

**SUPREME COURT OF CANADA**

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| **Citation:** R.P. *v.* R.C., 2011 SCC 65, [2011] 3 S.C.R. 819 | **Date:** 20111221  **Docket:** 33698 |

**Between:**

**R.P.**

Appellant

and

**R.C.**

Respondent

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

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| **Joint Reasons for Judgment:**  (paras. 1 to 53)  **Concurring Reasons:**  (para. 54) | Abella and Rothstein JJ. (Binnie, LeBel and Deschamps JJ. concurring)  Cromwell J. (McLachlin C.J. concurring) |

r.p. *v.* r.c., 2011 SCC 65, [2011] 3 S.C.R. 819

R.P. *Appellant*

v.

R.C. *Respondent*

**Indexed as: R.P. *v.* R.C.**

2011 SCC 65

File No.: 33698.

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 — Husband applying to terminate spousal support order on basis of his retirement and the market downturn — Husband not adducing evidence of his financial circumstances at time of original support order or of status of investments at the time of variation — Order gradually reducing then terminating support for 80‑year‑old wife — Whether husband had established that there had been a material change in circumstances since the original support order — Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 17(4.1) — Rules of practice of the Superior Court of Québec in family matters, R.R.Q. 1981, c. C‑25, r. 9, rule 39.*

The parties were married in 1958, separated in 1974 and divorced in 1984. At the time of separation, the wife remained in the matrimonial home with their two children and she now resides there alone. The husband was ordered to pay spousal and child support in the combined amount of $1,950 per month. In 1991, after the children no longer resided with the wife, the husband was ordered to pay $2,000 per month (indexed) in spousal support. At the time, because he did not contest his capacity to pay support, he did not file a sworn statement setting out his financial circumstances. In 2006, he retired and sold the house where he and his second wife lived, realizing the sum of $2 million. In 2008, he applied to terminate spousal support based on the facts that he no longer had employment income, that the market downturn had a negative impact on his assets, and that he had a son in university. At the time of the hearing in 2009, the husband was 71 and his former wife was 80. The trial judge held that because of the economic downturn and the husband’s retirement, there had been a material change in circumstances justifying a variation of the amount of spousal support to $1,500 per month, unindexed. Both parties appealed. The Court of Appeal upheld the variation and found that the trial judge did not need to know what the husband’s financial circumstances were when the original order was made. It ordered that support be gradually reduced and that payments terminate in September, 2010. The wife appealed to this Court.

*Held*: The appeal should be allowed and the 1991 Order should be restored.

*Per* Binnie, LeBel, Deschamps, Abella and Rothstein JJ.: Under s. 17(4.1) of the *Divorce Act*, the moving party must establish that there has been a material change of circumstances since the making of the prior order or variation. To be material, in accordance with *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, a change must be one which, if known at the time, would likely have resulted in different terms to the existing order. On an application to vary, the court should consider the terms of the order and the circumstances of the parties at the time the order was made to determine whether a particular change is material. The existing order is deemed to have been correct when it was made, and only if the requirements of s. 17 of the *Divorce Act* are met will there be a variation. In this case, the question was whether there was a material change in the husband’s circumstances since the 1991 Order. His application should be dismissed because there are two crucial evidentiary gaps. First, there is no information about whether he sold any of his investments — and thereby crystallized his losses — when they declined in value in late 2008. He cannot, without more, simply cherry-pick a date on which his investments decreased in value to claim that a material change of circumstances has occurred. The second gap is that there is no evidence in the record about the husband’s financial circumstances in 1991 when the Order was made. There is therefore no evidence from which reasonable inferences can be drawn about how the husband’s financial circumstances have changed. The husband’s acknowledgment of sufficient resources in prior proceedings does not relieve him of his evidentiary and legal burdens in this one. These gaps mean that there is no way of measuring whether there has been any material change that would entitle the husband to a variation of spousal support. The husband was required by the *Divorce Act* and the *Rules of practice of the Superior Court of Québec in family matters*,to identify the change relied on and to provide sufficient evidence to enable a court to decide whether a material change in his circumstances had in fact occurred since the making of the 1991 Order. Since he has produced no evidentiary foundation for a variation order under s. 17, his application is dismissed.

*Per* McLachlin C.J. and Cromwell J.: We concur with the majority that the respondent’s application to adduce fresh evidence should be dismissed, that the appeal should be allowed with costs throughout and that the terms of the 1991 Order of the Court of Appeal should be restored for the reasons given at para. 47.

**Cases Cited**

By Abella and Rothstein JJ.

**Applied:** *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 R.C.S. 775; **referred to:**  *Droit de la famille — 705*, [1989] R.D.F. 603; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*,2000 SCC 2, [2000] 1 S.C.R. 44.

**Statutes and Regulations Cited**

*Code of Civil Procedure*, R.S.Q., c. C‑25, art. 509.

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 17(4.1).

*Rules of practice of the Superior Court of Québec in family matters*, R.R.Q. 1981, c. C‑25, r. 9, rules 21 [am. (1985) 117 G.O.Q. II, 340, s. 3], 22 [am. (1990) 122 G.O.Q. II, 2655, s. 2], 28 [am. (1998) 130 G.O.Q. II, 4382, s. 2], 39 [*idem*].

APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Dufresne and Léger JJ.A.), 2010 QCCA 478 (CanLII), SOQUIJ AZ-50616979, [2010] J.Q. no 1959 (QL), 2010 CarswellQue 2053, affirming in part a decision of Samoisette J., 2009 QCCS 1304 (CanLII), SOQUIJ AZ-50546839, [2009] J.Q. no 2624 (QL), 2009 CarswellQue 2885. Appeal allowed.

*Julius H. Grey*, for the appellant.

*Robert Teitelbaum*, for the respondent.

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

Abella and Rothstein JJ. —

Introduction

1. R.P. seeks to have this Court reverse the judgment of the Court of Appeal which varied a 1991 spousal support order requiring R.C., her former husband, to pay spousal support. Like its companion case *L.M.P. v. L.S.*,2011 SCC 64, [2011] 3 S.C.R. 775 (“*L.M.P.*”), this appeal deals with a variation application under s. 17(4.1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).
2. Based on the analysis in *L.M.P.*, we would allow the appeal. In our view, the husband has failed to establish that there has been a material change in his circumstances.

Background

1. The parties were married in 1958. They had two children, born in 1963 and 1966. They separated in 1974 and were divorced in 1984. At the time of the divorce, the wife was 55 and the husband was 46.
2. When they divorced, the husband was ordered to pay spousal and child support in the combined amount of $1,950 per month. When the parties separated in 1974, the wife retained the matrimonial home and continues to live there by herself.
3. The husband remarried in 1985. He and his second wife have a son who, at the time of trial, was attending university.
4. In 1995, the husband, who owned a file storage company, sold his business. That same year, he bought a home, which was put in his second wife’s name. In 1996, the husband began operating an antiques business and his second wife worked with him.
5. In 1987, the husband sought to reduce the amount of support he was paying, and applied for a reduction in the amount based on the fact that the children no longer lived with their mother. His application was amended in 1988 to request a termination of both child and spousal support. There was a cross-application for increased spousal support.
6. The husband was successful on his application. In 1991, the Court of Appeal allowed an appeal by the wife and ordered the husband to pay her $2,000 per month (indexed) in spousal support (the “1991 Order”). The court held that despite her best efforts, the wife had never been able to become financially independent because of her domestic responsibilities.
7. The husband did not contest his capacity to pay support, but rather denied the wife’s entitlement. That meant that his means were not in issue, and neither the decisions of the Superior Court nor the Court of Appeal contain any information as to his financial circumstances at the time.
8. Following the 1991 Order, the parties executed an agreement to substitute a surety which was incorporated into a consent judgment (the “Surety Order”). The Surety Order replaced hypothecs the wife had registered against the husband’s property with an irrevocable banking letter of credit. Both parties were represented by counsel when they entered into that agreement.
9. In clause 1(c) of the Surety Order, the husband renounced his right to request a diminution or cancellation of spousal support based on a change in the wife’s circumstances. It states:

[translation] . . . furthermore, the applicant hereby renounces his right to seek a reduction and/or cancellation of the support payable to the respondent on the basis of a change in the respondent’s circumstances, particularly, but without limiting the generality of the foregoing, should the respondent sell her house, should she remarry or enter into a *de facto* union, when she begins receiving her old age pension, or should she earn income from any source whatsoever; [Emphasis added.]

1. The parties were back before the courts in 2005 when the husband applied to change the surety and substitute a sum of money for an irrevocable letter of credit. His application was denied.
2. In 2006, the husband shut down his antiques business and decided to retire. That same year, the home of the husband and his second wife was sold and they moved into an apartment. The subsequent division of the proceeds resulted in each of them getting $1,000,000 which they invested separately in 2006 expecting to receive annual investment income of 7 to 8%.

Judicial History

1. In 2008, the husband applied to terminate his spousal support obligations under the 1991 Order based on the fact that there had been a material change in his circumstances, namely, that his retirement meant he no longer had employment income, and the market downturn had a negative impact on his assets. This, plus his financial assistance to his son who was in university, meant that he was no longer able to pay support.
2. The trial judge, Samoisette J., accepted that he had investments worth over half a million dollars.
3. At the time of trial in January 2009, the husband was 71 and his former wife was 80.
4. The trial judge found that by virtue of clause 1(c) of the Surety Order, the husband could not rely on a material change in the wife’s circumstances to seek a variation in support, but that nothing in that clause prevented him from relying on a change in his own circumstances. In her view, the combined facts of the husband’s most recent retirement and the difficult economic climate represented a material change in circumstances justifying a variation of the amount of spousal support ordered in 1991 from a $2,000 indexed monthly amount ($2,911 per month by the time of trial) to $1,500 per month, unindexed. She made no reference to the financial circumstances of the wife when analysing whether there had been a material change or in determining the appropriate amount of support, nor did she make any reference to or findings about her expenses.
5. The wife appealed, arguing that there was no material change of circumstances justifying a variation in spousal support. The husband cross-appealed, arguing that the trial judge had erred by not taking the wife’s financial circumstances into account when determining the appropriate variation. Writing for a unanimous court, Léger J.A. dismissed the wife’s appeal and allowed the husband’s cross-appeal.
6. After the 2009 hearing before the Court of Appeal but before it rendered its decision, the wife brought a motion asking the court to require updated evidence from the parties about their assets. She relied on a newspaper article which indicated “that, on the whole, [investment] holdings have rebounded”. The wife argued that it would be “wrong to decide this case on the basis of a state of affairs . . . which now appears not to reflect the situation of most Canadian investors”. The husband objected.
7. The Court of Appeal rejected her application. Léger J.A. found that the proposed fresh evidence did not meet the necessary criteria under art. 509 of the *Code of Civil Procedure*, R.S.Q., c. C-25.
8. On the merits of the appeal, Léger J.A. concluded that there was no error in the trial judge’s finding that, based on his retirement and on [translation] “the subsequent increased volatility of the economy”, there had been a material change in the husband’s circumstances. Those facts alone were sufficient and the trial judge did not need to know what the husband’s financial circumstances were when the order was made in 1991 to determine whether a material change had occurred.
9. In allowing the husband’s cross-appeal, Léger J.A. found that the trial judge erred in analysing the variation amount based solely on the means of the husband. In his view, the Surety Order was not an obstacle to considering the situation of both parties to determine the appropriate variation.
10. On the basis of the financial situation of both parties, the Court of Appeal concluded that given their ages and assets, support should be terminated. In the absence of trial findings about the wife’s full financial picture and without updated information about the husband’s assets, the court concluded that the parties had roughly equal assets, and that it would be inequitable not to take into account the value of the wife’s home.
11. In the court’s opinion, part of the wife’s expenses arose from the costs of living alone in her home worth $344,600. The wife could not force the husband to continue to pay her spousal support on the basis of where she chose to live. Were she to sell her house, many of her expenses would be eliminated and the amount she would save would assist in covering the costs of her being able to rent new accommodation. Accordingly, the court ordered that the reduced monthly amount of $1,500 be paid from the time of the trial judgment until March 31, 2010, and a monthly amount of $800 be paid from April 1, 2010, until September 30, 2010. After that time, there was to be no more support.

Analysis

1. Under s. 17(4.1) of the *Divorce Act*, the moving party must establish that there has been a material change of circumstances since the making of the prior order or variation. The applicable framework for this case is the one elaborated in the companion decision, *L.M.P.* To be material, a change must be one which, if known at the time, would likely have resulted in different terms to the existing order. On an application to vary, the court should consider the terms of the order and the circumstances of the parties at the time the order was made to determine whether a particular change is material. The existing order is deemed to have been correct and only if the requirements of s. 17 of the *Divorce Act* are met will there be a variation.
2. In this case, the husband, in the Surety Order, renounced his right to rely on changes to the wife’s circumstances as the basis for an application to vary. It is true that clause 1(c) of the Surety Order is not a term of the 1991 support order, but it is nevertheless a reflection of the intentions of the parties which can assist a court in determining whether a particular change is material.
3. However, as we explained at para. 41 of *L.M.P.*, parties cannot oust the jurisdiction of the court to make a variation under s. 17 of the *Divorce Act*. As a result, a general term stating that no change in the circumstances of either or both parties is to be considered material cannot, by itself, be viewed as binding on the court.
4. Clause 1(c) also listed various specific circumstances which were not to be viewed as amounting to a material change of circumstances (e.g. [translation] “should the respondent sell her house, should she remarry or enter into a *de facto* union, when she begins receiving her old age pension, or should she earn income from any source whatsoever”). As we stated in *L.M.P.*, “[t]he 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” (para. 39). As with an actual support order, in assessing clause 1(c) of the Surety Order, a court should look to the terms of the order and the circumstances known to the parties at the time to determine whether the clause in fact addresses a particular change. Here, no changes to the wife’s circumstances were alleged, so there is no need to determine whether any changes to her circumstances fall within the terms of the Surety Order. Rather, the husband alleged that his own circumstances had changed.
5. The Surety Order does not prevent the husband from seeking a variation on the basis of a change in his own circumstances. And it is on the basis of such a change that the husband brought his application. Consequently, the question in this case is whether the husband has established a material change in his own circumstances. In our view, he has not.
6. Under s. 17(4.1) of the *Divorce Act* the husband, as the applicant, had the burden of establishing that there has been a material change in his circumstances since those existing at the time of the 1991 Order. His argument that as of 2008 he was no longer able to pay support is an insufficient basis to support a finding of material change.
7. The record before this Court contains no evidence as to the husband’s financial circumstances at the time of the 1991 Order. During those proceedings, he challenged the wife’s entitlement to support, not his capacity to pay the amounts she claimed. Neither the reasons of the courts in those earlier proceedings, nor the record before this Court, contain information as to the husband’s then financial circumstances.
8. In February 2008, the husband restructured his investments in order to attempt to generate dividend income of about $40,000 to $45,000 annually. Between the February 2008 restructuring and the time of the trial in January 2009, he said the value of his assets declined from about $850,000 or $900,000 to $573,000 because of the downturn in the economy. The trial judge found that despite the decrease in the value of his investments, the husband had not changed his lifestyle.
9. There are two crucial evidentiary gaps, however, in the husband’s financial circumstances. The first is that we have no information about whether he sold any of his investments — and thereby crystallized his loss and the resulting value of his marketable assets — when they declined in value in late 2008 as a result of the economic climate. The second is that the record is entirely lacking about the husband’s financial circumstances in 1991. These gaps mean that we cannot assess how the husband’s economic circumstances compared to those in 1991. There is therefore no way of measuring whether there is any material change that would entitle him to a variation of spousal support.
10. In respect of the first gap, we are left only with the fact of his closing down his antiques business in 2006 and the economic climate in 2008. As for the 2006 retirement, the trial judge noted that the change in the nature of his income from employment to investment did not provoke the husband to seek a variation. His own actions, therefore, suggest he did not view his retirement as a material change.
11. This brings us to the financial crisis of 2008, and the decrease in the value of the husband’s investments. The husband’s variation application was based on the fluctuations of the market and his assertion that those fluctuations fundamentally changed his ability to pay spousal support. But there was no evidence about whether he sold any of his investments at the time, and thereby crystallized his loss. As we stated in *L.M.P.*: “. . . a material change must have some degree of continuity, and not merely be a temporary set of circumstances . . .” (para. 35).
12. It is not clear why the Court of Appeal decided not to require updated financial information from the husband about whether his financial circumstances improved when the market rebounded. The husband’s variation application was based on the fluctuations of the market and his assertion that those fluctuations fundamentally changed his ability to pay spousal support. Without evidence as to what state the husband’s finances were in, or without evidence proving that the husband sold his investments at the time, and thereby had suffered a change in his financial circumstances with some degree of continuity, it is impossible for the husband to rely on a downturn in the financial markets at one specific point in time to claim that a material change of circumstances had occurred. Financial markets routinely fluctuate, and lose and gain value over time. A litigant cannot simply cherry-pick a date on which his or her investments have decreased in value, without more, to claim that a material change of circumstances has occurred. Absent any evidence that the change in the value of the husband’s investments was anything but temporary, a court cannot engage in speculation and guesswork as to the impact on the husband’s financial circumstances caused by market fluctuations. Otherwise, there is a strong risk that the husband might benefit from having his spousal support payments reduced when the market went down, and then benefit when the market went up and his unsold investments regained some or all of their lost value.
13. In respect of the second gap, we do not have any evidence for drawing reasonable inferences about how the husband’s financial circumstances compared to those in 1991 when he was ordered to pay $2,000 per month.
14. During the hearing before this Court, the lack of evidence about the husband’s financial circumstances in 1991 was raised with his counsel who argued that the law in Quebec gave the husband the right to acknowledge his capacity to pay and that he should not be disadvantaged as a result. Written submissions indicate that the law he relied on was rule 28 of the *Rules of practice of the Superior Court of Québec in family matters*, R.R.Q. 1981, c. C-25, r. 9 (“*R.F.P.*”).
15. Since 1990, the law in Quebec was, as is now stated in rule 28 of the *R.F.P.*, that, “[a] party that acknowledges in Form III being able to pay the amounts claimed by the other party is not required to provide a detailed financial statement, unless the Judge decides otherwise”. This rule was added to the *R.F.P.* by way of amendment in 1998 (130 G.O.Q. II, 4382, s. 2; formerly rule 22, (1990) 122 G.O.Q. II, 2655, s. 2).
16. But at the time of the husband’s 1987 application which resulted in the 1991 Order, he was subject to then rule 21, which stated:

**Rule 21:** To be put on the roll of the Practice Division, any motion for the purpose of fixing or modifying and [*sic*] alimentary pension shall be accompanied by a statement under oath of the financial circumstances of the applicant; such statement must be prepared in accordance with Form IV and served with the motion.

((1985) 117 G.O.Q. II, 340, s. 3)

There was no such sworn statement detailing his financial circumstances accompanying his application.

1. Even assuming that under rule 21, the husband could bring his application without providing detailed financial information (an interpretation which the Quebec Court of Appeal rejected in *Droit de la famille — 705*, [1989] R.D.F. 603), in our view, his reliance on rule 28 to explain the lack of evidence in the current application misses the point. The husband has not, pursuant to rule 28, admitted his capacity to pay in this proceeding. On the contrary, he is arguing that he does *not* have the capacity to pay support to the wife and has put changes to his financial situation in issue. While rule 28 permits a party to refrain from providing certain evidence in a proceeding when that party acknowledges his or her ability to pay, the rule cannot apply on an application to vary when the very issue in dispute is a change in capacity to pay.
2. The relevant statutory directions found in s. 17(4.1) of the *Divorce Act* and rule 39 of the *R.F.P.*, however, do apply. Section 17(4.1) of the *Divorce Act* requires that an applicant seeking variation demonstrate a material change since the making of the prior order or variation. In addition, rule 39 of the *R.F.P.* provides:

**39.** **Mandatory information**: Any motion to vary, rescind or suspend corollary relief shall be supported by an affidavit and contain the following information:

. . .

(*d*) The current amount of support and the amount requested;

(*e*) The amount of arrears, if any;

(*f*) The changes in circumstances that support the motion.

A substantially similar provision was included in 1986 amendments to the *R.F.P.* (118 G.O.Q. II, 392, s. 5), prior to the husband’s 1987 application.

1. In any event, it cannot be the case that the husband’s acknowledgment of sufficient resources in prior proceedings relieves him of his evidentiary and legal burdens in this one. And in *this* one, he was required by the *Divorce Act* and the *R.F.P.* to identify the change relied on and to provide sufficient evidence to enable a court to decide whether a material change in his circumstances had in fact occurred since the making of the 1991 Order. Since the onus is on him, and since he has produced no tangible basis for his argument that he is entitled to a variation under s. 17, his application must fail.
2. Normally, an applicant should adduce documentary evidence establishing the applicant’s specific financial circumstances at the time of the original order. Nevertheless, we recognize that in some cases a trial judge might be able to make findings about what the applicant’s circumstances were at the time of the order based on non-documentary, circumstantial or indirect evidence other than documentary evidence of the applicant’s specific financial circumstances at the time of the original order.
3. Here the husband could have led evidence capable of establishing his financial circumstances in 1991, but despite the clear requirements of the *Divorce Act* and the *R.F.P.* chose not to do so at trial, and failed to provide any explanation for his failure to do so. Absent some adequate explanation as to why no evidence has been adduced with respect to a party’s circumstances at the time of the order, no inference that a material change of circumstances has occurred is available.
4. We do not wish to suggest that parties should be prejudiced by prior reliance on rules which simplify and shorten proceedings. But such reliance does not eliminate the evidentiary requirements on subsequent applications to vary. Parties may find it necessary, in order to facilitate future applications, to keep records of their financial situation at the time an order for support is made, or to provide other evidence capable of establishing their financial circumstances at the relevant time.
5. In this case, although the trial judge correctly observed that it was necessary to determine whether there had been a material change since 1991, her conclusion that a finding of material change was reflected in the fact of the husband’s retirement and the 2008 economic climate, was not supported by the evidence. She focussed only on changes between 2006 and 2008 and failed to inquire whether these financial circumstances were the result of anything other than temporary market fluctuations, and were materially different from those in 1991. Consequently, her reduction of the husband’s support obligation cannot stand.
6. The Court of Appeal’s error was not only in accepting the trial judge’s conclusion that the husband had shown a material change, but was exacerbated by its own, unilateral assessment of the financial facts. In the absence of any findings by the trial judge, the Court of Appeal decided to undertake an assessment of the wife’s expenses and concluded that she should sell the home she had been in since 1974 and rent alternative premises. It therefore terminated her support, seemingly applying a clean break theory which this Court declared inoperative in 1992 in *Moge v. Moge*, [1992] 3 S.C.R. 813, to a great extent because too many courts were imposing unachievable expectations of self-sufficiency on long-time homemakers.

Fresh Evidence

1. Several weeks after the hearing before this Court, counsel for the husband applied to introduce as fresh evidence the husband’s 1990 Notice of Assessment. We would dismiss that application.
2. On an application to adduce fresh evidence, the applicant must demonstrate that the evidence meets the test for admission from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

1. In this case, the fresh evidence fails to clear the first hurdle. The husband’s motion states expressly “that this information was easily and readily available in the form of a notice of assessment”. Evidence easily and readily available is evidence that could and should have been presented at trial. As Justice Binnie observed in *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*,2000 SCC 2, [2000] 1 S.C.R. 44, at para. 13, in respect of statistical evidence that a party sought to admit: “If the evidence was important, it ought to have been led at trial. . . . Lack of due diligence is fatal to this aspect of the application.”
2. Counsel for the husband argued in his motion that “it was never an issue either with the Judge in first instance nor with any of the Judges of the Court of Appeal, that there was ever any requirement for the alimentary debtor to establish his income at the period when the last judgment was rendered”. Nevertheless, that does not change the legal requirements for a variation. The *Divorce Act* requires that the applicant on a motion to vary establish a material change since the making of the prior order or variation. The husband failed to present evidence of his prior circumstances to the courts. His lack of due diligence in this case is fatal. His motion is therefore dismissed.

Conclusion

1. The appeal is allowed with costs throughout. The indexed spousal support in the 1991 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

1. Cromwell J. — I agree with Abella and Rothstein JJ. that the respondent’s application to adduce fresh evidence should be dismissed, that the appeal should be allowed with costs throughout and that the terms of the September 11, 1991 order of the Court of Appeal should be restored. For the reasons given by my colleagues at para. 47 of their judgment, I agree that the judge at first instance erred in finding that the respondent had established a material change and therefore erred in varying the support order. For the same reason, the Court of Appeal erred in making a further and more substantial variation. I also agree with my colleagues that, as no changes in the appellant’s circumstances were alleged in the respondent’s application to vary, we need not determine whether any changes in her circumstances fall within the terms of the parties’ agreement which was incorporated into the Surety Order.

*Appeal allowed with costs.*

Solicitors for the appellant:  Grey, Casgrain, Montréal.

Solicitor for the respondent:  Robert Teitelbaum, Westmount, Quebec.