NOVA SCOTIA COURT OF APPEAL
Citation: *Volcko v. Volcko*, 2020 NSCA 68

Date: 20201028
Docket: CA 490903
Registry: Halifax

Between:

John B. Volcko

Appellant

v.

Susan Scheuermann Volcko

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: By written submissions, last submission filed September 18, 2020

Subject: Spousal support variation; Costs

Summary: The parties were divorced in 2013 after a 16-year traditional marriage. In 2014, the Court of Appeal heard an appeal brought by Ms. Volcko in which she challenged a number of the hearing judge's conclusions. This Court upheld all of the hearing judge's findings with the exception of the quantum of spousal support. This Court increased the spousal support payable to Ms. Volcko from the $15,000 per month ordered by the hearing judge, to $20,000 per month, effective November 1, 2013.

By 2018, both parties sought a variation of the spousal support ordered by this Court. Ms. Volcko sought to increase the payment to $40,000 per month. Mr. Volcko sought to terminate his obligation to pay support or in the alternative, set a prospective date for the termination of support. Mr. Volcko also sought a retroactive downward variation.

The hearing judge, in addition to other conclusions not relevant to the appeal, dismissed Ms. Volcko's request to increase the quantum of support; she dismissed Mr. Volcko's request to terminate support or set a termination date; she dismissed his request to decrease the amount of spousal support payable; and she declined to award costs to either party.

Issues: (1) Did the hearing judge err in declining to vary Mr. Volcko's spousal support obligation in light of a decrease in his income and Ms. Volcko's failure to make efforts towards self-sufficiency?

(2) Did the hearing judge err by declining to declare the arrears of spousal support payable by virtue of the earlier Appeal decision was periodic support for taxation purposes?

(3) Did the hearing judge err by declining to award Mr. Volcko costs?

Result: Appeal dismissed with costs.

The hearing judge's decision regarding the variation of spousal support was entitled to deference. She considered the appropriate factors, including Ms. Volcko's continuing failure to work towards self-sufficiency. In light of her findings including that Ms. Volcko's claim for compensatory support had not been exhausted, and Mr. Volcko had a continued ability to pay, her decision was to be afforded deference.

With respect to the second issue, the hearing judge declined to make a declaration regarding the nature of the arrears arising from the Court of Appeal decision in 2015. She made no error in doing so. Further, this panel is not in a position to make a declaration regarding the intent of the decision made in 2015. If Mr. Volcko was of the view that the 2015 order was unclear or did not incorporate the intent of the decision, he ought to have brought his concern to the panel then, not now.

The hearing judge did not grant the application of Ms. Volcko, nor did she make the changes requested by Mr. Volcko. The status quo remained. She was best placed to make a determination regarding an award of costs, if any. Her decision is entitled to deference, and Mr. Volcko has not established that appellate intervention is warranted.

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v.

Susan Scheuermann Volcko

Respondent

Judges:	Bourgeois, Fichaud and Van den Eynden JJ.A.
Appeal Heard:	By written submissions, last submission filed September 18, 2020
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois J.A.; Fichaud and Van den Eynden JJ.A. concurring
Counsel:	William L. Ryan, Q.C., for the appellant Mary Jane McGinty and Angela Walker, for the respondent

Reasons for judgment:

[1] John Volcko and Susan Scheuermann Volcko were divorced in 2013 after a 16-year traditional marriage, and contentious divorce hearing. In 2014 this Court heard an appeal brought by Ms. Volcko in which she challenged a number of the hearing judge's conclusions. This Court upheld all of the hearing judge's findings with the exception of the quantum of spousal support[1]. This Court increased the spousal support payable to Ms. Volcko from the $15,000 per month ordered by the hearing judge, to $20,000 per month, effective November 1, 2013.

[2] By 2018, both parties sought a variation of the spousal support ordered by this Court. Ms. Volcko sought to increase the payment to $40,000 per month. Mr. Volcko sought to terminate his obligation to pay support, or in the alternative, set a prospective date for the termination of support. Mr. Volcko also sought a retroactive downward variation. The variation hearing was heard by Justice Carole A. Beaton of the Nova Scotia Supreme Court, Family Division (as she then was) over three days concluding on May 22, 2019.

[3] The hearing judge (who had also presided over the first hearing in 2013) rendered her decision on July 12, 2019 (2019 NSSC 203). In addition to other conclusions not relevant to this appeal, she dismissed Ms. Volcko's request to increase the quantum of support; she dismissed Mr. Volcko's request to terminate support or set a termination date; she dismissed Mr. Volcko's request to decrease the amount of spousal support payable; and she declined to award costs to either party.

[4] Mr. Volcko appeals to this Court. He alleges the hearing judge erred by declining to immediately terminate or decrease the quantum of support; declining to set a termination date for support; declining to confirm the nature of the support ordered by this Court in the Appeal decision; and by declining to award him costs.

[5] For the reasons that follow, I would dismiss the appeal.

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[1] The earlier decision of this Court is reported as *Volcko v. Volcko*, 2015 NSCA 11. It will be referred to as the "Appeal decision" for the purposes of these reasons.

Background

[6] The history of the Volcko marriage has been set out in previous decisions. As such, I will not repeat much of what has been earlier written, but only what is necessary to address the issues now before the Court.

[7] In the early years of the marriage Ms. Volcko worked outside the home. That changed due to a joint-decision of the parties. In the Appeal decision, Justice Hamilton noted:

> [2] The judge briefly describes the situation of the parties at the beginning of her reasons:
>
> > [4] The parties married in 1990 and began living apart in late 2006. They are the parents of two adult children, the younger of whom remains dependent as a university undergraduate student. Since the late 1990's the Petitioner (hereinafter "the Husband") has been the sole income earner for the family, following the parties mutual decision that the Respondent (hereinafter "the Wife") would leave the workforce to focus on raising the children and thereby provide the Husband with greater employment flexibility.
>
> [3] The wife has a BSc. and an MBA. She first worked in medical research and then for J.P. Morgan and Scotia Capital Markets on Bay Street selling bonds to institutions, before staying home to look after the children. Her income was significantly higher than her husband's at the time, between $250,000 and $340,000 per year for her last three years of work outside the home. She was offered and took a job after separation, which she soon left as she does not want to work.
>
> [4] The husband has an engineering degree and an MBA. He began working for PCL Constructors Canada Inc. or its predecessor companies (collectively referred to as "PCL") on graduation and continues to do so as Vice President and District Manager for the Atlantic Region. He has purchased shares of the PCL group of companies as they have been offered to him over the years.

[8] After the marital breakdown, Ms. Volcko was found to have a strong claim for both compensatory and non-compensatory spousal support. The compensatory claim was anchored in the decision to have Ms. Volcko leave her career to permit Mr. Volcko to focus on his own professional pursuits. Those pursuits led to Mr. Volcko later enjoying a very impressive level of income, particularly post-separation.

[9] At the conclusion of the divorce hearing, Mr. Volcko was ordered to pay spousal support of $15,000 monthly. This quantum was based on the hearing judge being of the understanding the parties had agreed support would be based

upon Mr. Volcko having an annual income of $686,936.00. The subsequent Corollary Relief Order issued March 24, 2014 incorporated this determination.

[10] On appeal to this Court, Ms. Volcko successfully argued the hearing judge erred in finding there was an agreement regarding Mr. Volcko's income for the purpose of calculating spousal support. Based on this error, the Court considered what quantum of support was appropriate.

[11] In her reasons, Justice Hamilton first took note of Mr. Volcko's income. She wrote:

> [76] The record indicates the husband's income in 2012 was $1,520,976, $1,546,923 in 2010, $1,282,936 in 2011 and at least $1,248,756 in 2013.

[12] At this juncture, it is helpful to note that following the Appeal decision it became apparent Mr. Volcko's income in 2013 was actually much higher than referenced by Justice Hamilton. The record shows Mr. Volcko's income in 2013 was $1,625,702.

[13] In terms of setting a quantum of support, Justice Hamilton wrote:

> [78] What additional amount of prospective spousal support, if any, should be paid?
>
> [79] The **Spousal Support Guidelines** are not helpful because the husband's income is far in excess of the $350,000 ceiling provided for in them; **Bell v. Bell**, 2009 BCCA 280 and 2010 BCCA 138.
>
> [80] Courts have recognized need and standard of living as useful ways to evaluate the loss of opportunity suffered by a disadvantaged spouse; **Ross v. Ross**, (1995), 16 R.F.L. (4th) 1 (NBCA) at 15:
>
> > It is in cases where it is not possible to determine the extent of the economic loss of the disadvantaged spouse that the Court will consider need and standard of living as the primary criteria, together with the ability to pay of the other party.
>
> [81] Using standard of living as a tool to determine the amount of spousal support to be awarded was approved in **Moge** at 870:
>
> > As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.
>
> [82] Is the wife entitled to a higher amount of support to allow her to have a higher standard of living post marriage?

[83] The judge correctly considered the factors and objectives set out in ss. 15.2(4) and 15.2(6) of the **Divorce Act** in determining that the wife should receive $15,000 per month spousal support. Her error was in significantly understating the husband's income.

[84] The $15,000 per month ongoing spousal support ordered by the judge meets the wife's needs, in the sense it surpasses her budget significantly. The husband has the ability to pay more.

[85] There is significant discretion involved in determining the amount of spousal support. Considering:

- this was a sixteen year marriage;
- the wife stayed home to look after the children for the second half of the marriage;
- the wife's income in the last three years before she left the work force ranged from $250,000 to $340,000;
- the wife has had a responsibility to try to become self supporting since the date of separation, when she was 49 years old, and has made no attempt to find a job;
- the wife has been able to save $143,000 from the lower amount of support she received prior to the trial;
- the division of property made by the judge resulted in the wife being obliged to pay the husband an equalization payment of $398,221.13 and having relatively few income producing assets for a couple with the husband's income;
- the husband has the ability to pay;
- he has significant debts associated with the Shares and must pay significant amounts of interest and principal each year relating to them;
- the husband is solely responsible for his daughter's education and living expenses that are not covered by RESP's and for other s. 7 expenses;
- the husband was ordered to pay spousal support indefinitely;
- his income increased significantly in the year of separation and subsequently; and while married, the parties focussed successfully on paying down their debt and living well within their means,

I am satisfied the appropriate amount of spousal support to be paid to the wife is $20,000 per month, payable effective November 1, 2013. Given the date of this decision, any arrears outstanding shall be due and payable in full no later than May 31, 2015.

[14] This Court issued an order in February 2015 incorporating Justice Hamilton's reasons that varied the spousal support from $15,000 per month to $20,000 per month.

[15] The appeal now before the Court has its genesis in a Notice of Variation Application filed by Ms. Volcko on May 26, 2016 in which she sought to vary the terms of the Corollary Relief Judgment. Her only request was an order permitting her to place life insurance on Mr. Volcko's life to secure the payment of spousal support. She later amended her application to add, in the alternative, a request that Mr. Volcko's obligation to pay her support would be binding on his Estate.

[16] Mr. Volcko filed a Response to Variation Application in which he contested the relief sought by Ms. Volcko. He also requested a change to his spousal support obligation. He sought a retroactive downward variation in the quantum of support, and an immediate termination of his ongoing support obligation. In the alternative, Mr. Volcko sought a termination date for the payment of spousal support.

[17] Although she did not file a further Amended Notice of Variation, Ms. Volcko responded to Mr. Volcko's request to lower or terminate support by asking for it to be increased to $40,000 per month.

[18] Both parties filed pre-hearing written submissions. Mr. Volcko argued his income had dropped drastically since this Court set support at $20,000 per month. Ms. Volcko argued there was an increase, not a decrease, in his income. She submitted that an application of the *Spousal Support Guidelines* would warrant a variation of support to $40,000 per month.

[19] The hearing was conducted over two days, with oral submissions concluding on May 22, 2019. The hearing judge rendered a written decision on July 12, 2019. She concluded:

- Ms. Volcko's claim for increased support was dismissed;
- Ms. Volcko's requests regarding securing the payment of spousal support by way of insurance or a claim against Mr. Volcko's Estate were dismissed;
- Mr. Volcko's decrease in income in 2018 was a material change in circumstances permitting her to consider whether a variation was warranted;
- Mr. Volcko's request for a retroactive decrease in spousal support was dismissed;

- Mr. Volcko's request for a termination of spousal support was dismissed;
- Mr. Volcko's request for a decrease in the quantum of spousal support was dismissed; and
- The parties would bear their own costs of the hearing.

Issues

[20] In his Notice of Appeal Mr. Volcko alleges the hearing judge:

> 1. erred in not ordering a reduction in the amount of spousal support based on a material change in circumstances, and in not ordering a termination date for the payment of spousal support, including the failure to give proper consideration to the objective of promoting economic self-sufficiency of the parties under the *Divorce Act*;
>
> 2. erred in not confirming the additional payment of spousal support from the Appellant to the Respondent arising from the Court of Appeal decision, 2015 NSCA 11, as being a periodic payment; and
>
> 3. erred in failing to award costs to the appellant.

[21] Based on the arguments advanced, I would reframe the issues to be determined as follows:

1. Did the hearing judge err in declining to vary Mr. Volcko's spousal support obligation in light of a decrease in his income and Ms. Volcko's failure to make efforts towards self-sufficiency?
2. Did the hearing judge err by declining to declare the arrears of spousal support payable by virtue of the Appeal decision was periodic support for taxation purposes?
3. Did the hearing judge err by declining to award Mr. Volcko costs?

Standard of Review

[22] The standard of review to be applied is not in dispute. In *Laframboise v. Millington*, 2019 NSCA 43, Justice Saunders explained:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On

> questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[23] Given the discretionary nature of support orders, this Court applies a deferential standard of review. In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, an appeal court's ability to intervene was described as follows:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> 11 Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. These principles were stated by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *per* Wilson J.; in *Moge v. Moge*, [1992] 3 S.C.R. 813, *per* L'Heureux-Dubé J.; and in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 691, *per* Sopinka J., and at pp. 743-44, *per* L'Heureux-Dubé J.
>
> 12 **There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly.** It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and

> evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. **Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.**
>
> (Emphasis added)

[24] A hearing judge's determination of costs is also discretionary and attracts a deferential standard of review. This Court will only intervene where satisfied the hearing judge applied wrong principles of law or the decision is so clearly wrong as to amount to an injustice. See *Westminer Canada Ltd. v. Fraser*, 2005 NSCA 27 at para. 20.

Analysis

Did the hearing judge err in declining to vary Mr. Volcko's spousal support obligation in light of a decrease in his income and Ms. Volcko's failure to make efforts towards self-sufficiency?

[25] Before considering the hearing judge's reasons, it is helpful to review the legal principles that governed the matter before her.

[26] There is no dispute that the request to vary the support being paid by Mr. Volcko was governed by s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (the "*Act"*). Section 17(4.1) sets out that prior to varying an order, there must be a material change of circumstances:

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

[27] It is only after such a material change is found that a court may consider a variation, keeping in mind the following objectives:

> Objectives of variation order varying spousal support order
>
> (7) A variation order varying a spousal support order should

> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[28] The approach to the variation of spousal support orders was considered in *L.M.P. v. L.S.*, 2011 SCC 64. Justices Abella and Rothstein wrote:

> [29] 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*.
>
> [30] 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).
>
> [31] *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.
>
> [32] 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.
>
> [33] 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. (Emphasis in original)

And further:

> [47] 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).
>
> …
>
> [50] 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*.

[29] I turn now to the hearing judge's reasons. She began her analysis with a consideration of whether either party had established a material change of circumstances. She concluded the evidence before her did not establish a change in relation to Ms. Volcko's circumstances. However, the hearing judge was satisfied a material change had been established by Mr. Volcko. She wrote:

> [13] The Respondent has three sources of income – salary, bonus and share dividends/other investments (Court Exhibit 4, Tab 2, Exhibits A and B). The evidence illustrated a variable annual income, changing in each year, but with a significant decrease in 2018. I accept the Respondent's evidence that this decrease reflects a combination of events: (i) a change to the structure of the employment-related bonus compensation available to him; and ii) a reduction in the number of company shares he is permitted to hold, a limitation imposed by the company. The Respondent's employment duties have also changed due to organizational changes in the company, and he now works out of Toronto, not Halifax, although he chooses to continue to reside in Nova Scotia. These are not changes that could have been foreseen when the last court order was made.

[30] The hearing judge was satisfied Mr. Volcko's income, although subject to considerable fluctuation, had decreased in the two previous years. In order to

account for the variable nature of his income, she undertook an averaging approach to determine Mr. Volcko's income for support purposes:

> [15] I am satisfied the evidence put before the Court can lead to a determination that the Respondent's 2018 income was $868,000. Looking at each year individually, 2017 was the Respondent's second lowest income earning year in the last five and 2018 was his lowest, by a considerable margin as compared to earlier years.
>
> [16] Considering the Respondent's income over a three year period, as contemplated in s.17 of the *Federal Child Support Guidelines*, (SOR/97-175) would mirror the approach taken in argument on behalf of the Applicant. Assuming that the most reasonable way to allow for the 2015-2016 spike/drop in the Respondent's income is to use an average of the two years (as mentioned earlier), then the three year average of his income would calculate as follows:
>
> i. 2010-12 - $1,450,278
>
> ii. 2011-13 - $1,476,538
>
> iii. 2012-14 - $1,584,218
>
> iv. 2013-15 - $1,649,559
>
> v. 2014-16 - $1,679,992
>
> vi. 2015-17 - $1,556,581
>
> vii. 2016-18 - $1,273,581
>
> [17] Looking at the three year averages, the most recent period from 2016 to 2018 also calculates an average yearly income markedly lower than in any other three year period in the last decade.
>
> [18] The Respondent's income has fluctuated year over year since 2010, but the reduction in income in 2018 has been the most dramatic change to date. The change in circumstances in this application is found in the downward change in the Respondent's annual income in 2017 and 2018. Increases in the Respondent's income during the period 2010 to 2018 are, by comparison, much less significant than the most recent reduction in income.

[31] The hearing judge's approach to considering Mr. Volcko's income was not challenged on appeal. Having found a change in circumstances, the hearing judge then turned to a consideration of s. 17(7) of the *Act*. She observed one factor in particular, self-sufficiency, "formed much of the evidence and argument in the application". The record amply demonstrates the issue of Ms. Volcko's failure to make efforts towards self-sufficiency was a major factor underpinning Mr. Volcko's variation request.

[32] The hearing judge acknowledged Ms. Volcko's ongoing lack of efforts towards self-sufficiency. She further noted this lack of effort "negatively impacts [Ms. Volcko's] compensatory entitlement to spousal support". The hearing judge did not, however, view this factor as determinative of Mr. Volcko's request to vary the spousal support ordered by this Court in 2015. She concluded:

> [39] Despite the reduction in the Respondent's 2017 and 2018 income, I am not persuaded it is necessary to make any changes to the quantum of support at this time. The Respondent's evidence established that he does have a modicum of control over the sale of his company shares, which to a certain extent allows him to exert influence over that income stream, at least with respect to the timing of generating cash from that asset. Further, as the Applicant has made certain lifestyle choices, so too has the Respondent, in terms of his expenditures and acquisitions, and he no longer has a child support obligation. I am satisfied he continues to be capable of meeting the current support obligation, even on his reduced 2017 and 2018 incomes. Should the Respondent's income continue to decrease from the 2018 rate, it may well trigger a reduction in his obligation in future.
>
> [40] The Applicant's compensatory claim continues, rooted in the division of responsibilities during the marriage and the parties' joint investment in the Respondent's career. However, this should not be interpreted as an "endorsement" of the Applicant's lack of effort to explore self-sufficiency, nor does it eliminate the potential for changes in the future.
>
> [41] The more years that pass since separation, versus the number of years of marriage, the greater will be the diminution of the link between the Applicant's present circumstances and her sacrifices in the marriage. Coupled with an absence of efforts at self-sufficiency and fluctuations in the Respondent's annual income, at some point these may well be factors that tip the scales to termination. While I am not prepared to terminate the spousal support obligation as I do not accept the Applicant's compensatory claim is yet exhausted, it is inescapable that it will diminish with time.

[33] Before this Court, Mr. Volcko highlights two of the hearing judge's findings, namely:

- Ms. Volcko had made no efforts towards self-sufficiency;
- Ms. Volcko had an equal, or perhaps superior, lifestyle to Mr. Volcko post-separation.

[34] Mr. Volcko's allegation of error on the hearing judge's part is summarized in his written submissions as follows:

> 76. Having made these findings, coupled with the finding that Mr. Volcko had established a material change in circumstances, the Decision of the Learned Trial Judge to fail to vary the spousal support award is an error, justifying a review and intervention from this Court.
>
> 77. The findings of the Learned Trial Judge on each factor of section 17(7) of the Act were all in favour of Mr. Volcko's application for a decrease in the spousal support award. Given these findings, the objective of section 17(7)(d), in relation to self-sufficiency, must be given significant weight in these circumstances.
>
> 78. The ultimate conclusion of the Learned Trial Judge is not supported by the findings made. The continuing nature of Ms. Volcko's compensatory claim can still be given effect by setting a termination date, as a compensatory claim is not to be support in perpetuity. The objectives of section 17(7) and the findings of the Learned Trial Judge should be given effect through a reduction of the amount of spousal support given the material change of circumstances of the significant decrease in Mr. Volcko's income.
>
> 79. The failure of the Learned Trial Judge to give effect to the findings made and the objectives of section 17(7) is a palpable and overriding error.

[35] In light of the above submissions, it is helpful to revisit the standard of review. Spousal support determinations are discretionary in nature and, accordingly, significant deference is afforded to a hearing judge's conclusions. To successfully challenge the finding here, Mr. Volcko must establish that in exercising her discretion the hearing judge erred in law, or that the result was patently unjust.

[36] In my view, Mr. Volcko has failed to establish appellate intervention is warranted and, in particular, that the hearing judge erred in law by declining to vary or terminate the quantum of spousal support set by this Court in 2015 either immediately or as a set date in the future. I am also satisfied a continuation of support at the rate of $20,000 per month does not amount to a patent injustice. In reaching these conclusions, I make the following observations:

- Contrary to Mr. Volcko's assertion, the hearing judge's findings on each factor in s. 17(7) of the *Act* were not "in favour of Mr. Volcko's application for a decrease in support". In acknowledging Ms. Volcko's continuing compensatory claim, the hearing judge recognized she continued to suffer the economic consequences of setting aside her career opportunities to support Mr. Volcko's professional efforts. This of course also included the parties' joint decision that Ms. Volcko would remove herself from the workforce to undertake the primary responsibility for their children. These

considerations, reflected in s. 17(7)(a) and (b), weighed in favour of Ms. Volcko's continuing support claim, not against it;

- The hearing judge's determination that the parties presently enjoyed comparable lifestyles engaged s. 17(7)(c). Given the nature of the compensatory claim and the goal of achieving relatively similar standards of living between spouses post-separation, the similarity of lifestyles was indicative that the current quantum of support was achieving that goal;

- The hearing judge gave full consideration to the promotion of self-sufficiency. It is, however, just one factor to be considered along with the others set out in s. 17(7). It is not the predominant factor, nor is it necessarily determinative. The relative weight afforded to the various factors will vary depending on the nature of the evidence before a hearing judge. Absent an error, appellate courts should not engage in a re-weighing of the factors;

- The finding of a material change in Mr. Volcko's income did not necessitate a variation of the support order. The hearing judge found Mr. Volcko had a continuing ability to pay support as ordered. The record demonstrates this conclusion was available to the hearing judge based upon the detailed financial information before her. She also noted that since this Court set the quantum of support in 2015, Mr. Volcko had been relieved of his requirement to financially support his daughter. These were appropriate considerations in determining whether, notwithstanding a drop in his income, the quantum of support ought to remain unchanged; and

- In 2015, this Court determined support of $20,000 per month was appropriate. At that time, the Court understood Mr. Volcko's recent income to be $1,282,936 in 2011, $1,520,976 in 2012, and "at least" $1,248,756 in 2013. Applying an averaging approach demonstrates an income of $1,350,889. On the variation application, the hearing judge concluded Mr. Volcko's averaged income for the prior three years was $1,273,581. Although clearly a decrease from the level of income noted by the Court in 2015, it was not as marked as Mr. Volcko had argued when seeking a downward variation.

[37] As a final point, Mr. Volcko submits the hearing judge failed to consider the impact of continuing to pay support at the current level on his ability to retire. Although retirement may be a factor that impacts upon the level of support, in the present case, the hearing judge was not presented with any concrete evidence of

Mr. Volcko's intention to retire, an anticipated timeline, or importantly, how that would impact upon his income. In light of the arguments before her, I see no error in the hearing judge's analysis being silent on the issue of Mr. Volcko's retirement.

[38] For the reasons above, I would dismiss this ground of appeal.

Did the hearing judge err by declining to declare the arrears of spousal support payable by virtue of the earlier Appeal decision was periodic support for taxation purposes?

[39] In February 2015, this Court ordered Mr. Volcko's spousal support obligation be varied from $15,000 to $20,000 per month effective November 1, 2013. This resulted in significant arrears owing to Ms. Volcko. The arrears were paid in installments and Mr. Volcko subsequently claimed these amounts as deductible from his taxable income as periodic support. Ms. Volcko did not claim the arrears received as income.

[40] The Canada Revenue Agency disallowed Mr. Volcko's deductions. This has given rise to a dispute between Mr. Volcko and the Canada Revenue Agency ("CRA") regarding the classification of the arrears, and the resulting tax consequences. Mr. Volcko wanted the hearing judge to declare the arrears he paid flowing from the Appeal decision was periodic support, which in turn would support his claim of deductibility with the CRA.

[41] Mr. Volcko did not ask for a declaration regarding the nature of the arrears in his Response to Variation Application. However, in identifying the issues to be addressed by the hearing judge, Mr. Volcko posed in his pre-hearing submissions:

> Should the retroactive amount of spousal support as ordered by the Court of Appeal be taxable to Ms. Volcko?

[42] His pre-trial written submissions on this issue were confined to three paragraphs:

> 71. The Court of Appeal increased the amount of spousal support from $15,000 per month to $20,000 per month. The Court of Appeal provided at the end of paragraph 85 (Book of Authorities, Tab 15):
>
> > I am satisfied the appropriate amount of spousal support to be paid to the wife is $20,000 per month, payable effective November 1, 2013. Given the date of this decision, any arrears outstanding shall be due and payable in full no later than May 31, 2015.

> 72. The arrears were clearly meant to compensate Ms. Volcko for the increased spousal support amount of $5,000 per month. The additional amount of $5,000 per month is also clearly defined as spousal support. The payment of arrears would, by extension, be classified as the additional spousal support to be paid on a monthly basis – this would result in the arrears being taxable by Ms. Volcko.
>
> 73. Any suggestion by Ms. Volcko that the arrears are not taxable, as they were paid in multiple lump sum payments, would result in a windfall to Ms. Volcko. This was not and cannot be the intention of the Court of Appeal. The arrears amount to $70,000. With Ms. Volcko's tax rate of 40%, she will have gained a windfall of $28,000 if her argument is allowed to stand.

[43] In his post-hearing oral submissions, Mr. Volcko's counsel identified three issues for determination. He said:

> There are three issues presently before you. The first, dealing with the request that life insurance be mandated and ordered by this court on the life of Mr. Volcko to be paid by Sue Volcko. The second, is there a change in the circumstances to warrant a variation under Section 17.4.1 of the **Divorce Act**? And as I pointed out initially, there is a request by both parties in relation to a variation. And the third is, should there be a termination date set with respect to the payment of spousal support?

[44] Mr. Volcko's counsel did not identify the classification or taxability of the arrears as an issue for determination before the hearing judge. It was not referenced in his post-hearing submissions at all.

[45] In her decision, the hearing judge observed:

> [5] I note here that while the written submissions filed prior to the hearing raised the matter of tax implications concerning a retroactive payment component arising from the post-divorce decision of the Court of Appeal (*Volcko*, 2015 NSCA 11), I take the view it is not a matter for this Court to address. It is not up to this Court to determine what would appear to be a dispute between the parties and Canada Revenue Agency.

[46] As referenced earlier, in his Notice of Appeal Mr. Volcko says the hearing judge "erred in not confirming the additional payment of spousal support from the Appellant to the Respondent arising from the Court of Appeal decision … as being a periodic payment".

[47] In my view, Mr. Volcko has failed to demonstrate an error on the part of the hearing judge. With respect, it is now unwarranted for Mr. Volcko to launch such an allegation of error. His pleadings did not contain such a request; his written

submissions did not ask for a specific determination from her; and his post-hearing submissions did not identify the classification of the arrears or their tax treatment as an issue.

[48] Further, in his arguments advanced before this Court, Mr. Volcko does not provide any explanation as to how the hearing judge fell into error. Rather, he writes:

> 86. Mr. Volcko acknowledges that the Learned Trial Judge did not feel the issue was a matter for the Supreme Court (Family Division); however, he respectfully requests that this Court clarify what was meant in the Appeal Decision. This would be an efficient, practical approach that will avoid the need for another hearing (whether in this Court, the Family Division and/or the Tax Court of Canada) and provide a clear statement to the Canada Revenue Agency as to what was intended by this Court in the Appeal Decision.

[49] I am satisfied the hearing judge did not err in declining to comment on the nature of the arrears arising from the earlier Appeal decision, and thus provide assistance to Mr. Volcko in his dispute with the CRA. I reach this conclusion for two reasons.

[50] Firstly, there is a clear path for Mr. Volcko to follow with respect to his taxation dispute. This is outlined by the CRA in its Income Tax Folio acknowledging the Tax Court of Canada's decision in *James v. R.*, 2013 TCC 164. Secondly, disputes with the CRA should not be resolved directly or indirectly in either the Supreme Court of Nova Scotia, or in this one. The hearing judge had no authority, and certainly no obligation, to make a determination regarding the tax consequences of the payments made by Mr. Volcko, nor to clarify the intention of this Court in its 2015 decision and order.

[51] For the above reasons, I would dismiss this ground of appeal. However, I will further address what appears to be Mr. Volcko's attempt to utilize this appeal, in relation to an entirely different decision and absent a demonstrable error, to obtain a clarification of the 2015 Appeal decision and order. He has provided no authority for his ability to make this very unusual request.

[52] The doctrine of *functus officio* generally prohibits a court from revisiting its order, subject to two well-defined exceptions. In *Capital District Health Authority v. Nova Scotia Government and General Employees Union*, 2006 NSCA 85, Cromwell J.A. (as he then was) explained:

> [36] *Functus officio* is a rule about finality: once a tribunal has completed its job, it has no further power to deal with the matter. In relation to court proceedings, the principle means that, in general, once a court has issued and entered its final judgment, the matter may only be reopened by means of appeal. To this general rule, however, there are at least two exceptions: the court may correct slips and, as well, address errors in expressing its manifest intent: **Paper Machinery Ltd. v. J.O. Ross Engineering Corp.**, [1934] S.C.R. 186; see also *Civil Procedure Rule* 15.07.
>
> [37] These principles developed in the context of court decisions which are subject to full rights of appeal. The existence of these full rights of appeal fostered the view that an appeal, rather than a reopening of the case before the initial decision-maker, was generally the preferred way to address errors in the initial decision.

[53] It may have been open to Mr. Volcko to seek clarification from the Court in 2015 when the order was issued, if he could establish a slip or the necessity to address an error in expressing its manifest intent. He did not do so. It was the panel that heard the appeal in 2014, made the decision, and issued the resulting order in 2015 that would have been in a position to know whether the circumstances were such that a clarification was appropriate and warranted. In my view, that is not an exercise this panel, on an entirely different appeal and after the passage of five years, ought to undertake.

Did the hearing judge err by declining to award Mr. Volcko costs?

[54] With respect to costs, the hearing judge said:

> [54] Neither party has had success in the Application or the Response to Application. It is appropriate for each party to bear their own costs.

[55] Mr. Volcko submits the hearing judge erred in reaching the above conclusion and, in particular, by not awarding him costs. He says he was, considering the discrete issues before the hearing judge, the successful party on all but one issue, and that it was an error in principle not to have costs follow that outcome.

[56] Ms. Volcko argues the success in the court below was divided. Mr. Volcko fended off her application, and she fended off his. In such a case, there was no obligation for the hearing judge to award either party with costs.

[57] I see no error in principle in the hearing judge's determination that each party should bear their own costs. Although each was successful in responding to

the issues advanced by the other, neither obtained what they were seeking in the court below. The status quo remained despite each party requesting changes.

[58] The hearing judge was well placed to consider the nature of the issues advanced, the evidence elicited in relation to each, and to make a determination with respect to an award of costs. I see no error in principle that would justify appellate intervention, nor has Mr. Volcko demonstrated a patent injustice arising from each party bearing their own costs.

[59] I would dismiss this ground of appeal.

Disposition

[60] Based on the reasons above, I would dismiss the appeal. I would further order Mr. Volcko pay costs on appeal to Ms. Volcko in the amount of $5,000, inclusive of disbursements.

Bourgeois J.A.

Concurred in:

Fichaud J.A.

Van den Eynden J.A.