms of the agreement if those terms do not comply with the objectives of the Act.
2. In order to balance the parties’ intentions with the objectives of the *Divorce Act*, the Court in *Miglin* outlined a two-stage test for initial support orders under s. 15.2. The first step examines the process leading to and the substance of the agreement. The second requires a determination of “the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act” (para. 87). This addresses the direction in s. 15.2(4)(*c*) of the *Divorce Act* that on an *initial* application for support, among other factors, a court shall consider “any order, agreement or arrangement relating to support of either spouse”.

Section 17 Variation

1. This brings us to the role of such agreements under s. 17 of the Act. Unlike the question that confronted the Court in *Miglin*, this appeal concerns an application under s. 17 of the *Divorce Act* to vary an existing spousal support order where there had been a spousal support agreement prior to the section 15.2 order. Section 17 authorizes a court to vary, rescind or suspend prior orders (s. 17(1)), defines the factors allowing for variation (s. 17(4.1)) and sets out the objectives such a variation should serve (s. 17(7)). These provisions state:

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

(*a*) a support order or any provision thereof on application by either or both former spouses; or

(*b*) a custody order or any provision thereof on application by either or both former spouses or by any other person.

. . .

(4.1) [Factors for spousal support order] 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.

. . .

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

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

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

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

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

1. While the *objectives* of the variation order are virtually identical in s. 17 to those in s. 15.2 dealing with an initial support order, the *factors* to be considered in ss. 17(4.1) and 15.2(4) are significantly different. Section 17(4.1) sets out “a change in the . . . circumstances” of the parties as the sole factor. On initial support orders, on the other hand, the factors are as follows:

**15.2** . . .

(4) In making an order under subsection (1) [for spousal support] or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(*a*) the length of time the spouses cohabited;

(*b*) the functions performed by each spouse during cohabitation; and

(*c*) any order, agreement or arrangement relating to support of either spouse.

1. In other words, there are differences between what a court is directed to consider in making an initial support order and on a variation of that order. Notably, unlike on an initial application for spousal support under s. 15.2(4)(*c*), which specifically directs that a court consider “any order, agreement or arrangement relating to support of either spouse”, s. 17(4.1) makes no reference to agreements and simply requires that a court be satisfied “that a change in the condition, means, needs or other circumstances of either former spouse has occurred” since the making of the prior order or the last variation of that order. Because of these differences in language, it is important to keep the s. 15.2 and s. 17 analyses distinct.
2. On an application under s. 15.2, the court is expressly concerned with the extent to which the terms of an existing agreement should be incorporated into a first court order for support. On an application under s. 17, on the other hand, the court must determine whether to vary or rescind that support order because of a change in the parties’ circumstances.
3. Contrary to what our colleague Cromwell J. suggests, the majority in *Miglin* recognized that the different language employed by Parliament in ss. 15.2 and 17 required a different approach to initial and variation applications. At para. 61, Bastarache and Arbour JJ. state:

We disagree . . . with [the] importation of the “material change” test developed for s. 17 of the Act (see *Willick* [[1994] 3 S.C.R. 670]) into s. 15.2 in respect of pre-existing agreements. As we noted earlier, the statutory language simply does not support this. Whereas s. 17 of the Act directs the court to satisfy itself that a change has occurred, s. 15.2 respecting initial support applications does not. Rather, s. 15.2(4) requires the court to consider the length of cohabitation, the roles of the parties during the marriage, and any orders, agreements or arrangements. This explicit direction cannot be avoided, cast, as it is, in mandatory language.

1. We recognize that some confusion has arisen with respect to the treatment of support agreements under s. 17 based on the majority’s suggestion at para. 91 of *Miglin* in *obiter* that

it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17.

1. In our respectful view, the reference to consistency between orders under ss. 15.2 and 17 referred to at para. 91 of *Miglin* is best understood by the explanation given at para. 62 of *Miglin*:

As we shall explain below, consistency between treatment of consensual agreements incorporated into orders and those that are not is achieved another way. It is achieved when judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order.

Where the parties entered into a mutually acceptable agreement, the agreement is not ignored under either s. 15.2 or s. 17. However, its treatment will be different because of the different purposes of each provision.

1. The approach developed in *Miglin*, then, was responsive to the specific statutory directions of s. 15.2 of the *Divorce Act* and should not be imported into the analysis under s. 17.

A. *The Threshold for Variation*

1. In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1). A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse *since the making of the spousal support order*.
2. In our view, the proper approach under s. 17 to the variation of existing orders is found in *Willick v. Willick*, [1994] 3 S.C.R. 670, and *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. Like the order at issue in this case, *Willick* (dealing with child support) and *G. (L.)* (dealing with spousal support) involved court orders which had incorporated provisions of separation agreements. Both cases were decided under s. 17(4) of the *Divorce Act*, the predecessor provision to s. 17(4.1).
3. *Willick* described the proper analysis as requiring a court to “determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances” (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.
4. That “change of circumstances”, the majority of the Court concluded in *Willick*, had to be a “material” one, meaning a change that, “if known at the time, would likely have resulted in different terms” (p. 688). *G. (L.)* confirmed that this threshold also applied to spousal support variations.
5. The focus of the analysis is on the prior order and the circumstances in which it was made. *Willick* clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change “would likely have resulted in different terms” to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the *Willick* approach to variation applications requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement.
6. The decisions in *Willick* and *G. (L.)* also make it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.
7. In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40, at para. 49). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see MacPherson J.A., dissenting in part, in *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385, at paras. 54 and 63).
8. The threshold variation question is the same whether or not a spousal support order incorporates an agreement: Has a material change of circumstances occurred since the making of the order? (See *Willick*; *G. (L.)*; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920.)
9. This does not mean that the incorporated agreement is irrelevant. As Sopinka J. observed in *Willick*, “Where . . . the agreement is embodied in the judgment of the court, it is necessary to consider what additional effect is to be accorded to this fact” (p. 687).
10. The agreement may address future circumstances and predetermine who will bear the risk of any changes that might occur. And it may well specifically provide that a contemplated future event will or will not amount to a material change.
11. Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the *Willick* question may well be found in the terms of the order itself. That is, the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the *Willick* inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the *Divorce Act* when the order was made.
12. Alternatively, an agreement incorporated into an order may include a general provision stating that it is subject to variation upon a material change of circumstances, such as the agreement and subsequent order in *Hickey v. Hickey*, [1999] 2 S.C.R. 518. In such a case, the agreement incorporated into the s. 15.2 order does not expressly give the court any additional information as to whether a particular change would have resulted in different terms if known at the time of that order. The presence of such a provision will require a court to examine the terms of the s. 15.2 order and the circumstances of the parties at the time that order was entered into to determine what amounts to a material change.
13. Finally, an agreement incorporated into a s. 15.2 order may simply include a general term providing that it is final, or finality may be necessarily implied. But even where an agreement incorporated into an order includes a term providing that it is final, the court’s jurisdiction under s. 17 cannot be ousted (*Miglin*; *G. (L.)*; *Leskun*). A provision indicating that the order is final merely states the obvious: the order of the court is final *subject to* s. 17 of the *Divorce Act*. Courts will always apply the *Willick* inquiry to determine if a material change of circumstances exists.
14. Ultimately, courts are tasked with determining if a material change of circumstances has occurred so as to justify a variation of a s. 15.2 orderunder s. 17. The analysis is always grounded in the actual circumstances of the parties and the terms of the s. 15.2 order; what meaning a court will give any general statement of finality found in an order will be a question to be resolved on that basis. As we have explained, in some situations, the agreement incorporated into the order may help shape what is meant by a “material change of circumstances”. Where a s. 15.2 order deals with a specific change, it assists courts by answering the *Willick* inquiry through its terms. Conversely, when the order is general, or simply purports to be final, these less specific terms provide less assistance to courts in answering the *Willick* inquiry. Sometimes, in such cases, the circumstances of the parties may be such that courts will give little weight to a general statement of finality and conclude that a material change exists. However, at other times, in such cases, the circumstances of the parties may also be such that the courts will give effect to a general statement of finality and conclude that a material change does not exist.
15. An example is the simple case of a young couple who were only married a few months and who ended their marriage on essentially equal terms. A general statement of finality in an agreement incorporated into an order, coupled with these circumstances, should be given weight by a court conducting the *Willick* inquiry.
16. In sum, it bears repeating that the threshold question under s. 17, whether or not there is an agreement, is the one Sopinka J. described in *Willick*, namely:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation. [p. 688]

1. In Justice Cromwell’s opinion, however, “the parties’ comprehensive, final agreement must be accorded significant weight at the variation stage” because it “is critical evidence of what they actually or ought reasonably to be taken to have contemplated at the time” (paras. 76 and 84). With respect, the general proposition that spousal support agreements should be accorded “significant weight” in the search for a material change under s. 17 is problematic. As explained earlier, while a term stating that a specific type of change will — or will not — give rise to variation will constitute such “evidence” and will inform the court’s application of the *Willick* test, an agreement containing only general terms, such as a general statement of finality, provides little guidance in practice on whether or not a particular event or circumstance was contemplated by the parties or on the consequences the parties would have ascribed to it. The court will of necessity interpret any such general provision by reference to the parties’ circumstances at the time of the s. 15.2 order.  These circumstances may or may not lead the court to conclude that the parties have contemplated the event and, consequently, whether a material change warranting a variation has occurred: the court must find a “change, such that, if known at the time, would likely have resulted in different terms” (*Willick*, at p. 688).
2. The examination of the change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement as for one that does. A general statement that the agreement must be accorded “significant weight”, even though its implications in a concrete case are unclear, in effect raises the threshold necessary to establish a “material change” under s. 17 when there is an agreement, and emphasizes legal certainty and finality at the expense of the statutory requirements of s. 17.  Such a result is reminiscent of the “clean break” approach of the *Pelech* trilogy, rejected in *Moge* and *Miglin* because it was held to be inappropriate in the context of the current *Divorce Act*.

B. *The Appropriate Variation*

1. If the s. 17 threshold for variation of a spousal support order has been met, a court must determine what variation to the order needs to be made in light of the change in circumstances. The court then takes into account the material change, and should limit itself to making only the variation justified by that change. As Justice L’Heureux-Dubé, concurring in *Willick*, observed: “A variation under the Act is neither an appeal of the original order nor a *de novo* hearing” (p. 739). As earlier stated, as Bastarache and Arbour JJ. said in *Miglin*, “judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order” (para. 62).
2. Variation involves the application of both s. 17(4.1) and s. 17(7) of the *Divorce Act*. In *Hickey*, L’Heureux-Dubé J. described the interplay between them as follows:

On an application for variation of an award of spousal support, the court must first find, under s. 17(4), that there has been a material change in the conditions, means, needs, or circumstances of either spouse (see *Moge*, *supra*, at pp. 875-76, and *Walker v. Walker* (1992), 12 B.C.A.C. 137, at pp. 141-42) and in making the order, the court must take into consideration that change. As with the variation of child support orders, this change must be material, and cannot be trivial or insignificant. The factors enumerated give the court considerable discretion in determining whether a variation order is justified: see J. Payne, *Payne on Divorce* (4th ed. 1996), at p. 321. Once this threshold is passed, the court must consider the four objectives of spousal support enumerated in s. 17(7) of the *Divorce Act*. [para. 20]

1. Julien D. Payne and Marilyn A. Payne observed that “[t]here is nothing in the *Divorce Act* to suggest that any one of the objectives [in s. 17(7)] has greater weight or importance than any other objective” (*Canadian Family Law* (3rd ed. 2008), at p. 253). Rather, the objectives “operate in the context of a wide judicial discretion” and “provide opportunities for a more equitable distribution of the economic consequence of divorce between the spouses”.
2. In short, once a material change in circumstances has been established, the variation order should “properly reflec[t] the objectives set out in s. 17(7), . . . [take] account of the material changes in circumstances, [and] conside[r] the existence of the separation agreement and its terms as a relevant factor” (*Hickey*, at para. 27). A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the *Divorce Act*.

Application to This Case

1. The issue in this case is whether the spousal support order should have been varied under s. 17. In our view, it should not have been.
2. The trial judge conducted a *de novo* hearing on the issue of the wife’s ability to work and concluded that the wife was “capable of working outside the home and that she should seek to become economically self-sufficient”. She made no finding about whether there had been a material change in the wife’s circumstances since the 2003 order was made. The Court of Appeal concluded that the trial judge’s factual determination of the wife’s capacity to work, coupled with the passage of time, amounted to a material change of circumstances.
3. In light of the circumstances at the time the original order was made, these findings are, with respect, unsustainable. When the order was made, the wife had been living with multiple sclerosis for 14 years. She was receiving disability payments because she was found to be unable to work by the insurance company. Except for the brief period before her diagnosis, she did not work outside the home during the marriage.
4. Not only was the husband fully aware of her medical condition, he made representations, before and after the separation, to her disability insurer, to pension personnel, and to tax authorities that she was unable to work. His explanation for these representations was that he had “embellished” his wife’s health problems to the authorities to help ease his financial situation. His changed position at trial, that she can now work, is both unpalatable and unworthy of serious consideration.
5. The expert evidence was that there has been little or no change in the wife’s medical condition in 19 years. That means that there has been no improvement. It is, in short, the same as when the order was made. And that in turn means that there has been *no* change, let alone a material one, since the order. This ought to have been dispositive of the husband’s application to vary.
6. However, instead of determining whether there had been a material change of circumstances, the trial judge conducted a *de novo* assessment of the wife’s ability to work as if this were an original application for support under s. 15.2. In relying on this assessment to infer a material change of circumstances, the Court of Appeal fell into the same error.
7. The husband argued that the wife had a duty to seek employment based on the factors in s. 15.2(6) of the *Divorce Act* which were included in the agreement incorporated in the order. In particular, he relied on the objective that “insofar as practical” there should be “economic self-sufficiency of Plaintiff and Defendant”. Her failure to seek employment, he therefore argued, was a material change of circumstances.
8. We do not accept the husband’s submissions. There is nothing in the order suggesting that the wife was expected to seek employment. The order recognized that the wife was in receipt of disability payments. It provided for spousal support and included no term or provision for review. Its terms indicate that spousal support was intended to be for an indeterminate period. The order expressly acknowledged that the objectives of s. 15.2(6) of the *Divorce Act* were taken into consideration by the parties.
9. Neither does the *Divorce Act* impose a duty upon ex-spouses to become self-sufficient. As this Court affirmed in *Leskun*, the “[f]ailure to achieve self-sufficiency is not breach of ‘a duty’ and is simply one factor amongst others to be taken into account” (para. 27). Section 15.2(6)(*d*) of the *Divorce Act* simply states that the order should “in so far as practicable, promote the economic self-sufficiency” of the parties.
10. In sum, upon examination of the actual circumstances of the parties at the time the order was made, and the terms of the order, it is apparent that there has been no material change of circumstances since the making of the order. It cannot be said that the wife’s failure to seek employment is something that, “if known at the time, would likely have resulted in different terms” to the order (*Willick*, at p. 688). Simply put, at the time of the order, the wife had multiple sclerosis and was not expected to seek employment outside the home; nothing has changed with respect to her medical condition since that time. As a result, the husband’s application for variation cannot succeed as he has failed to meet the threshold required by s. 17(4.1).
11. We would therefore allow the appeal with costs throughout. The indexed spousal support in the original order is to continue, effective retroactively to the date it was varied by the trial court.

The reasons of McLachlin C.J. and Cromwell J. were delivered by

Cromwell J. —

I. Introduction

1. When the parties have reached a comprehensive, final agreement relating to their separation and its provisions are incorporated into a court order, what weight should be given to their agreement when one of them seeks to vary that order? As I see it, the principles established by the Court in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, require that the agreement be given considerable weight. While I agree with my colleagues Abella and Rothstein JJ. that the appeal should be allowed, I respectfully disagree with their analysis of this question.
2. My colleagues Abella and Rothstein JJ. are of the view that *Miglin* has nothing to do with variation applications, that the analysis of what weight to give the parties’ agreement on an initial support application is completely distinct from the analysis of the same issue in relation to a variation application and that, on a variation application, the parties’ agreement should be given no special weight unless it specifically addresses the matter relied on as the basis of the change. My view is that the agreement plays a central role in the context of variation of the order and that the principles established in *Miglin* are highly relevant to this exercise.
3. In *Miglin*, the Court set out the proper approach to determining an initial application for spousal support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support. *Miglin*’s central teaching is that “assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties’ interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular” (para. 67). In my view, this same balancing of these values, as assessed in accordance with all the objectives of the Act, lies at the core of the court’s task when dealing with an application to vary a support order that incorporates the support provisions of the parties’ comprehensive agreement.

II. Analysis

1. It is useful to approach the case by answering the following three questions:

1. What is the threshold for variation under s. 17 of the *Divorce Act*?

2. What is the effect of incorporating the support provisions of a separation agreement into a court order?

3. What is the effect of a separation agreement on an application to vary a spousal support order incorporating its terms?

A. *The Threshold for Variation Under Section 17*

1. This, I think, is not a controversial matter. Section 17(4.1) of the Act directs that “[b]efore 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”. The Court in *Willick v. Willick*, [1994] 3 S.C.R. 670, which concerned child support, held that what is required is a “material change” of these circumstances. This means “a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation” (p. 688). This threshold also applies to applications to vary spousal support: *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370, at para. 73, *per* Sopinka J., and paras. 48-51, *per* L’Heureux-Dubé J.
2. It is thus clear from *Willick* that a matter known at the time of the original order cannot provide the basis of a material change in circumstances. But what about matters that were simply foreseeable at that time? According to L’Heureux-Dubé J. in *G. (L.)*, the question is whether the parties must be taken to have actually contemplated the matter in question; as she put it at para. 51,simple foreseeability does not bar a variation finding under s. 17 because “the fact that a change was objectively foreseeable does not necessarily mean that it was contemplated by the parties”: citing *Willick*, at p. 734 (emphasis added). Thus, changes which the parties actually contemplated or that must have been in the parties’ contemplation cannot constitute material changes.
3. There is, in my opinion, no inconsistency between *Miglin* and *Willick*. *Miglin* did not suggest that the “material change” threshold for variation as set out in *Willick* does not apply. *Willick* did not discuss the weight that the parties’ agreement should be given on a variation application other than, as we shall see in the next section, by setting out the effect on the variation application of the fact that the parties’ agreement had been incorporated into a court order.

B. *The Effect of Incorporating the Agreement Into a Court Order*

1. Once again, this is not a controversial issue. In *Willick*, the Court addressed this question in relation to a child support order. Once the terms of an agreement are incorporated into a court order, the provision must be assumed to have met the statutory requirements at the time and the correctness of that order is not reviewed during the variation proceeding (p. 687). Thus, the court asked to vary the order assumes that it was an appropriate order at the time it was made and applies the material change threshold on that basis. The same approach is used with respect to variation of spousal support orders (*Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.), at p. 313; J. D. Payne and M. A. Payne, *Canadian Family Law* (3rd ed. 2008), at p. 298).

C. *The Effect of a Comprehensive Agreement Which Has Been Incorporated Into an Order on an Application to Vary the Order*

(1) Background: From the Trilogy to *Miglin*

1. At the time of the *Willick* and *G. (L.)* decisions, the relevant law about how much weight to give to the parties’ agreement was set out in a trilogy of cases: *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *Richardson v. Richardson*, [1987] 1 S.C.R. 857, and *Caron v. Caron*, [1987] 1 S.C.R. 892. The party wishing to depart from the agreement’s terms had to establish that there had been a radical change causally connected to the marriage. This test applied both to initial applications for support (as in *Richardson*) and to variation of court orders incorporating agreements (as in *Pelech* and *Caron*). Neither in *Willick* nor in *G. (L.)*, which came after the trilogy, did a majority of the Court directly address how agreements affected an application by one of the former spouses to vary a support order incorporating its terms. However, these judgments contain two comments that are particularly relevant here:

(i) The court has discretion with respect to variation and is not strictly bound by the terms of the parties’ agreement (*Willick*, at p. 686, and *G. (L.)*, at para. 58, *per* concurring reasons of L’Heureux-Dubé J.).

(ii) However, the agreement is an “important” factor in exercising the discretionary power to vary (*G. (L.)*, at para. 56). This is so even though agreements are expressly included in the factors to be considered on an initial support application (s. 15(5)(*c*) of the *Divorce Act* (now s. 15.2(4)(*c*), S.C. 1997, c. 1, s. 2)) and are not so expressly mentioned in relation to variation applications (s. 17) (*G. (L.)*, at paras. 53-55).

1. Since these pronouncements, the legal landscape in relation to initial support applications in the presence of an agreement has changed as a result of the Court’s judgment in *Miglin*. The Court held that the narrow test enunciated in the *Pelech* trilogy for interfering with a pre-existing agreement was no longer appropriate in the new statutory context of the provisions of the 1985 Act (para. 47). Nonetheless, *Miglin* affirmed that unimpeachably negotiated agreements should receive considerable weight provided that they represent the intentions and expectations of the parties and substantially comply with the objectives of the *Divorce Act* as a whole. Thus, while the Court concluded that the very stringent test set out in the trilogy was no longer apt under the new statutory provisions, a comprehensive, final agreement was still to be given considerable weight.
2. As held in *Miglin*, an initial application for spousal support inconsistent with a pre-existing agreement requires a two-stage investigation into all the circumstances, first at the time of the agreement’s formation and second at the time of the application. At the first stage, the court determines whether the agreement was negotiated under satisfactory conditions and whether its terms, when negotiated, were in substantial compliance with the general objectives of the Act (paras. 80-86). At the second stage, the court assesses whether the agreement continues to reflect the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act. The party seeking an order different than the terms of the agreement must show that there are new circumstances which were not reasonably anticipated by the parties; the test is not “strict foreseeability” but whether the agreement “can be said to have contemplated the situation before the court at the time of the application” (para. 89). The alleged change is also measured against the objectives of the Act to ensure that the agreement’s provisions continue to be in substantial compliance with those objectives (para. 87).

(2) *Miglin* and Variation Applications

1. As noted, *Miglin* was an initial application case. The Court recognized that in deciding what weight to give to the parties’ agreement on an initial application, the material change threshold does not apply (para. 61). However, the Court’s reasons make clear that the parties’ agreement is an important consideration on a variation application.
2. The Court outlined how to strike the balance between preserving reasonable certainty in legal relations and recognizing the distinctions between separation agreements and commercial contracts. This balance, *Miglin* held, is struck by ensuring that separation agreements have been fairly negotiated and comply substantially with the statutory objectives. As the Court put it: “. . . a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the *Divorce Act* as a whole should receive considerable weight” (para. 4 (emphasis added)). The Court emphasized that this principle applies equally to a variation application as to an initial application. While my colleagues dismiss these comments in *Miglin* as an *obiter* suggestion, Bastarache and Arbour JJ. for the majority of the Court could not have been clearer:

It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight. As we noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17. . . . The objectives of finality and certainty noted above caution against too broad a discretion in varying an order that the parties have been relying on in arranging their affairs. . . . Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties’ understanding of what constituted an equitable sharing of the economic consequences of the marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration. [Emphasis added; para. 91.]

1. This is the considered opinion of a majority of the Court. Moreover, *Miglin* provided considerable assistance in deciding how the passage of time affects the weight to be given to the parties’ agreement. The court must assess “the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act” (para. 87).
2. In my respectful view, while the two-step *Miglin* analysis cannot simply be imported into variation applications, *Miglin* stands for the proposition that the parties’ comprehensive, final agreement must be accorded significant weight at the variation stage, as it is at the initial application stage. In addition, *Miglin* provides considerable guidance about how this ought to be done.
3. I part company with my colleagues Abella and Rothstein JJ. when they state that “it is important to keep the s. 15.2 [initial application] and s. 17 [variation] analyses distinct” and that the approach developed in *Miglin* “should not be imported into the analysis under s. 17” (paras. 23 and 28). This leads them, in my view, to give the parties’ comprehensive, final agreement far too limited a role on a variation application. That role, in my respectful view, is not properly characterized by saying simply, as my colleagues do, that the agreement is not “irrelevant” (para. 37).
4. They base this conclusion on two points: first, the difference in the statutory language between s. 15.2(4)(*c*), which applies to initial applications, and s. 17(4.1), which applies to variations, and second, a close reading of the majority judgment in *Miglin*. I respectfully disagree with both of these points.
5. I turn first to the difference in the statutory language. As my colleagues note, s. 15.2(4)(*c*) (initial applications) requires a court to consider an agreement between the parties but s. 17(4.1) (variation applications) has no express direction to consider agreements. For several reasons, my view is that the absence of an express direction in s. 17(4.1) does not support giving different weight to the parties’ agreement in these two situations.
6. The Court’s decisions have never attached great importance to the differences between initial applications and variation applications in relation to the role of the parties’ agreement in determining support. The approach of the trilogy, we should remember, applied to both situations: see *Richardson*, at pp. 866-67. In *G. (L.)*, L’Heureux-Dubé J. did not attribute any significance to the difference between the language in ss. 15 and 17 in relation to the importance of the parties’ agreement with respect to an initial and a variation application:

Section 17, which governs variation orders, restates for its part the general provisions applicable to a support order without specifically mentioning the obligation to take into account agreements concluded between the parties. One should not conclude, however, that such agreements should be ignored when applications to vary support orders are made, especially when they were intended to be a final settlement, and were ratified by the original support order, an order which must be taken into account. [para. 55]

1. As I have noted earlier, the Court in *Miglin* specifically addressed the issue of whether the difference in statutory language should result in a significantly different weight being given to the agreement on a variation application. The Court concluded that it should not (para. 91, cited above at para. 74). I conclude that consistent and recent authority from this Court is against inferring, as my colleagues do, that the difference in the statutory language supports giving the parties’ agreement different weight on an initial application and on a variation application.
2. My colleagues write that the factors to be considered on a variation application and an initial application are “significantly different” (para. 22) and that the differences in language require that the s. 15.2 and the s. 17 analyses be kept distinct. Respectfully, the statutory text does not bear this out.
3. In order to have the authority to vary the earlier 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” (s. 17(4.1)). Section 15.2(4) provides that the “condition, means, needs and other circumstances of each spouse” *includes*, by virtue of s. 15.2(4)(*c*), any agreement or arrangement relating to support of either spouse. But even without that express inclusion, the parties’ agreement must fall within the “condition, means, needs or other circumstances” for the purposes of s. 17(4.1). I do not understand how s. 15.2(4)(*c*), by specifically *including* the parties’ agreement as one aspect of their “condition, means, needs and other circumstances”, can be understood to limit consideration of that agreement as an aspect of their “condition, means, needs or other circumstances” under s. 17(4.1). Moreover, the statutory objectives of the initial and the varied order are virtually identical, as a comparison of s. 15.2(6) and s. 17(7) shows. Respectfully, the “differences in language” between ss. 15.2 and 17 on close examination are very minor and provide no foundation for keeping the analyses under these two provisions “distinct” in relation to the weight to be given to the parties’ agreement.
4. Similarly, I do not understand how, as a matter of logic, the parties’ comprehensive and final agreement could not be central to considering whether there had been a material change. The *Willick* test is applied on the basis that a change is not material if it was known to the parties or must reasonably be taken as having been contemplated by them. The parties’ agreement is critical evidence of what they actually or ought reasonably to be taken to have contemplated at the time.
5. My colleagues further conclude that the majority judgment in *Miglin* was responsive to the specific statutory directions in s. 15.2 and should not be imported into variation analysis under s. 17. I agree that the Court in *Miglin* was clear that the “material change” threshold applicable on a variation does not apply on an initial application. However, as I have set out earlier, the Court was also clear that important weight is to be given to the parties’ agreement in *both* situations. The Court noted that it would be inconsistent to do otherwise (para. 91). In any event, I do not understand how in logic the Court’s analysis in *Miglin* could *not* be applicable to a s. 17 variation. The very issue discussed in *Miglin*’s second step is how change over time affects the weight to be given to an agreement (paras. 88 and 90). That same consideration is an important issue facing a court on a variation application in relation to an initial order that was the product of an agreement.
6. My colleagues take quite a different approach, proposing that only where an agreement specifically provides for a particular matter will it be of much help in answering the “*Willick* question” (para. 39). As for types of changes other than those specifically addressed in the agreement, the fact of the agreement is likely not to be of much assistance on the material change question. To me, this approach is at odds not only with *Miglin*, but also with one of the basic purposes of agreements, namely to apportion the risks of future uncertain events in order to achieve finality and certainty. Giving considerable weight to the parties’ comprehensive, final agreement does not, as my colleagues suggest, bring back the “clean break” approach rejected in *Miglin*; it applies the express holding and underlying principles of *Miglin*.
7. The “change” threshold specified in s. 17 does not apply to initial orders; there is no reference to any “change” requirement in s. 15.2. However, this difference in the statutory language provides no basis for my colleagues’ conclusion that the weight to be given to the parties’ agreements is different on variation applications than on initial applications. My colleagues rely on para. 61 of *Miglin* to support their contention that there must be a “different approach”. However, when the whole of para. 61 is considered, it is in my view clear that this paragraph simply rejects the importation of a material change threshold into s. 15.2. Paragraph 61 of *Miglin* reads:

We disagree, however, with [the] importation of the “material change” test developed for s. 17 of the Act (see *Willick*, *supra*) into s. 15.2 in respect of pre-existing agreements. As we noted earlier, the statutory language simply does not support this. Whereas s. 17 of the Act directs the court to satisfy itself that a change has occurred, s. 15.2 respecting initial support applications does not. Rather, s. 15.2(4) requires the court to consider the length of cohabitation, the roles of the parties during the marriage, and any orders, agreements or arrangements. This explicit direction cannot be avoided, cast, as it is, in mandatory language.

1. This paragraph, respectfully, has nothing to do with the weight to be given to the parties’ agreement when one of them seeks to vary an initial order incorporating that agreement.
2. My colleagues also refer to para. 62 of *Miglin*. But as that paragraph makes explicit, it deals with consistency of treatment as between “consensual agreements incorporated into orders and those that are not”. We are here concerned with variation of an order which incorporates an agreement. Paragraphs 60-62 of *Miglin* have nothing to do with the weight to be given to the parties’ agreement in that situation.

(3) Post-*Miglin*

(a) *Brief Overview of the Jurisprudence*

1. I turn to the question of how the principles from *Miglin* apply to variation applications. Before setting out what in my opinion is the correct answer to this question, it will be useful to canvass briefly the range of views that have emerged on this issue. Even the brief survey that follows shows that clarification is required.
2. Most courts have concluded that *Miglin* is relevant to applications to vary support orders which incorporate the parties’ comprehensive separation agreement. However, the courts have taken different approaches to *how* the *Miglin* analysis is relevant. Some courts have been uncertain as to whether both steps of *Miglin*’s analysis are applicable: see, e.g., *Kehler v. Kehler*,2003 MBCA 88, 177 Man. R. (2d) 135, at paras. 23-24; *L. (H.) v. L. (M.H.)*, 2003 BCCA 484, 19 B.C.L.R. (4th) 327, at paras. 19-23. Others have taken the view that *Miglin*’s two-stepanalysis applies to a variation order, without referring to *Willick*: *Ambler v. Ambler*, 2004 BCCA 492, 5 R.F.L. (6th) 229, at para. 11; *Spencer v. Spencer*, 2005 SKQB 116, 261 Sask. R. 150, at paras. 9-10. Still others have said that both *Willick* and *Miglin*’s two-step analyses apply: *Turpin v. Clark*, 2009 BCCA 530, 4 B.C.L.R. (5th) 48, at paras. 57-62; *Droit de la famille — 103038*, 2010 QCCA 2074, [2010] R.D.F. 647, at para. 49; see also M. D.-Castelli and D. Goubau, *Le droit de la famille au Québec* (5th ed. 2005), at p. 485; J. Pineau and M. Pratte, *La famille* (2006), at p. 463. Other courts have decided that the approach depends on whether the agreement is a final settlement. If the agreement is a final settlement, both *Miglin* steps apply. If it is not a final settlement, the *Willick* material change test applies: see, e.g., *Templeton v. Templeton*, 2005 ABCA 133, 363 A.R. 392, at paras. 6-10. Others take the view that the party seeking variation must satisfy both the *Willick* “material change” threshold and the second step in the *Miglin* test: see, e.g., *Kemp v. Kemp*, [2007] O.J. No. 1131 (QL) (S.C.J.), at paras. 61-76. Two prominent commentators have also essentially adopted this view:J. G. McLeod, Annotation to *Dolson v. Dolson* (2004), 7 R.F.L. (6th) 25, at pp. 29‑30; Payne and Payne, at pp. 284-86.

(b) *The Correct Analytical Approach*

1. In my view, when faced with an application to vary a support order under s. 17, courts should refer to the following approach. I address here only variation applications that are subject to the material change threshold under s. 17. I am not intending to address variation applications that are subject to the limitation provided for in s. 17(10).

1. The core of the court’s task when dealing with an application to vary a support order which incorporates the support provisions of the parties’ comprehensive, final separation agreement is to balance the goal of preserving autonomy and certainty with ensuring the support arrangements are in substantial compliance with the overall objectives of the Act.

2. *Willick* establishes the principle that the order for which variation is sought, unless set aside, is assumed to have been correct when made and is not challenged on the variation application. This means that the first step of *Miglin* is generally not relevant on the variation application because those issues are taken to have been decided when the agreement was incorporated into the order (J. G. McLeod, Annotation to *Ambler v. Ambler* (2004), 5 R.F.L. (6th) 229; McLeod, Annotation to *Dolson*, at pp. 29-30; Payne and Payne, at pp. 285-86).

3. The threshold under s. 17 is that set out in *Willick*, that is, “a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation” (p. 688). In the context of an application to vary a support order that incorporates the parties’ comprehensive final agreement, a change, in order to be “material”, must be a change that (1) relates to something that was not either expressly addressed by the parties in the agreement or that cannot be taken as having been in their contemplation; and (2) results in the support provision, considered in the context of the entire agreement, no longer being in substantial compliance with the objectives of the Act as a whole.

4. With respect to point (1), the analysis at step two of *Miglin* should inform the inquiry. A comprehensive and final agreement which contains no review or variation mechanism must be taken to have been entered into in contemplation of the matters expressly dealt with as well as of the sorts of changes in circumstances that were or must have been in the parties’ contemplation at the time of the order (*Miglin*, at para. 89). The test, however, is not simple foreseeability in its broadest sense as virtually any change is foreseeable: see *Miglin*, at para. 89; *G. (L.)*, at para. 51; *Stones v. Stones*,2004 BCCA 99, 195 B.C.A.C. 41,at paras. 15-16; *Innes v. Innes* (2005), 199 O.A.C. 69 (S.C.J. (Div. Ct.)), at paras. 25-27. Rather, the issue for the court is whether the parties have either expressly contemplated the situation now relied on as a material change or, having regard to the terms of the agreement and the surrounding circumstances, must be taken as having contemplated it. Lambert J.A. put it well in *Stones*,at para. 16, when he said that the matter is one which the parties must have had in contemplation and built into the framing of their agreement. This is consistent with what was said in *Miglin*: the question “is the extent to which the . . . agreement can be said to have contemplated the situation before the court at the time of the application” (para. 89). The converse is also true: the non-occurrence of an event that was contemplated as going to occur may also give rise to a material change in circumstances.

5. With respect to point (2), the relevant part of the analysis from the second step in *Miglin* applies. *Miglin* directs that, when measuring whether the agreement continues in the current circumstances to substantially comply with the objectives of the Act, *all* of the objectives of the Act must be taken into consideration. These include not only the statutory objectives specific to support orders but also the broader objectives of finality, certainty and autonomy that Parliament has endorsed in the Act (*Miglin*, at paras. 53-57 and 91).

6. If a material change is identified, the agreement is also to be considered in determining what variation is justified. Change is not a threshold that permits the court “to jettison the agreement entirely” (*Miglin*, at para. 90). Rather, judges making variation orders under s. 17 should limit themselves to making the appropriate variation, but should not make a fresh order unrelated to the existing one (*Miglin*, at para. 91). I agree with Abella and Rothstein JJ. that the court “should limit itself to making the variation which is appropriate in light of the change” (para. 50).

D. *Application*

1. The parties separated in April 2002 and were divorced on May 13, 2003. On April 30, 2003, the parties entered into a “Consent to Judgment on Provisional Measures and Accessory Measures” which I will refer to as the agreement. Each party was represented by counsel.
2. The 17-page agreement was comprehensive, addressing in detail custody, access, child and spousal support and partition of the family patrimony. It recited that the parties wished to enter into a final agreement settling all of the provisional and accessory measures including, among other things, spousal support. The agreement noted that the former wife was receiving disability insurance and provided for indexed spousal support without time limit or mechanism for review.
3. The husband was at all times fully aware of his wife’s medical condition. In fact, the evidence showed that both before and after separation, he made representations to her disability insurer, to pension personnel and to tax authorities that she was unable to work. For example, he wrote to tax authorities on August 12, 2002 (about five months after the separation, but about eight months before the separation agreement was signed in April of 2003), asking for a cancellation of interest and penalties imposed on him, pleading inability to pay. In addition to other matters which the husband relied on to support his request to the tax authorities, he referred to [translation] “the precarious and greatly deteriorated state of health of my wife, who has experienced six (6) new attacks of multiple sclerosis over the past two (2) years”.
4. As called for by the agreement, its provisions were incorporated into a court order (dated May 13, 2003), including those relating to indexed spousal support (with no time limit or provision for automatic review) payable by the husband to the wife in the amount of $3,688 per month. The preamble to the order states that the parties took into account the criteria set out in s. 15.2(4) of the *Divorce Act* and those set out in s. 15.2(6).
5. In my respectful view, the Court of Appeal erred in finding that there had been a change in the “means, needs or other circumstances of either former spouse” since the making of the spousal support order which would justify varying it under s. 17(4.1) of the Act. While I am of the view that the agreement in this case should receive greater weight than my colleagues believe, I nonetheless agree with the conclusion found at para. 60 of their reasons that there has not been a material change in circumstances in this case.
6. The parties reached a comprehensive agreement that they intended to be a final settlement of all the outstanding issues between them. The husband knew his wife had multiple sclerosis and could not be expected to seek employment outside the home. The agreement provided for spousal support that was not time-limited or subject to any review mechanism set out in the agreement and was indexed. In light of the terms of the agreement and the circumstances known to the parties at the time, the fact that the wife would not seek employment outside the home must be taken to have been contemplated by their agreement. The wife’s failure to search for work cannot be viewed as a circumstance that departed from the reasonable outcomes anticipated by the parties in framing the agreement (*Miglin*, at para. 91). This was not something that “if known at the time, would likely have resulted in different terms” (*Willick*, at p. 688).
7. I agree with my colleagues that the findings of the judge at first instance that the wife was capable of working outside the home and that she should seek to become economically self-sufficient are not sustainable in light of the circumstances at the time the original order was made (paras. 52-56).
8. I would therefore join Abella and Rothstein JJ. in proposing to allow the appeal with costs throughout.

*Appeal allowed with costs.*

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