NOVA SCOTIA COURT OF APPEAL
Citation: ***Volcko v. Volcko***, 2015 NSCA 11

Date: 20150203
Docket: CA 425885
Registry: Halifax

Between:

Susan Scheuermann Volcko

Appellant

v.

John B. Volcko

Respondent

Judges:	Hamilton, Scanlan, Bourgeois, JJ.A.
Appeal Heard:	November 12, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed, except with respect to the amount of ongoing spousal support; cross-appeal dismissed; no costs ordered; per reasons for judgment of Hamilton, J.A.; Scanlan and Bourgeois, JJ.A. concurring
Counsel:	Mary Jane McGinty and Angela A. Walker, for the appellant William L. Ryan, Q.C., for the respondent

Reasons for judgment:

Background

[1] The appellant, Susan Scheuermann Volcko, appeals, on several grounds, the decision of Justice Carole A. Beaton dealing with child and spousal support and division of property on divorce (2013 NSSC 342). The respondent, John B. Volcko, cross-appeals her costs decision.

[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.

[5] The husband moved out of the matrimonial home in October 2006. He rented a condominium to live in and bought it a few months later. He made a concerted effort to remain heavily involved with activities involving the children thereafter because of the traumatic effect his own parents' custody battle had on him as a child. He wanted to avoid this happening to the children. The husband

and wife continued attending marriage counselling until June 2009, when he disclosed he was involved with another woman. During this period, he continued to deposit his salary and performance bonuses into the parties' joint bank account.

Issues

[6] The issues to be decided in this appeal are whether the judge erred in:

(a) determining the date of separation to be October 2006 rather than June 2009;

(b) characterizing the husband's shares of PCL ("Shares") as business assets rather than matrimonial assets;

(c) failing to consider whether Ms. Volcko contributed to the Shares so as to be entitled to an award under s. 18 of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275 ("**MPA**");

(d) failing to consider whether Ms. Volcko was entitled to an unequal division of assets pursuant to s. 13 of the **MPA**;

(e) not finding the residential condominium Mr. Volcko purchased a few months after separation to be a matrimonial asset and dividing its net value equally between the parties;

(f) refusing to order the husband to pay retroactive or ongoing child support to his wife;

(g) not ordering ongoing spousal support in an amount greater than $15,000 per month;

(h) refusing to order retroactive spousal support;

(i) dividing the household contents and

(j) the amount of costs she ordered.

Standard of Review

[7] The Supreme Court of Canada set out the applicable standard of review for appeals involving support issues in family matters in **Hickey v. Hickey**, [1999] 2 S.C.R. 518:

> 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.**
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> 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.
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> 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)

[8] As set out by Cromwell, J.A. (as he then was) in **MacLennan v. MacLennan**, 2003 NSCA 9, this standard of review also applies to appeals involving division of property:

> [9] In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (C.A.). The determination of support and division of property requires the

> exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136 (S.C.A.D.) at 162; **LeBlanc v. LeBlanc**, [1988] 1 S.C.R. 217 at 223 - 24; **Elsom v. Elsom**, [1989] 1 S.C.R. 1367 at 1374 - 77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518 at paras. 10 - 13.

[9] In addition, issues of fact and mixed law and fact from which no error of law is extractable, are reviewed for palpable and overriding error. Issues of law, including points of law which are extractable from mixed questions of fact and law, are reviewed for correctness; **Wong v. Wong**, 2008 NSCA 43, para. 12.

[10] An award of costs will only be disturbed where wrong principles of law were applied or the decision is so clearly wrong as to amount to an injustice; **Westminer Canada Ltd. v. Fraser**, 2005 NSCA 27, para. 20.

[11] An appeal is not a rehearing. This Court may not substitute its opinion for that of the judge if she exercised her discretion judicially in accordance with correct legal principles; **Young v. Young,** 2003 NSCA 63, at paras. 6-7.

(a) Did the judge err in determining the date of separation to be October 2006 rather than June 2009?

[12] The judge accepted Mr. Volcko's position that the parties separated in October 2006, when he moved out of the matrimonial home. Ms. Volcko argues the judge erred in making this finding and that the date of separation was June 2009, when Mr. Volcko disclosed that he was in a relationship with another woman.

[13] In reaching her decision that the parties separated in October 2006, the judge referred to s. 8(3)(a) of the **Divorce Act,** R.S.C. 1985, c. 3 (2nd Supp.):

> *(a)* spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; …

[14] She thoroughly reviewed the evidence relevant to this issue:

> [9] The parties agreed in their evidence that the Husband moved out of the matrimonial home on Thanksgiving weekend in 2006, and soon purchased

another residence without the input of the Wife. When the Husband left, the parties were very concerned about the children because the Husband's difficult childhood experience had been the acrimonious divorce of his parents which had a "significant impact" on him; the Husband was "determined" that his children would not have a similar experience.

[10] Both parties testified as to the details regarding the Husband's determination to avoid conflict, including him spending a number of "family occasions" with the children and the Wife (e.g. birthdays, Christmas, out-of-province travel to one of the children's sports tournaments and to his father-in-law's birthday, mutual golf games with the children, and attendance at the children's school events). The Husband told the Court "...throughout the years between 2006 and 2009 [the Wife] and I continued to live separate lives but with the children in common".

[11] Under cross-examination the Husband testified that between 2006 and 2009 he chose to stay in close contact with the Wife so as to maintain harmony within the family and to continue to focus on the children. The Husband testified that when he moved out he wanted the children to feel as though they were part of a family even though he considered the marriage to be over, because he was concerned the Wife would try to draw the children into the parties' issues or alienate the children if he did not strive to keep daily life as normal as possible for all concerned. For the same reasons, he was worried about raising the subject of divorce with the Wife.

[12] Under cross-examination the Husband described having been questioned by friends and reporting to them that he was separated but keeping the matter quiet for the benefit of the children. Independent evidence to that effect was also provided by the witnesses:

(a) Mr. Vaslet, who testified he was aware of the parties separation shortly after the Husband moved out of the home in 2006. He heard the Husband express concern for the children and that the marriage was over.

(b) Mr. Vincent, who testified as to the same, and stated he became aware of the separation in 2007.

(c) Mr. Mills, who testified he met the Husband in 2008 and learned the Husband was separated "over the course" of discussions; it was clear to him the Husband felt there would be no reconciliation.

[13] While none of those three witnesses provided specific dates in their evidence, none of them were cross examined. The cumulative effect of their evidence was that it corroborated the Husband's evidence that after he left the matrimonial home, friends/business associates in the community understood from him that the marriage was over.

[14] The Husband's evidence was that he told the Wife "on numerous occasions" that the marriage was over, nonetheless he continued to attend marriage counselling with her. Although he believed the Wife may have attended counselling in an attempt to reconcile, he did so to have the process confirm his view that there was no hope of reconciliation.

[15] The Husband was cross-examined concerning 14 emails which he and/or the Wife authored over the time period from February, 2007 to November, 2008. The majority of the messages related to the subject of coordinating events involving the parties and the children. Two exchanges in particular (Exhibit 24, March 31, 2008 and Exhibit 26, October 5, 2008) contained replies by the Husband to the Wife's comments about their ongoing counselling, including that he was committed to the process, that the Wife was not wasting her time and that there was "still hope". The Husband agreed with counsel for the Wife that during those exchanges she had given him an opportunity to be honest by asking him directly about his level of commitment to the process and he had mislead the Wife.

[16] By contrast, the Wife testified that throughout the period from late 2006 to June 2009 she "truly believed that [the Husband] and I were working on the issues that had arisen in our marriage and I did not believe or intend that our marriage was at an end", although she did agree that after it happened, she had discussed the 2006 separation with a number of her friends. The wife pointed to events the parties shared, the frequency and types of communication between them, the continued sharing of finances and the ongoing attendance at marriage counselling as proof of the lack of intention of the parties to sever the marital consortium.

[15] She made findings and explained them:

[20] In considering the Husband's actions over the period from October 2006 to June 2009 I am satisfied on the evidence before me that he not only formed an intention to live separate and apart from his wife when he departed the matrimonial home in October 2006, but he demonstrated that intention in every way, save and except maintaining a harmonious relationship with the Wife, which centered around the children. (To that extent, both parties went to admirable lengths to protect the children's sense of security in a manner that might well be the gold standard for separated parties looking to focus on the best interests of the children).

[21] The Husband's intention was illustrated in the presence of the following factors:

(a) the children were told the parties "*separation*" was an interim or trial event.

(b) the parties never again engaged in sexual relations or shared sleeping quarters.

(c) the parties did not spend time alone with one another except to engage in "homework" prescribed at their marriage counselling sessions, which consisted of occasionally eating dinner together.

(d) the Wife no longer attended any of the Husband's work related social events or functions.

(e) the Wife did not take part in the Husband's selection of a residence nor did she ever visit him there.

(f) the parties took separate vacations with the children.

(g) the parties did not shop together, perform household tasks for one another, or engage together in any of the routine activities of daily life.

[22] Objectively assessed, the Husband presented through his actions, and interactions with his Wife, as possessing an intention to live separate and apart. Although the Husband, perhaps somewhat disingenuously, hadn't raised the subject of a divorce with the Wife in 2006, he was clearly not intending to remain married. The separation went on for an extended period, but nothing about the nature of the parties ongoing contact could reasonably permit any determination other than that these parties were separated but behaving maturely for the children's sake. The Husband clearly formed an intention to live separate and apart and outside a married state in 2006. The Wife's evidence supports that she did not view the purpose of marriage counselling as being for any reason other than to save the marriage, but I can be satisfied the Husband had already formed the requisite intention to separate, as required by section 3(a) of the *Act*, in 2006.

[23] The Wife testified she was confident the Husband had always understood that a "line in the sand" for her, in terms of keeping the marriage intact, would be if he became involved with another woman. Indeed, on two separate occasions after 2006 but before 2009, the Wife confronted the Husband and he denied the same. The Wife testified she declared the marriage over in June 2009, once she learned through the counselling process that the Husband was now involved with another woman. That was the Wife's measure as to the end of the marriage. The Wife may have chosen to interpret the Husband's actions in a particular light during the period between 2006 and 2009; those same actions, viewed objectively, satisfy me the Husband demonstrated the requisite intention to separate from the Wife and sever the "marital consortium", despite his efforts to remain amicable.

[24] Section 8 of the *Divorce Act* does not require a mutual intention to end the marriage, as discussed in *O'Brien v. O'Brien* 2013 ONSC 5750, per McDermot, J. at paragraph 50:

> Unlike the decision marry, the decision to separate is not a mutual one. It is a decision which is often made by one party over the objections of the other. Those protestations matter not: once one party has decided to

> permanently separate and has acted on it, the other party has no ability to stop the process or object to it. This is confirmed by section 8(3)(a) of the *Divorce Act*, which states that "spouses shall be deemed to have lived separate and apart for any period during which they lived separate and apart and *either of them* had the intention to live separate and apart from the other" (emphasis). As stated by D.L. Corbett J. in *Strobele v. Strobele*, [2005] OJ 6312 (S.C.J.), the separation occurs when "the parties knew or acting reasonably, ought to have known that their relationship was over and would not resume" [paragraph 29].

[25] The facts here may be distinguished from those in the recent case of *Morrison v. Morrison*, 2013 NSSC 358 wherein Forgeron, J. was satisfied that although the parties had been unhappily married for a number of years, because they presented to family, friends and the broader community as a married couple, separation only occurred once the husband purchased a property without discussing it with the wife, and she followed that by signing a Petition for Divorce. Here, both parties were presenting to family, friends and the broader community as a separated couple by 2006, even though divorce was not raised until 2009.

[26] I do not accept the Wife's assertion that 2009 was the date of separation because she was "mislead" by the Husband about his intentions between 2006 and 2009 while the parties were engaged in marriage counselling. The parties circumstances during that period were very different from reported cases where parties were found to have separated even though they continued to live under the same roof (*French v French*, [1997] N.S.J. 287) or where parties lived separately but continued to engage in sexual relations (see *K.L.S. v. D.R.S* 2012 NBCA 16). I do not accept these parties' participation in marriage counselling had the effect of blunting or negating sufficiently the cumulative effect of all of the other factors discussed earlier herein which so clearly point to a separation in 2006.

[27] In *K.L.S.* (supra) Green, J.A. on behalf of the majority, in listing factors relating to the circumstances of the parties that a court may look to in determining whether parties are living separate and apart, noted:

> [22] This list is not intended to be exhaustive. As part of an analytical framework, these and similar factors should be considered collectively, and the Court should base its finding on whether the parties are at law living separate and apart based on the whole of the evidentiary record. It is not necessary for each individual factor to point conclusively to legal separation. As well, no one factor should be given undue weight, especially to the exclusion of some or all of the others which may point to a contrary result. (emphasis added)

I conclude that to place greater weight or emphasis upon or ascribe a greater significance to the Husband's participation in marriage counselling would be to

> do so to the exclusion of virtually all of the other factors that establish these parties separated in October, 2006.
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> [28] The parties relationship after October 2006 was in the context of their mutual concern and consideration for their children. The only significance of 2009 is that it was the point at which the Wife accepted that the marriage, already over, would not be resurrected. The date of separation, for the purposes of identifying the matrimonial asset pool available for division, the duration of spousal support, and the period(s) of any retroactive payments, is fixed at October 31, 2006.

[16] The wife says the judge erred by misapprehending the evidence, by not properly weighing the evidence, and by accepting the husband's explanation of why, after he moved out of the matrimonial home, he attended marriage counselling, participated extensively in activities involving the children and the wife, communicated with the wife as he did and maintained the parties' joint bank account.

[17] I disagree. The judge's reasons give no indication she misapprehended the evidence. Rather they indicate she understood and considered the evidence of both parties. It was squarely within the judge's mandate to determine what evidence she accepted. She made no palpable and overriding error in weighing the evidence and accepting the husband's evidence as to why, after he moved out, he acted as he did.

[18] In essence, the wife is asking this Court to retry this issue. That is not our function. The judge took into account all of the evidence and considered the appropriate law. She made no error in finding the date of separation was October 31, 2006.

[19] I would dismiss this ground of appeal.

(b) Did the judge err in characterizing the Shares as business assets rather than matrimonial assets?

[20] The wife argues the judge erred in finding the Shares are exempt from division as business assets under the **MPA**.

[21] The **MPA** defines matrimonial assets:

> **4 (1)** In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
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> …
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> (e) business assets;

[22] "Business assets" are also defined:

> **2** (a) "business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;

[23] In her reasons, the judge reviewed these provisions of the **MPA** and recognized that the onus is on the husband to prove the Shares are business assets. [see **J.W.L. v C.B.M.**, 2008 NSSC 215]

[24] She referred to the evidence concerning the Shares:

> [34] The Wife did not challenge the Husband's evidence that the shares cannot be controlled by him and are contingent on his ongoing employment with PCL, and that she had no involvement in acquiring the shares; at most, she read from time to time literature the Husband brought home regarding the subject.
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> [35] The affidavit evidence of PCL legal counsel, Andrew Wallace, which I accept, attached a "Share Ownership" document which confirms that:
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> (a) the offering of shares for purchase and the number of shares that may be purchased are matters in the control of the company;
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> (b) the shares have no commercial market value outside of the company;
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> (c) share valuation is determined once per year;
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> (d) shares must be held in the name of the employee;
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> (e) each employee is responsible to secure individual financing to purchase shares; and
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> (f) the purchase of shares represents investment in a construction company with "significant inherent risk".

[25] She correctly reviewed the relevant case law, identifying the hallmark of business assets as "assets which have as their purpose the generation of income in an entrepreneurial sense":

> [36] Both parties referred the Court to a number of authorities distinguishing matrimonial versus business assets, including *Clarke v. Clarke*, [1990] 2 S.C.R. 795; *Hickey v. Hickey* [1999] N.J. No. 259; *S.L.K. v. M.M.H.* 2009 NSSC 319; *Bishop v. Drohan*, 2004 NSSF 77. These cases discuss the distinguishing features of business assets as being those that involve an entrepreneurial act or possess an entrepreneurial sense**.** The Husband maintains his investment in the shares was and is an entrepreneurial act on his part. In *S.L.K.* (supra), Campbell, J. discussed the notion of "entrepreneurial sense" in assessing whether certain "flow through shares" held by the Husband were business assets:
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> 74. I am familiar with a number of cases in this court which have held that stocks and various other forms of financial investment portfolios are matrimonial assets. Those cases might support the notion that these flow through shares are matrimonial assets.
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> 75. The Supreme Court of Canada in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 analysed the definition of business assets as that term is used in the MPA in the context of whether or not pensions are business assets. In concluding that pensions are not business assets, Justice Wilson at paragraph 42 that "it seems to me that business assets are assets which have as their purpose the generation of income in an entrepreneurial sense". This reference to an "entrepreneurial sense" has been relied upon in a number of cases in this province.
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> 76. After hearing the evidence of the parties, I was left with the distinct impression that the husband was very much an entrepreneur in terms of the family's financial life. The Canadian Oxford Dictionary defines "entrepreneur" as ""a person who starts or organizes a commercial enterprise especially one involving financial risk". In my view the term implies business decision-making and risk taking. Here the investment was purchased entirely with borrowed money; it obviously involves risk since its value is substantially less than the balance of the Lines of Credit from which the purchase money came; it is a rather complicated form of investment; and, it required careful decision-making which would need to employ sharp investment skills to determine, for example, how and when to convert the flow through shares to mutual funds. I am satisfied that there was significant entrepreneurial effort coming from the husband in regard to this asset. I therefore classify this asset as a business asset and I will exclude it from division.

[37] In *Osmond v. Clarke*, 2006 NLCA 47 the Newfoundland Court of Appeal, in determining the husband's acquisition of certain shares was not entrepreneurial in nature, examined the shares in the context of an "entrepreneurial element":

> 29. Where is the entrepreneurial element in the Loan Plan Shares? I see none. There is no venture undertaken nor any enterprise conducted by the husband (other than his work at CHC). As the Nova Scotia Court of Appeal stated in *Tibbetts v. Tibbetts* (1992), 119 N.S.R. (2d) 26 (NSCA) at para. 17:
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> > ... generally speaking, an investment portfolio of stocks, bonds, GICs, mutual funds or the like does not involve the employment of capital for the purpose of generating income in an "entrepreneurial sense". An entrepreneur is defined in the **Concise Oxford Dictionary** as a "person in effective control of commercial undertaking"; one who "undertakes a business or enterprise, with chance of profit or loss". Holding a stock portfolio does not normally equate with operating a business.
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> 30. Here there is provision for soft loans (all interest-free, some limited recourse) to provide enhanced benefits to a handful of senior executives in CHC. (The CHC Stock Purchase Loans Term Sheet quoted above referred to these shares as "a significant portion of [the senior executives'] total compensation".) Accessing such soft loans to invest in these shares is simply *not* in any meaningful sense entrepreneurial.
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> 31. Thus, the Trial Judge committed an error of law in the application of the test as to whether the Loan Plan Shares are a business asset. They are not. They are a matrimonial asset and, as such, subject to equal division.

[38] The Wife cautions, and I agree, that the intention of the investor cannot be looked at in isolation or to the exclusion of how the asset functions - whether it "is working or being worked in an entrepreneurial way" (paragraph 24 Wife's Pre-trial Brief). In *Hickey* (supra), decided before *Osmond* (supra) the same Court of Appeal expressed concern about defeating the intention of matrimonial property legislation by giving "business assets" an overly broad interpretation. There, the court instructed trial judges that the manner of holding the asset and statements made about the specific intention for which the asset is held may inform the purpose of having the asset, but are not determinative of the question "whether the asset is held for the purpose of generating income in an entrepreneurial sense". (paragraph 25) In that case, the Court found the Appellant's purpose in holding the asset for future needs, but in an interest-earning fashion, did not amount to use of the asset in an entrepreneurial sense

[26] The judge distinguished **Osmond** and **Hickey** in finding the Shares were business assets:

> [39] Contrary to the circumstances in *Osmond* (supra) and *Hickey* (supra), the evidence in this case is that the purchase of the shares in question is not an automatic or mandatory feature of the Husband's employment compensation. Furthermore, I am not persuaded that the purchase of the shares was a cornerstone of the parties' long term financial planning. The history of financial decisions made by them has clearly resulted in them having paid down debt early on and having accumulated a healthy asset pool. However, regarding the shares, the Husband alone assumed the risk associated with them and he alone carried the loans associated with them.
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> [40] It is clear the Wife understood the inherent risk associated with ongoing acquisition of the shares, supported by her statement during cross examination that when she stopped working in 1998 the shares accumulated to that date were an uncertainty and therefore a "very small piece" of the parties' "financial pie", but she was "prepared to bet on my husband". This notion of "betting" by the Wife underscored the point that the value of the shares is subject to risk, in the performance of not just the Husband but also many others in the company, and the overall yearly success of PCL. In purchasing the shares, the Husband has had to use his knowledge of the company's past and projected performance and that of the construction industry each time he decided to make a purchase. The choice to purchase shares has been his alone, requiring him to exercise his expertise.
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> [41] The Husband has established and the evidence supports that the shares in question possess the requisite entrepreneurial sense that makes them business assets. The shares are easily distinguishable by their features from those kinds of assets that have in the past been determined to be matrimonial as opposed to business, such as, for example, pension plans and investment portfolios where the asset was passively held. Accepting the definition of "entrepreneur" discussed in *Osmond* (supra), citing from *Tibbetts v. Tibbetts* (1992), 119 N.S.R. (2d) 26, as "a 'person in effective control of commercial undertakings'; one who 'undertakes a business or enterprise, with chance of profit or loss'" (paragraph 29), the Husband has not controlled the company, but he has controlled his decisions about whether to buy shares in it, and he has borrowed money to do so. This is not a situation where the Husband simply put money in an account, plan or portfolio to let it grow in the nature of, for example, a pension or savings fund. These shares were and are intimately tied to the fortunes of the company, and the Husband has used his expertise and knowledge of the company and the industry, but also to some extent "gambled" on the performance of others, in deciding each year whether to accept the risk and purchase shares.

[27] It is important to recall the standard of review we are to apply to this issue. We are to show deference to her decision if she did not err in law, misapprehend

the evidence or if her decision is not clearly wrong on the facts. On findings of fact and findings of mixed fact and law, we apply correctness to extractible issues of law and palpable and overriding error to the facts, inferences and assignment of weight. We are not entitled to interfere simply because we would have balanced the relevant factors differently.

[28] The wife argues the judge erred in several findings of fact. She says she erred when she found: (1) the decision to buy the Shares was the husband's alone (para. 40), (2) the husband exercised expertise in purchasing the Shares (para. 40), (3) there was risk involved in purchasing the Shares (para. 39) and (4) the Shares were not a cornerstone of the couple's financial planning (para. 39).

[29] There was evidence supporting each of the findings the wife challenges. There is nothing indicating the judge misapprehended that evidence in reaching her findings. In making her findings, she accepted the husband's evidence, and that of Andrew Wallace, PCL's legal counsel, rather than the wife's. Deciding what evidence to accept and what evidence to reject is squarely within the judge's mandate.

[30] I am satisfied the judge made no palpable and overriding error in these findings of fact.

[31] The wife also argues the judge misapplied the law to the facts when she found the husband's ownership of the Shares possessed the requisite entrepreneurial sense to make them business assets. She says the judge erred in distinguishing **Osmond**.

[32] In **Osmond**, from a province with a similar matrimonial property regime to that in Nova Scotia, the court found the husband's shares of his employer were matrimonial assets. There, the husband's purchase of shares was tailored to his transitioning, at the age of 50, from the private practice of law to becoming an employee. The return he received as a shareholder was considered to be a portion of his total compensation as an employee. His employer provided him with interest free loans, some of limited recourse, to allow him to buy the shares. The amount he could borrow from his employer to purchase shares was directly related to his salary.

[33] In **Osmond**, there was a closer tie between the husband's employment and his shares than in this appeal. Here, there was no custom-made share purchase plan designed for Mr. Volcko when he became an employee. He was given the

opportunity to buy shares from time to time, in the same way shares were offered to other employees. He began purchasing shares prior to the parties' marriage, soon after he began working for PCL. While the husband could only purchase shares as an employee of PCL and the number of shares he could purchase was set by PCL, the decision to purchase was solely his. There was no evidence the return from his Shares was considered to be part of his total compensation as an employee. Also, his risk was greater. He borrowed money from the bank and paid interest on his loans. None of his loans are without recourse.

[34] Given these differences, the judge did not err in distinguishing **Osmond**.

[35] In this appeal, the judge's reasons indicate she understood the law she was to apply in determining whether the Shares were business assets; i.e. whether their purpose to the husband was the generation of income in an entrepreneurial sense. She found as a fact, that in any year he was offered shares, the husband alone decided whether to purchase them without the wife's involvement. She recognized, that in all but two years prior to marriage, the husband fully financed the purchase of the Shares from loans, in his name only (approximately $1,200,000 at the time of trial), and from his return on the Shares, not from his salary or performance bonuses that were used to support the family.

[36] The judge accepted the evidence that there is risk involved in the construction industry generally, including PCL, with its shares fluctuating in value over the years. She found the husband used his expertise, his knowledge of the construction industry and of PCL in particular, to assess the risk each year and decide whether to purchase any shares offered to him.

[37] There was uncontested evidence of the relatively minor value of the Shares at the time the wife stopped working outside the home and of the significant financial planning the couple did by paying off their mortgage and investing in the stock market, RRSP's, pension plans and RESP's. All this supported the judge's finding that the Shares were not a cornerstone of the couple's financial planning.

[38] Given her findings of fact, I am satisfied the judge did not err in applying the law to them.

[39] The judge made no error of law, did not misapprehend the evidence and her decision is not clearly wrong. Her decision is entitled to deference. We are not entitled to interfere simply because we may have weighed the evidence differently.

[40] I would dismiss this ground of appeal.

(c) Did the judge err in failing to consider whether Ms. Volcko contributed to the Shares so as to be entitled to an award under s. 18 of the MPA?

(d) Did the judge err in failing to consider whether Ms. Volcko was entitled to an unequal division of assets pursuant to s. 13 of the MPA?

[41] I will deal with these two grounds of appeal together. These are issues of law to which I will apply the standard of correctness.

[42] Having determined that the Shares were business assets of the husband, the judge did not go on to consider whether there should be an unequal division of matrimonial assets under s. 13 of the **MPA** or whether the wife was entitled to compensation for a contribution to the Shares under s. 18 of the **MPA**, noting the wife did not pursue that relief:

> [42] If a spouse cannot "own" the business assets of the other spouse, relief may be found in other sections of the *Act*. Here, the Wife did not pursue alternate relief under sections 13 or 18 of the *Act*; that is to say, given the Court is persuaded the shares are not matrimonial assets and therefore not available for division, the Court is not being asked to consider an unequal division of matrimonial assets in the Wife's favour in recognition of her contribution to the acquisition by the Husband of non-matrimonial property (s. 13), nor whether the Wife contributed to a business asset acquired by the Husband (s. 18).

[43] The wife argues this was an error. She says the pleadings were broad enough to allow the judge to consider an unequal division under these sections and that she erred in not doing so. She also argues the judge erred by not "determining a just result and finding her way to it".

[44] Sections 13 and 18 provide:

> **Factors considered on division**
>
> **13** Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;

(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;

(c) a marriage contract or separation agreement between the spouses;

(d) the length of time that the spouses have cohabited with each other during their marriage;

(e) the date and manner of acquisition of the assets;

(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;

(g) the contribution by one spouse to the education or career potential of the other spouse;

(h) the needs of a child who has not attained the age of majority;

(i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(j) whether the value of the assets substantially appreciated during the marriage;

(k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;

(l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;

(m) all taxation consequences of the division of matrimonial assets.

…

Contribution to business asset by spouse

18 Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

[45] The pleadings of both parties sought a division of property pursuant to the **MPA** without making reference to any specific section. The husband anticipated ss. 13 and 18 arguments in his pre-trial brief. Clearly the wife's plea for a division of property was sufficient to alert him to the possibility of an unequal division and had the wife pursued such an argument at trial, the husband would not have been surprised.

[46] The problem is the wife made it clear she was not pursuing a claim under ss. 13 or 18. She specifically argued for equal division in her pre-trial brief. While the basis of that argument was that the Shares should be classified as matrimonial assets, she set out no alternative argument that an equal division would be unfair or unconscionable if the Shares were exempt from division or that she had contributed to the Shares.

[47] When the judge sought clarification of the issue during trial, the wife confirmed she was not seeking an unequal division under ss. 13 or 18:

> **THE COURT**: And if I am to determine that the shares belong to Mr. Volcko and your client has no beneficial interest, it increases his ability to make an increased spousal support payment to your client. Isn't that where we are …
>
> **MR. KELLY**: That is the alternate argument.
>
> **THE COURT**: … ultimately?
>
> **MR. KELLY**: That is the alternate argument. Yes. And with that … yes.
>
> **THE COURT**: Because the parties don't really dispute … no one is making an argument for an unequal division in their favour, really.
>
> **MR. KELLY**: No. My Lady, could I have presented an argument under Section 18 and Section 13? Yes, I could. But there's really not much point presenting an argument that case law doesn't support.

[48] In light of the wife's stated position, the husband had no reason to believe a claim under ss. 13 or 18 was a live issue. He was therefore justified in not leading evidence, cross-examining or making submissions on this issue. For the judge to have considered a division under these sections in these circumstances would have been an error, as it would have amounted to a denial of procedural fairness; **Slawter v. Bellefontaine**, 2012 NSCA 48.

[49] The wife's second argument is that the judge erred by not determining a just result and finding her way to it, using ss. 13 or 18. Respectfully, that is not the analysis mandated by the **MPA**. The **MPA** makes it clear there is a presumption

of equal division of matrimonial assets. It is only where an equal division creates an unfair or unconscionable result that a judge has jurisdiction to award an unequal division under s. 13. The burden of establishing entitlement under s. 13 rests on the spouse who seeks the unequal division. Thus it was up to the wife, if she was seeking an unequal division, to present strong evidence supporting her position, that unfairness and unconscionableness would result without such a division.

[50] Similarly, the burden was on the wife to present evidence that she contributed to the Shares so as to be entitled to a contribution with respect to them under s. 18.

[51] No one disputes that the wife assumed the family's domestic responsibilities as of 1998 and the husband's career flourished thereafter. However, those facts, without more, do not establish that an equal division would be unfair or unconscionable.

[52] I am satisfied the judge did not err by not considering ss. 13 and 18.

(e) Did the judge err in not finding the residential condominium Mr. Volcko purchased a few months after separation to be a matrimonial asset and dividing its net value equally between the parties?

[53] The wife argues the judge erred by not dividing equally between the parties, the net value of the residential condominium the husband purchased a few months after he moved out of the matrimonial home in October 2006, the date of separation. She says an equal division is required as the condo constitutes a matrimonial asset as the husband purchased it with matrimonial assets.

[54] Before dealing with this argument, I will deal with a question that arose at the appeal hearing as to whether a document entitled "Assets and Debt Chart", prepared by the wife and provided to the husband and the Court at the last minute, should be considered by the Court. The wife indicated the chart was intended to show what the division of property between the spouses would be if she is successful in convincing us that the condo is a matrimonial asset. In fact the chart makes other changes to the division of property ordered by the judge, such as those involving the division of household contents and cars. I am satisfied the husband was not prejudiced by the late presentation of the chart, given his familiarity with the information it contains, so it is appropriate for us to consider it, as I have. Having said that, the chart was not helpful to me given my conclusion on this issue.

[55] The wife's argument on this ground of appeal differs from her argument throughout the trial process, where she sought an equal division of the condo only if the date of separation was found to be June 2009, after its purchase, rather than October 2006 as found. Given the wife's trial position, the husband's only response in his final submissions before the judge was that the condo should not be divided as it was purchased after the date of separation.

[56] In light of the parties' positions, after finding the separation date was prior to the purchase of the condo, the judge said nothing about the condo in her reasons.

[57] The husband's evidence was that the condo was purchased with his personal line of credit and dividends from his Shares that were not deposited into the joint bank account he had with his wife. He paid the condo fees from his separate personal account and later took out a traditional mortgage.

[58] Given this evidence, and the wife's position at trial, I am satisfied the judge made no reviewable error by not ordering an equal division of the condo.

(f) Did the judge err in refusing to order the husband to pay retroactive or ongoing child support to the wife?

[59] The judge refused to order the husband to pay retroactive or prospective child support to the wife. Instead, she ordered him to be solely responsible for his daughter's education and living expenses not covered by RESP accounts and to pay any other s. 7 expenses as decided between him and his daughter.

[60] The wife argues this was an error.

[61] In considering prospective child support the judge states:

> [43] The parties younger child, aged nineteen, is presently in the second year of undergraduate university studies in another province. There was no dispute that the Husband's 2012 income for the purpose of calculating support is $686,936.00. The Wife seeks child support in the table amount ($5,301.00) for the months when the child is not in attendance at school and residing in her home, and child support at fifty percent of the table amount ($2,650.50) for the months when the child is in school, asserting she is responsible for the child's clothing, toiletries and activities while the child is attending school. The Husband maintains that he should not be obligated to pay child support as he is prepared to pay all expenses associated with the child's education and overaged dependency that are not otherwise funded by RESP's already accumulated for that purpose.

[44] Section 3(2) of the *Federal Child Support Guidelines*, SOR 97/175 provides:

> (2) Child the age of majority or over - Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support is:
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[45] The evidence of the Wife established that the dependent child earned income from employment during the summer of 2012, however no amount of earnings was identified. The Wife testified she incurs additional expenses in having the child in her home over the summer period, however no specifics as to those costs or the Wife's cost of contributing to the child's expenses while at university were provided (in any event, it would seem that any contribution made by the Wife would ultimately be funded by the Husband, as spousal support is the Wife's sole source of income). The Court heard no evidence as to whether it is the child's intention to again reside in the home of the Wife for the summer upon completion of the 2013-2014 academic year. There are RESP funds marked for, and historically used by the parties, to assist in funding the children's education, although information as to the actual costs (e.g. tuition, books) of the younger child's education were not before the Court.

[46] The evidence is much too vague upon which to conduct the appropriate analysis under either section 3(2) (a) or (b) of the *Guidelines* (supra). There is not a sufficient evidentiary foundation upon which to consider the question of prospective child support. Furthermore, the evidence clearly established the Husband has historically financed the children's education above the parties' application of funds specifically designated for that purpose. The Court, and the Wife, can be confident the Husband will fulfill his undertaking provided at trial that he will continue to do so. The Corollary Relief Judgement shall reflect the Husband's obligation to fully fund the dependent child's education and living expenses. To require monies to flow from the Husband to the Wife as child support would serve only to transfer cash, the proper amount of which could only be speculated upon, for purposes that cannot be supported by the evidence.

[62] In considering retroactive child support she states:

[47] In October 2011 the parties executed a without prejudice Interim Agreement which stated in part that "The Husband has paid child support for the

children since separation, and paid their private school and university expenses." It also required the Husband to pay child support of $2,645.00 per month.

[48] The Wife seeks a payment of $60,000.00 representing her calculation of the shortfall between the child support actually paid and the amounts attracted by application of the *Guidelines* (supra) tables, for the period from June 2009 to the date of the hearing.

[49] In *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Heimstra v. Heimstra*, [2006] S.C.J. 37 the Supreme Court of Canada identified the four factors that must be considered in assessing whether an award of retroactive child support is justified. Those factors are: (a) the reasonable excuse as to why support was not sought earlier; (b) the conduct of the payor parent; (c) the circumstances of the child; (d) the hardship associated by a retroactive award. No one factor takes precedence over any other factor.

[50] In this case, the evidence does not illustrate any excuse as to why retroactive support was not sought earlier, nor any evidence of wrongdoing or misconduct by the payor Husband. As to the circumstances of the children, the whole of the evidence can only lead to the singular conclusion they were well cared for and had all of their needs and wants met by two attentive parents, as funded by the parties' use of their joint account between 2006 and 2009, and later as funded by the Husband directly and/or through payment of child support to the Wife. The evidence does not provide any basis upon which an award of retroactive support ould (*sic*) be justified in this case. As noted by Bastarache, J. In *D.B.J.* (supra):

> 95. It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.
>
> 96. Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.
>
> 97. Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only

> be exceptional that children are returned the support they were rightly due. ...
>
> [51] Here, there is no situation that the children are required to be returned to, and no discernible benefit for them to recapture by such an award. The evidence does not permit a determination that the children, or either of them, were deprived of any benefit of such support during the retroactive period.

[63] With respect to prospective child support, the wife argues her uncontested evidence was that the youngest child would be living with her in the summer months while she was attending university. She says that required the judge to calculate the amount of child support to be paid to her pursuant to s. 3(2) of the **Child Support Guidelines**, which she failed to do. She says if there were insufficient evidence upon which the judge could complete this analysis, she should have adjourned the trial to allow additional evidence to be brought forward.

[64] With respect to retroactive support, the wife argues the judge erred by wrongly assessing the factors to be considered in deciding whether to order retroactive child support and by failing to appreciate that the child support order entered into after separation was done on a without prejudice basis, so she was not precluded from retroactively increasing the amount of child support provided for in the order.

[65] I am satisfied the judge did not err in her treatment of child support.

[66] As to ongoing child support, the wife overstates the evidence with respect to where the younger child would be living in subsequent summers. The wife's evidence was only that she "anticipated" the younger child would live with her in the summer months while she was attending university. The husband felt this was uncertain. The judge considered calculating child support pursuant to s. 3(2)(a) of the **Guidelines**, but found she was unable to do so because there was virtually no evidence as to the younger child's means or needs. No adjournment was sought to enable more evidence to be presented.

[67] Faced with this lack of evidence, the husband's undertaking that he would be solely responsible for all of the younger child's education and living expenses that were not funded by RESP's and knowing the laudable manner in which the husband financially supported his children and wife following separation, the judge did not err in making an order in accordance with the husband's undertaking.

[68] With respect to retroactive child support, there is nothing in the judge's reasons to suggest she inappropriately assessed the appropriate factors, misunderstood the nature of the interim support order or felt constrained by its provisions. The evidence was clear the husband had ensured from the date of separation that the children were financially secure.

[69] I would dismiss this ground of appeal.

(g) Did the judge err in not ordering ongoing spousal support in an amount greater than $15,000 per month?

(h) Did the judge err in refusing to order retroactive spousal support?

[70] I will deal with these issues concerning spousal support together.

[71] The judge found the wife was entitled to prospective spousal support of $15,000 per month based on the husband having an income in 2012 of $686,936. Her decision clearly sets out her reasons:

> [55] The parties were married for sixteen years and for half of that time the Wife, having left her own highly lucrative career, was entirely dependent on the Husband, by their mutual agreement. There can be little doubt the Wife has an entitlement to both compensatory support (*Bracklow v. Bracklow*, (1999) 1 S.C.R. Y20) and non-compensatory support (*Moge v. Moge*, (1992) 3 S.C.R. 813).
>
> [56] Sections 15.2(4) and 15.2(6) of the *Divorce Act*, *supra*; sets out the legal principles and objectives to be considered in assessing a spousal support award:
>
> 15.2(4) **Factors**- In making on order under subsection (1) 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 co-habitated;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> 15.2(6) **Objectives of spousal support order**- An order made under subsection (1) or an interim order under subsection (2) that provides or the support of a spouse should

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

(b) apportion between the 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 spouses arising from the breakdown of the marriage; and

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

[57] The Wife claims support of an unlimited duration and relies on the *Spousal Support Advisory Guidelines* (SSAG) mid-point range of $20,036.00 per month calculated upon the Husband's 2012 income (for support purposes) of $686,936.00. The Husband does not challenge the Wife's entitlement nor the calculation of his income, but asserts both that the quantum sought is excessive and the support obligation should be time limited.

[58] As identified in the parties' October 2011 interim agreement, the Husband paid effective August 2011 "...spousal support totalling $12,355.00 per month (consisting of $9,355.50 cash and a $3,000.00 tax hold back payable to CRA by the Husband on behalf of the Wife)."

[59] From 2006 to 2009 the Wife had unlimited access to matrimonial bank accounts including the joint chequing account, and matrimonial assets. In 2009, she removed $50,000.00 from the joint asset pool and placed it in her name when the Husband requested a divorce, although the evidence before me did not identify the Wife's purpose in doing so.

[60] The Husband objected to the Wife's Statement of Expenses sworn July 23, 2013 (Tab 4, Exhibit 4) identifying monthly expenses of $6,350.00 excluding costs when the younger child, a university student, would be at home. The Wife's evidence was that hers is a "bare-bones", "minimal budget" reflecting "... the amounts that I have spent, not because it is an accurate budget, but because the Husband controls the income I receive. There are numerous items I have been unable to pay for, including routine maintenance and repairs on the home or setting aside money to purchase a new vehicle." This was in sharp contrast to the Wife's significant evidence during cross-examination that the source of monies she holds in an account she acquired since separation, containing approximately $143,000.00 is "from my monthly spousal support cheques". While her Statement of Expenses did not estimate what the future costs of home repairs or purchase of a vehicle might be, the Wife is presently entirely dependant on the Husband for income. Her budget includes allowances for recreation, holidays and entertainment, but not income tax.

[61] The evidence supports and I can be satisfied there has been no change in the Wife's day-to-day lifestyle since the parties' 2006 separation, following which she carried on her spending patterns uninterrupted. She testified that since separation she has been very careful about expenditures because the Husband controlled the amount of money available to her, although during that time the Wife continued unimpeded her pursuits of volunteering, travel and recreation. I took her evidence to mean "control" to the extent that the Husband alone was her sole source of income.

[62] Spousal support payments are not meant to be a blank cheque, in the sense that there must be some nexus between the Wife's legitimate needs and the sum awarded, while trying to achieve as much as possible an equalization of the parties' lifestyles within the context of the Husband's ability to pay.

[63] In conducting the "means and needs" analysis referred to in *Bracklow* (supra) the Wife's need is difficult to assess. Her Statement of Expenses shows monthly expenditures that are less than the present spousal support payment being made by the Husband. Furthermore, the application of the *SSAG* is discretionary and while the numbers suggested in the DivorceMate calculation relied on by the Wife can provide a range, there is also the inherent caution about the accuracy of the calculations when a payor's income exceeds $350,000.00. It is difficult to accept, on the evidence before me and the application of the factors set out in section 15.2(6) of the *Act* (supra), that a spousal support payment in excess of $20,000 per month is justified in this case.

[64] The Wife will have an asset pool as a result of the division of matrimonial property, which should provide her with a limited ability to generate a modest income. In addition, the Wife will not bear any of the expenses associated with the overaged dependency of the parties' younger child. There is also the matter of the Wife's obligation to make all reasonable efforts at self sufficiency. The Wife is 56 years of age and in good health. She is well educated (Bachelor of Science in Kinesiology; Masters of Business Administration) with a solid employment record to 1998, when, after being laid off from Scotia Capital Markets, the couple decided she would stay home with the children for the reasons discussed earlier herein.

[65] The Wife's evidence made it abundantly clear that she *chooses* not to work at this time, which is much different than being unable to work or being able to work only to a limited extent. The Wife stated in her evidence "Given my age and how long I have been out of the workforce, it is unrealistic and not practicable to attempt to return to paid employment". However, there is no evidence the Wife cannot realistically secure *some* modest measure of employment - she simply has not tried to test the job market. The Wife's own evidence was that she was approached by the husband of a friend in 2011 to take a short term position with TD Waterhouse. After a very brief time there she quit, and in an effort to retain her the bank then offered to create a different job opportunity for her, which the Wife turned down. In cross-examination, she acknowledged to counsel for the

Husband that she does not wish to work. While that may be the Wife's choice, it does not eliminate her legal obligation to explore, in so far as it may be possible or achievable, a reasonable measure of self-sufficiency.

[66] While the Wife has established a claim for both compensatory and non-compensatory support, spousal support is not to be seen as a lifetime pension. The Wife has been supported by the Husband for seven years since separation; how long the Husband's support obligation should continue is not easily determined at this time. Given the Wife's financial statement, the history of the marriage and the whole of the evidence before me, I exercise my discretion to set spousal support at $15,000.00 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 April 30, 2014. The parties are required to disclose their income information to one another no later than May 15 of each year; if any adjustments are needed they can become effective on July 1 of that year.

[72] The judge refused to impute income to the wife:

[67] The Husband urged the Court to impute annual income to the Wife of $90,000.00 - $100,000.00 on the basis of her failure to attempt self-sufficiency. I decline to do so in the absence of any evidence whatsoever as to what that number might be based upon, relative to the Wife's work experience, skill set, level of education, and the current labour market in this region. The range suggested is purely speculative; rather than speculate it is appropriate to limit spousal support to an amount that can be supported by the evidence. If either party seeks a variation of spousal support in the future, at that time a Court might choose to examine the matter of self-sufficiency of the Wife.

[73] The husband did not appeal this finding.

[74] The judge found the wife was not entitled to retroactive spousal support:

[68] The considerations on a question of retroactive spousal support were identified by Cromwell, J. in *Kerr v. Baranow*, [2011] S.C.J. No. 10 at paragraph 207:

> While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spouse support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support...

> [69] It is difficult to accept that any hardship might be suffered by the Husband were he required to make payment of the retroactive amount claimed by the Wife; his overall financial picture could hardly sustain a suggestion that he might be prejudiced under the weight of such a payment, positioned as he is with income and assets at his disposal sufficient to meet the amount claimed. Nevertheless, I decline to require the Husband to pay retroactive support in any amount as the evidence does not establish any disadvantage suffered by the Wife during the retroactive period; rather the Wife's entitlement to have her pre-separation standard of living perpetuated as far as possible was met by the Husband during the relevant period. The Wife's own evidence, in addition to documentary evidence before the court support that the Wife's spending patterns continued, without any appreciable change from 2006 - 2009. After 2009, the parties came to an agreement on interim support, as had been discussed elsewhere herein. During all of that time (2006 to date) her lifestyle continued, uninterrupted. There is no evidentiary basis upon which it could be said that additional need or hardship on the part of the Wife existed that must now be reimbursed by the Husband.
>
> [70] The evidence does not point to or allow me to conclude the Wife suffered any economic displacement during the period in question. Permitting the Wife's claim for retroactive support would remedy no loss to her; it would serve only to transfer monies to her under the thinly veiled guise of spousal support.

[75] With respect to prospective spousal support, I agree with the wife that the judge was wrong in her belief that the parties agreed the husband's income for spousal support purposes, in the event the Shares were not divided, was $686,936, and that she based the amount of spousal support she ordered on this mistaken belief.

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

[77] In light of this error, should we determine the amount of spousal support or refer the question back to the judge or to another judge of the Supreme Court Family Division? Given the time and cost involved in referring the issue back, the opportunity the parties had to deal with this issue as part of the appeal and the fact the record contains significant detail of the financial positions of the parties, I am satisfied we should make that determination.

[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.

[86] However, I am satisfied the judge did not err in refusing to order retroactive spousal support. The wife's access to the joint bank account from 2006 to 2009 ensured she had sufficient money to maintain her pre-separation lifestyle. Thereafter, she received spousal and child support that enabled her to save $143,000. The evidence does not establish any disadvantage she suffered during the retroactive period.

[87] I would allow the ground of appeal dealing with ongoing spousal support, by increasing the monthly spousal support to $20,000 per month, effective November 1, 2013, and dismiss the ground of appeal concerning retroactive spousal support.

(i) Did the judge err in dividing the household contents?

[88] The judge determined that specific household items should be turned over to the husband:

> [72] During closing submissions the Husband's counsel produced a list of "personal and incidental items not appraised" which the Wife's counsel then advised had already been agreed upon as items to be transferred to the Husband. In addition, the Husband identified various of the appraised items he seeks to retain totalling $2,490.00 in value. It would seem appropriate to require the Wife to turn over those items to the Husband by January 31, 2014 and reduce the Husband's one-half share by that same amount (to $6,156.50); the Wife shall retain the remaining household contents.

[89] The wife argues that the judge erred in reaching this decision. She points out that her position during trial was that she would keep all of the household contents, valued at $12,313, and credit the husband with 50% of this amount. She also points out that the husband's position until closing submissions was that the contents should be sold and the proceeds divided. She says she was prejudiced by not knowing the husband wanted the items he was awarded and had no chance to respond to it by cross-examination or evidence.

[90] The issue of splitting the household contents was not a significant issue at trial. In closing submissions, wife's counsel supported her position of her retaining the household contents rather than having them sold and the proceeds divided, on the basis there was a significant difference between the appraised market value which may be obtained on sale of the items and their replacement value which would likely be significantly more. Sometime prior to his oral submissions, husband's counsel provided wife's counsel with a list indicating that the husband wanted approximately 22 of the 160 items listed on the appraisal if they were not to be sold and the proceeds divided. He provided this list to the judge during submissions, explaining this division would be satisfactory to him, instead of his original position of an auction of all items where he could bid on the items to which he had a personal attachment. In her reply, wife's counsel did not object to the husband changing his position during submissions, focussing instead on the fact there was agreement on some of the items.

[91] While it may have been preferable for the husband to have made his position known earlier, given the relative importance of this issue compared to the other trial issues and given the fact wife's counsel had the opportunity to respond to the

husband's position in reply, I am not satisfied the judge made a reversible error in dividing the contents of the home as she did.

[92] I would dismiss this ground of appeal.

(j) Did the judge err in the amount of costs she ordered?

[93] The husband appeals the costs awarded by the judge. He argues the judge erred by awarding insufficient costs that do not amount to a "substantial contribution" to his legal fees and insufficient disbursements. He seeks a costs award of $183,063.81 pursuant to Tariff A of Rule 77 of the **Civil Procedure Rules**, together with his necessary and reasonable disbursements, as he did at trial, while recognizing costs are discretionary.

[94] The judge ordered the wife to pay all inclusive costs to the husband in the amount of $17,750, by periodic payments, with a drop dead date six months after her oral decision.

[95] The judge addressed all of the parties' arguments. She determined some costs should be awarded to the husband to recognize his success on the issues of date of separation, the Shares, retroactive child and spousal support and prospective child support. She also determined that the amount should recognize the wife's success on the s. 7 expenses, resisting imputation of income and the quantum and duration of ongoing spousal support. She recognized that the issues the husband was successful on were the ones involving the greatest dollar amount, but noted he "misled" the wife to some extent by attending marriage counselling for several years despite his certainty that the marriage was over. She took into account the fact that the husband's financial situation is markedly better than the wife's, but noted the wife is not impecunious given the substantial ongoing spousal support she ordered, $180,000 per year.

[96] She specifically refused to order disbursements given the lack of evidence.

[97] She concluded:

> $17,750 is not an insignificant award in the world of costs, if I can use that phrase. It's not an insignificant award in a family law matter. It is certainly nowhere near what Mr. Volcko was advocating, but it is a figure which, in my view, balances a recognition of Mr. Volcko's success with Mrs. Volcko's current circumstances and the fact that while Mr. Volcko was, on the whole, the successful party, he was not necessarily successful on each and every claim and

> Mrs. Volcko herself had success on certain aspects of the litigation that had a smaller dollar value associated with them.

[98] I am satisfied the judge did not apply wrong principles of law and that her decision is not so clearly wrong as to amount to an injustice.

[99] I would dismiss the husband's costs appeal.

[100] The wife seeks a reduction in the amount of trial costs if she is successful on appeal. Given her limited success on appeal, and the amount of trial costs awarded, I am satisfied no reduction should be made.

[101] I am satisfied the wife's appeal should be dismissed, except with respect to the amount of ongoing spousal support which should be increased to $20,000 per month effective November 1, 2013. I am also satisfied the husband's costs appeal should be dismissed.

[102] As both parties had some success on appeal, I would order each party to bear their own costs and disbursements with respect to the appeal itself.

Hamilton, J.A.

Concurred in:

Scanlan, J.A.

Bourgeois, J.A.