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## Let's Make a Deal

*Category: Separation Agreements*

A deal is a deal. That appears to be the clear message of the Supreme Court of Canada in a recent precedent setting decision. The case examined when, if ever, the spousal support provisions in a Separation Agreement can be reviewed and varied by the Courts. The Supreme Court of Canada decision overturned an earlier Ontario Court of Appeal decision in the case of *Miglin v. Miglin*.

The decision is considered by some in the legal community as being one of the most significant rulings on the subject in many years. It is also one with far reaching consequences for thousands of Canadians who have, or who will be, entering into Separation Agreements containing spousal support provisions.

By way of background, the *Miglin* case involved a Separation Agreement entered into between Eric and Linda Miglin in 1994. Both parties received a division of assets which, by most ordinary people's standards, would seem generous. The terms of the Separation Agreement provided that the wife obtained ownership of the family home, now apparently worth over one-half a million dollars, and child support of \$5,000 a month for the support of the couple's four (4) children. The husband received ownership of the couple's "Killarney Lodge", a resort which apparently earns the husband millions of dollars in annual revenue. The parties also agreed that the husband was not responsible to pay spousal support to the wife and a provision to that effect was included in the Agreement.

Despite the fact that terms also described the Agreement as being a "full and final settlement", the wife successfully took her husband to the Ontario Court of Appeal to have the Agreement varied, to provide her with monthly spousal support of \$4,400.00.

The basis for the wife's legal position was not particularly unusual or unique. Basically, she said she found it difficult to obtain satisfactory employment

and financial independence with a Bachelor's degree in English literature, partly because she was spending more time caring for the children that she had originally anticipated. She also claimed that she was pressured into signing the Agreement by her husband at a time when she was "emotionally vulnerable". The Supreme Court rejected both arguments.

The Supreme Court identified several key tests which would need to be satisfied before a variation of spousal support would be considered. One test is to ask whether the parties were able to negotiate a fair deal. In the *Miglin's* situation both parties had received professional legal advice and assistance in negotiating the terms of the Separation Agreement. Therefore, there was less of a likelihood that Linda was "pressured" into an unfair deal. The second test is to ask whether there was a "significant departure" from the circumstances under which the Agreement was signed, or in other words whether the future changes were reasonably foreseeable or not. The Supreme Court decided that Linda Miglin also failed this second test, citing her ability to find employment and her willingness to previously retain child care services for the children.

The decision, however, should not be considered as the court's blanket refusal to consider varying the spousal support terms of a Separation Agreement, which will still be based on whether or not the deal struck was fair. The best way to ensure that your Separation Agreement is fair, with less risk of being successfully challenged, is to obtain professional independent legal advice and assistance before you, or your partner, sign on the dotted line. After all, at time like this, who needs any added separation anxiety? 🌀