NOVA SCOTIA COURT OF APPEAL
Citation: *Woods v. Ferguson*, 2022 NSCA 1

Date: 20220113
Docket: CA 504580
Registry: Halifax

Between:

Michael Anthony Woods

Appellant

v.

Sharry Gay Ferguson

Respondent

Judge:	The Honourable Justice Hamilton
Appeal Heard:	November 10, 2021, in Halifax, Nova Scotia
Subject:	*Nova Scotia Civil Procedure Rule* 78.08(a) and (b); Division of Property on Divorce under the *Matrimonial Property Act*; Bankruptcy
Summary:	A Corollary Relief Order was issued in 2014, dividing the parties' property on divorce. Mr. Woods declared bankruptcy in 2015. Ms. Ferguson made a motion in 2018 pursuant to *Nova Scotia Civil Procedure Rule* 78.08, the "slip rule", seeking a quantification of the equalization amount owed to her. The motions judge ordered Mr. Woods to pay $41,052.82 to Ms. Ferguson to reimburse her for money she paid to the Canada Revenue Agency relating to Mr. Woods' unpaid income tax and to obtain deeds from the trustee in bankruptcy conveying Mr. Woods' interest in two properties to her.
Issues:	Did the judge err in ordering Mr. Woods to pay these amounts to Ms. Ferguson?
Result:	Appeal allowed, without costs. The judge failed to consider the legal principles applicable on a motion pursuant to *Rule*

78.08, the concept of *functus officio* or whether she had jurisdiction to vary the division of property provided for in the 2014 CRO. The "slip rule" can be used to "correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order" (78.08(a)) and to "amend an order to provide for something that should have been, but was not, adjudicated on" (78.08(b)). It cannot be used to vary a portion of the CRO dealing with division of matrimonial property on divorce; *Donner v. Donner*, 2021 NSCA 30.

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v.

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Respondent

Judges:	Van Den Eynden, Hamilton, Scanlan JJ.A.
Appeal Heard:	November 10, 2021, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Hamilton J.A.; Scanlan and Van den Eynden JJ.A. concurring.
Counsel:	Michael Anthony Woods, appellant on his own behalf Sharry Gay Ferguson, respondent on her own behalf

Reasons for judgment:

[1] Michael Anthony Woods appeals the January 21, 2021 unreported Endorsement of Justice Pamela J. MacKeigan of the Supreme Court of Nova Scotia (Family Division) and her Order issued February 11, 2021. On a motion pursuant to *Nova Scotia Civil Procedure Rule* 78.08, the "slip rule", made by Mr. Woods' former wife, Sharry Gay Ferguson, the judge ordered Mr. Woods to pay $41,052.82 to Ms. Ferguson, with respect to the division of their property on divorce in 2014, despite his subsequent bankruptcy. Neither party is represented by counsel on appeal.

[2] I am satisfied the judge erred and would allow the appeal without costs.

Background

[3] The parties were middle-aged when they married, a second for Ms. Ferguson and a third for Mr. Woods. Their divorce and division of property in 2014–2015 was dealt with by Justice Deborah Gass. The issues at that time were division of property, when co-habitation began and whether spousal support should be paid to Mr. Woods. Mr. Woods was found not to be entitled to spousal support. Ms. Ferguson never claimed spousal support.

[4] Ms. Ferguson was represented by counsel throughout the 2014–2015 proceedings. Mr. Woods represented himself at the time of the three-day divorce hearing but had counsel until a few months before. He also retained counsel to review the Corollary Relief Order ("CRO") drafted by Ms. Ferguson's counsel after Justice Gass gave her oral unreported decision on November 3, 2014. The Divorce Order and CRO were issued November 24, 2014. On January 20, 2015, Justice Gass ordered Mr. Woods to pay costs to Ms. Ferguson in the amount of $27,000.

[5] At the time of divorce, the parties had assets and debts in their own names, together with the matrimonial home and three rental houses jointly owned and encumbered by mortgages, lines of credit and a judgment registered by one of Mr. Woods' previous lawyers. Ms. Ferguson had exclusive possession of the matrimonial home and was paying 100% of the expenses related to it.

[6] With respect to the property, Justice Gass ordered an unequal division of some assets, an equal division of the net value of the four properties and that each

party would retain the assets in their possession and be solely responsible for the debts in his or her own name. The amount of the equalization payment for the division of the property was not calculated. Among other things, it would depend on the sale prices and costs incurred in selling the rental properties and would involve offsetting credits and debits. Justice Gass directed Ms. Ferguson would control these sales as Mr. Woods had failed to cooperate in the past.

[7] One of the debts in Mr. Woods' name was $39,858.26 he owed the Canada Revenue Agency ("CRA") for his unpaid income tax just prior to divorce. (Exhibit #32 at the divorce hearing.)

[8] The CRO was not appealed.

[9] Ms. Ferguson sold two of the rental properties, one in February 2015 and the other in July 2015, before Mr. Woods filed for bankruptcy on September 15, 2015.

[10] Except for the consequences of Mr. Woods' bankruptcy, there was no dispute Mr. Woods owed a significant amount to Ms. Ferguson as an equalization payment pursuant to the CRO. She received notice of his bankruptcy and was listed as an unsecured creditor in the Statement of Affairs he filed. After consulting legal counsel, she did not file a claim. The reason she gave Justice MacKeigan for not filing a claim was that she felt the amount payable to her pursuant to the CRO should be categorized as a constructive trust or as a form of lump sum maintenance that would be protected from discharge by Mr. Woods' bankruptcy pursuant to s. 178 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*")

[11] In connection with selling the third rental property in February 2016, Ms. Ferguson became aware the CRA had filed a lien for $38,522.82 against it and the matrimonial home relating to Mr. Woods' unpaid income tax. She chose to pay the CRA debt to remove the lien and allow her to sell the rental property at that time. She also paid $2,500 to obtain deeds from Mr. Woods' trustee conveying his interest in that rental property and the matrimonial home to her.

[12] Mr. Woods was discharged from bankruptcy January 20, 2017.

[13] Ms. Ferguson calculated the amount she felt was owed to her under the CRO and wanted to obtain an execution order against Mr. Woods for that amount. On December 6, 2018, she made a motion under *Rule* 78.08 for that purpose. Mr. Woods was represented by counsel. Ms. Ferguson represented herself. Her submissions to Justice MacKeigan indicate she had done substantial research and

was familiar with the perceived clash between family law and bankruptcy law as it relates to unpaid equalization payments relating to the division of property on divorce, referred to by the Supreme Court of Canada in *Schreyer v. Schreyer*, 2011 SCC 35 at paras. 9, 19 and 20.

[14] As indicated, Justice MacKeigan ordered Mr. Woods to pay $41,052.82 to Ms. Ferguson—$2,500 for the trustee's deeds and $38,552.82 for the amount she paid the CRA.

[15] While Mr. Woods appeals Justice MacKeigan's Endorsement and Order, Ms. Ferguson does not cross-appeal.

Endorsement

[16] In Justice MacKeigan's Endorsement, she framed the issues before her as follows:

> 15. Does Michael Woods' discharge from bankruptcy extinguish debts owed to Sharry Ferguson as set forth in her affidavit of the 6th of December 2018 filed in support of her motion pursuant to Civil Procedure Rule 78.08?
>
> 16. Is Michael Wood[s'] CRA debt secured by liens on properties and paid by [Sharry] Ferguson a debt recoverable by Sharry Ferguson?
>
> 17. Is the cost award of $27,000 made by the Honourable Justice Gass on the 20th of January released by the bankruptcy?

[17] She referred to the law set out in *Schreyer*, *supra*, and correctly concluded Ms. Ferguson's unpaid equalization claim was a claim provable in bankruptcy and was discharged by his bankruptcy:

> 35. In this decision, the S.C.C. held that an unpaid equalization payment is the same as any other debt owed by the bankrupt spouse and it becomes a claim that must be proved just like any other claim put forth by a creditor. Equalization payments do not attract any preferential status and the bankrupt spouse is released from that claim once the bankruptcy has been discharged. If the equalization claim was liquidated before the bankruptcy, there is no doubt the claim is provable.
>
> 36. At paragraph 26 of the Schreyer decision the S.C.C. discusses what is a provable claim.
>
> 37. The Court notes s.121 of the BIA contains a broad definition of what is a provable claim which includes:

> [26] … all debts and liabilities that exist at the time of the bankruptcy or that arise out of obligations incurred before the day the debtor went into bankruptcy. Thus, s. 121 provides that "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt" are deemed to be provable claims. […] If the debt exists and can be liquidated, if the underlying obligation exists as of the date of bankruptcy and if no exemption applies, the claim will be deemed to be provable.
>
> 38. If the equalization claim is still unliquidated, then s.121(2) of the BIA directs the trustee must apply s.135 of the BIA to determine whether the unliquidated claim is provable, is there a formula by which the quantum of the debt can be ascertained, or is the debt too uncertain to allow the trustee to value it.
>
> …
>
> 44. I find Justice Gass set a clear formula in the CRO for determining how each property was to be divided and while the rental property had not been sold prior to the bankruptcy a clear formula existed to determine quantum making the claim provable. I reject Sharry Ferguson's argument that the bankruptcy assignment interrupted fulfillment of the formula.
>
> 45. I find Sharry Ferguson's equalization claim was a claim provable in bankruptcy and has been released by Michael Wood[s'] discharge from bankruptcy.
>
> 46. The claim was not so uncertain such that s.135 of the BIA could not apply as the CRO set a clear formula to determine quantum.

[18] She correctly found Ms. Ferguson's claim was not exempt as a lump sum maintenance payment and there was no evidence of a constructive trust.

[19] The judge referred to *Mutual Transportation Services Inc. v. Saarloos*, 2020 NSSC 198, and its consideration of whether a costs award is discharged by bankruptcy or can be classified as a penalty under s. 178(1)(a) of the *BIA*, so as to survive bankruptcy. She appropriately found the costs award in favour of Ms. Ferguson does not fall under s. 178(1)(a) and was therefore also discharged by Mr. Woods' bankruptcy:

> 59. In this case Sharry Ferguson's costs were not awarded in consequence of contempt findings. The costs were awarded and quantified before bankruptcy and are discharged as they do not fall within the exemption under s. 178(1)(a) of the BIA.

[20] It is not necessary to say more about these findings, given Ms. Ferguson does not cross-appeal.

[21] Having found Ms. Ferguson's "equalization claim" and costs were discharged by Mr. Woods' bankruptcy, the judge treated the payments of the CRA lien and for the trustee's deeds differently.

[22] The issue before us is whether she erred in doing so.

[23] With respect to the $2,500 Ms. Ferguson paid Mr. Woods' trustee for the deeds to the matrimonial home and the last rental property sold, the only thing the judge said is that she found it to be "recoverable" because it was "outside of the equalization payment contemplated by the CRO":

> 49. Sharry Ferguson was required to pay $2,500 to Grant Thornton to acquire Trustee Deeds to the matrimonial home (2825 Connaught Avenue) and rental property (2831 Connaught Avenue). I find this amount to be recoverable by Sharry Ferguson and **is outside of the equalization payment contemplated by the CRO**.
>
> [Emphasis added]

[24] With respect to the $38,484.83 Ms. Ferguson paid the CRA, the judge stated:

> 50. Sharry Ferguson submits her payment of Michael Wood[s'] CRA debt of $38,484.83 should survive the bankruptcy as this debt was not part of the CRO and did not become known until the sale of the rental property in February 2016. CRA had a tax lien against the properties which was a secured debt that had to be paid before the properties could be sold.
>
> 51. Sharry Ferguson retained counsel prior to paying this debt "under protest" arguing Michael Wood[s'] had no equitable interest in the properties given previous court orders.
>
> 52. The position put forward by Sharry Ferguson was not resolved.
>
> 53. Filing bankruptcy will not remove a tax lien against a property. A tax lien can be registered against jointly owned property. In essence, a tax lien changes a tax debt into a form of mortgage against a property exempt from discharge through bankruptcy. A tax lien prevents a person from selling or refinancing a mortgage until the debt is paid.
>
> 54. Sharry Ferguson had no option. She had to pay Michael Wood[s'] tax debt which was secured by a tax lien against the property in order to be able to sell the rental unit.

> 55. As this was secured debt which would not have been released until paid, I find Sharry Ferguson is entitled to recover $38,484.83 representing the secured CRA debt owed by Michael Woods and paid by Sharry Ferguson.

[25] Nowhere in her Endorsement did the judge consider the legal principles applicable on a motion pursuant to *Rule* 78.08, the concept of *functus officio* or whether she had jurisdiction to vary the division of property provided for in the CRO.

Standard of Review

[26] The applicable standard of review is set out in *Laframboise v. Millington*, 2019 NSCA 43:

> [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.

Analysis

[27] As indicated, I am satisfied the judge erred in ordering Mr. Woods to pay Ms. Ferguson for the trustee's deeds and to release the CRA lien.

[28] The only motion before her was pursuant to *Rule* 78.08. There was no application to vary the CRO.

[29] I am not suggesting the result of this appeal would be different had Ms. Ferguson applied to vary the CRO. As this Court most recently set out in *Donner v. Donner*, 2021 NSCA 30, the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275,

under which the CRO was issued, does not permit variation of the portion of a CRO dealing with division of matrimonial property:

> [19] As noted earlier, Mr. Donner commenced the proceeding by filing an Application to Vary. In the context of divorce proceedings and resultant corollary relief orders, s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 provides the mechanism for varying, rescinding or suspending a child or spousal support order. The aspect of corollary relief with which Mr. Donner was concerned in his application related to division of property, not matters of spousal or child support. Therefore, s. 17 of that *Act* had no application.
>
> [20] The issue at the heart of the Donners' divorce trial related specifically to their disagreement about the characterization of the loan. Ms. Donner maintained it was a matrimonial asset, available for division despite being held inside a company. The judge's authority to determine the nature of the asset rested in s. 16(1)(b) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275:
>
> > 16(1) Either spouse may apply to the court for the determination of any question between the spouses as to
> >
> > (a) the ownership or right to possession of any particular property;
> >
> > (b) whether property is a matrimonial asset or a business asset,
> >
> > except where an application has been made and not determined or an order has been made respecting the property under this Act.
>
> [21] **Nowhere in that *Act* is there authority for a judge to later consider a variation of the division of property.** In his factum, Mr. Donner suggested the judge could have varied the CRO "to allow for a redistribution of matrimonial assets," and relied on *Pullin v. Ryan*, 2017 NSSC 20, as authority to do so. That decision is easily distinguishable from this matter. There, the court commented on a variation application as the only mechanism by which to put back before the court a dispute regarding a previous child support order:
>
> > [6] … When parties disagree about what those calculations should be there is no formalized procedure for the interpretation to be applied to previous orders except by way of Variation Applications. In this case because the parties did not define the costs that were to be included and because there is a real interpretive challenge about the meaning of "existing sources of funding" a court may decide the Order, or part of the Order cannot be enforced because the terms of the Order lack specificity.
>
> [22] Not only are these parties not concerned with any ambiguity in, or disagreement about, interpretation of an order, they are not concerned with a support order. **The judge had no jurisdiction to "vary" the portion of the CRO that addressed division of matrimonial property.**
>
> [Emphasis added]

See also *Rent v. Rent* (1987), 79 N.S.R. (2d) 188 (S.C.(A.D.).

[30] Ms. Ferguson's motion before Justice MacKeigan was made under *Rule* 78.08, the relevant part of which provides:

> 78.08 Errors and extensions of time
>
> A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated on;
>
> …

[31] These sections of *Rule* 78.08 encapsulate what is known as the "slip rule", which *Rule* was also discussed in the *Donner* case:

> [27] Commonly referred to as the slip rule, *Civil Procedure Rule* 78.08 is intended to address "errors", "mistakes", "amendments" … :
>
> …
>
> [28] The rule has its genesis in the common law principle of *functus officio*, designed to provide finality in judgments. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 the Supreme Court of Canada discussed the function of procedural rules usually designed to express the common law principle:
>
> > 79 It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal.
> >
> > …
> >
> > 81 In any case, the rules of practice in Nova Scotia and other provinces allow courts to vary or add to their orders so as to carry them into operation or even to provide other or further relief than originally granted (Nova Scotia *Civil Procedure Rules*, Rule 15.08(d) and (e); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2)(c) and (d); *Alberta Rules of Court*, Alta. Reg. 390/68, Rule 390(1)). This shows that the practice of providing further direction on remedies in support of a decision is known to our courts, and does not undermine the availability of appeal. Moreover, the possibility of such

proceedings may facilitate the process of putting orders into operation without requiring resort to contempt proceedings.

…

113 Canadian doctrinal and judicial writing on *functus officio* is sparse, even though the rule itself derives from an old case of the English Court of Appeal (*In re St. Nazaire Co.* (1879), 12 Ch. D. 88). **Essentially, the rule is that the court has no jurisdiction to reopen or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been error in expressing the manifest intention of the court** (see *In re Swire* (1885), 30 Ch. D. 239 (C.A.); *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186). …

…

115 If a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding, or, as G. Pépin and Y. Ouellette have perceptively termed it, the providing of [TRANSLATION] "legal security" for the parties (*Principes de contentieux administratif* (2nd ed. 1982), at p. 221). This concern for finality is evident in the definition of *functus officio*:

> [TRANSLATION] Qualifies a court or tribunal, a public body or an official that is no longer seized of a matter because it or he or she has discharged the office. E.g. A judge who has pronounced a final judgment is *functus officio*.
>
> (H. Reid, Dictionnaire de droit québécois et canadien (2001), at p. 253)

The principle ensures that subject to an appeal, parties are secure in their reliance on the finality of superior court decisions.

116 This common law rule is further reflected in modern rules of civil procedure (see, e.g., Nova Scotia *Civil Procedure Rules*, Rule 15.07 [replaced by Rule 78.08 (a) and (b)]) and the interpretation of criminal appeal provisions (see *R. v. H. (E.F.)* (1997), 115 C.C.C. (3d) 89 (Ont. C.A.), considering s. 675 of the *Criminal Code*). Whether in its common law or statutory form, the doctrine of *functus officio* provides that only in strictly limited circumstances can a court revisit an order or judgment (see Nova Scotia *Civil Procedure Rules*, Rule 15.08 [replaced by 78.08]). If it were otherwise, there would be, to paraphrase Charron J.A. in *H. (E.F.)*, *supra*, at p. 101, the recurring danger of the trial process becoming or appearing to become a "never closing revolving door" through which litigants could come and go as they pleased.

…

[30] While the slip rule has its origins in common law, its codification in rules of court procedure is hardly a recent construct. In *Ayangma v. French School Board*, 2011 PECA 3, Jenkins C.J.P.E.I. examined some of the history of the development of the rule:

> 12 … The function of a judge or a court is taken to be exhausted when the judgment is drawn up and entered: ***Paper Machinery Ltd. v. J.D. Ross Engineering Corp***, [1934] S.C.R. 186.
>
> 13 In the ***Paper Machinery*** case, the Supreme Court of Canada dealt with the finality of judgments and the power of a court to amend a judgment. Rinfret J. stated:
>
> > The question really is therefore whether there is power in the court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think, -- and we see no reason why it should not also be the rule followed by this Court -- that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the court (***In re Swire*** [(1885), 30 Ch. D. 239.]; ***Preston Banking Company v. Allsup & Sons***, [1895] 1 Ch. 141.]; ***Ainsworth v. Wilding*** [[1896] 1 Ch. 673.]. In a very recent case (***MacCarthy v. Agard*** [[1933] 1 K.B. 417.]), the authorities were all reviewed and the principle was re-asserted. In that case, although, indeed, all the judges expressed the view that the circumstances were particularly favourable to the applicant, but because neither of the conditions mentioned were present, the Court of Appeal came to the conclusion that it had no power to interfere. (The rule as stated was approved by the Privy Council in ***Firm of R.M.K. R.M v. Firm of M.R.M. V.L.*** [[1926] A.C. 761 at 771-772.]).
> >
> > The respondents' application does not come under the so-called slip rule. Nor is it apparent that some matter which should have been dealt with in the reasons has been overlooked; and, in our view, the minutes as settled accord with the judgment pronounced by the Court. [*sic*] any doubt which might have subsisted on those points must have been made clear by the discussion before their Lordships of the Privy Council and the order made upon the petition for special leave to appeal.
>
> 14 This explanation of the general rule and exceptions was discussed and reaffirmed by Sopinka J. in the Supreme Court of Canada decision in ***Chandler v. Alberta Association of Architects***, [1989] 2 S.C.R. 848… .
>
> 15 The court's inherent jurisdiction, and the source of the codifying rules of court, was explored by Green J.A. in ***Beanland v.***

Beanland (1997), 151 Nfld. and P.E.I.R. 51 (Nfld. C.A.). He stated at para. 41:

> [41] The court has inherent jurisdiction, as well as power under Rules 49.10 and 15.07 to amend or vary a previous order which has been drawn up and entered. The circumstances under which this may be done are, however, limited. The "general rule" as stated by Cameron, J.A., in this court in ***McLean et al. v. Carr Estate et al.***, (1996) 142 Nfld. & P.E.I.R. 25; 445 A.P.R. 25; 138 D.L.R. (4th) 541, is that a final decision of a court cannot be reopened. This is especially so where the order is made on consent because in such circumstances it is based upon the contract of the parties. See ***Wright, Re,*** [1949] O.W.N. 113 (H.C.) at p. 115. Exceptions to this rule, however, include circumstances where there has been a slip in drawing up the order or where there has been error in expressing the manifest intention of the court. **See *Paper Machinery Ltd. et al. v. Ross (J.O.) Engineering Corporation et al.,*** (S.C.C.), [1934] S.C.R. 186 per Rinfret, J., at p. 188; ***McLean et al. v. Carr Estate et al.*** at p. 544. Additional grounds would include fraud and, in the case of a consent order, circumstances that would enable the court to set aside the agreement upon which the consent order was based. See ***Wright, Re.*** Further, Rule 15.07 also allows an amendment 'to provide for any matter which should have but was not adjudicated upon', i.e., where the law requires the court to consider something which should have been but was not brought to the attention of the court: ***McLean et al. v. Carr Estate et al.*** Of course, there is also an inherent jurisdiction in the court to correct or set aside, 'ex debito justitiae', a decision, the fundamental basis for which is found to be lacking, as for example where an appeal has not been heard on its merits but struck out for non-appearance of the appellant when, in fact, the appellant was not properly served. See ***Marlay Construction Ltd. v. Mount Pearl (City)***, (1996), 147 Nfld. & P.E.I.R. 191; 459 A.P.R. 191 (Nfld. C.A.).
>
> [42] Absent any of the recognized exceptions, however, any purported variation or amendment of an order already drawn up and entered will be beyond the jurisdiction of the court to make.

16 The general rule that a final decision of a court cannot be reopened, subject to the exceptions to correct a slip in drawing it up, **or** where there was an error in expressing the manifest intention of the court, is not meant to provide an avenue to deal with arguments that could have been advanced, but were not. This can be done on appeal. **The rule providing for exceptions is meant to allow consideration of matters that must be dealt with in the sense that, had they been brought to the**

> **judge's or court's attention at the time of the hearing, the judge or court would have been obliged to take the matter into account. Examples of application of the rule include a court having made an order that exceeded the amount permitted by a regulation that was not brought to the attention of the court; or an order having been made that did not take into account a deposit that it had already been paid**: ***McLean v. Carr Estate***, [1996] N.J. No. 181 (NLSC-Ct. of Ap.), at para. 8-11; referring with approval to ***Yen and Yen v. Dapas and Torbay Investors Ltd.*** (1978), 6 B.C.L.R. 264 (B.C.S.C.).
>
> [Underlining in original; bolding added]

…

[36] Mr. Donner maintains the error in the figure representing the loan justifies the application of the slip rule in this case as an "exceptional circumstance". He relies on the discussion in in *Ivey v. Ivey*, 2014 NSSC 108:

> [30] The recent Ontario case of **Millwright Regional Coun[cil] of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.**, 2013 ONSC 1502, provides an excellent summary of the appropriate application of the slip rule. Perell J. reviews the parameters of the rule at paras. 30 to 33, wherein it is stated as follows:
>
> > [30] Rule 59.06 (1) is designed to amend judgments containing a slip or error, errors which are clerical, mathematical or due to misadventure or oversight. The rule is designed to amend judgments containing a slip, not to set aside judgments resulting from a slip in judicial reasoning: *Central Canada Travel Services v. Bank of Montreal*, [1986] O.J. No. 1249 at para. 21 (H.C.J.); *Dhaliwal v. Plantus*, [2007] O.J. No. 5450 at para. 4 (S.C.J.). **Rule 59.06 (1) is not designed to be a disguised means to review errors in the making of the Reasons for Decision; rather, it is designed to correct errors in memorializing the Reasons into a formal order or judgment.**
> >
> > [31] Generally speaking the court's inherent and statutory jurisdiction to amend an order or judgment is limited to: (1) cases of fraud; (2) where there has been a slip in drawing up the order; and (3) where there has been an error in the order expressing the manifest intention of the court from its reasons for decision: *Paper Machinery Limited v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186; *Re Wright*, [1949] O.J. No. 3 (H.C.J.); *Millard v. North George Capital Management Ltd.*, [1999] O.J. No. 3957 (S.C.J.). The rule is only operative in exceptional circumstances given the public interest in the principle of finality to the litigation process: *Shaw Satellite G.P. v. Pieckenhagen*, 2011 ONSC 5968 (S.C.J.) at para. 20.

> [32] Under rule 59.06(1), the Court has the power to amend an order where there has been an error in expressing the manifest intention of the Court: *Paper Machinery Limited. v. J.O. Ross Engineering Corporation*, [1934] S.C.R. 186; *Millard v. North George Capital Management Ltd.*, [1999] O.J. No. 3957 (S.C.J.); *Convay v. Marsulex*, [2004] O.J. No. 3645 (S.C.J.).
>
> [33] **The rule permits amendments where the order obviously or indubitably does not reflect what the court intended to do, either by error or oversight:** *Johnston v. Johnston*, [2002] O.J. No. 1570 (Div. Ct.); *Saikely v. 519579 Ontario Ltd.*, [2002] O.J. No. 2863 (S.C.J.); *Kerr v. Danier Leather Inc*. (2005), 76 O.R. (3d) 354 (S.C.J.).
>
> [Emphasis added]

[32] The judge's Endorsement makes it clear she understood the effect the bankruptcy of one spouse has on the unpaid equalization claim of the other spouse arising from the division of property on divorce. An unpaid equalization claim relating to the division of property is the same as any debt owed by the bankrupt spouse. It does not attract any preferential status and the bankrupt spouse is released from it once the bankruptcy is discharged. This can lead to unfortunate results, such as is the case here for Ms. Ferguson and was the case in *Schreyer, supra*; *Rent, supra*; *and Hastie v. Hastie*, 2019 NSSC 126.

[33] What is not clear is what legal principles she applied when she ordered Mr. Woods to reimburse Ms. Ferguson for the amounts she paid for the trustee's deeds and to have the CRA lien released.

[34] The only reason the judge gave for ordering Mr. Woods to reimburse Ms. Ferguson for the money she paid for the trustee's deeds was that it was "outside of the equalization payment contemplated by the CRO." Her explanation with respect to the CRA debt suggests she ordered Mr. Woods to reimburse Ms. Ferguson for this amount because it had to be paid for the rental property to be sold and the CRA was a secured creditor for bankruptcy purposes so that the debt would not have been discharged by Mr. Woods' bankruptcy.

[35] The law set out in *Donner, supra*, indicates there are limited circumstances in which the slip rule will apply because the issuance of an order is a watershed moment in litigation triggering the common law doctrine of *functus officio*. While accidental slips and oversights may be corrected, deliberate decisions and afterthoughts cannot be effected under the slip rule; *Lantin (Litigation Guardian for) v. Sokolies*, 2019 MBCA 115 at para. 24.

[36] The slip rule can be used "to properly give effect to the original intention of the court"; *Donner, supra*, para. 31. It cannot be used to alter "previous orders on the basis of 'afterthoughts'"; *Donner, supra*, para 35.

[37] In *Wood v. Wood*, [1982] N.S.J. No. 31 (S.C.), the judge amended the CRO where a term the parties had agreed to prior to the CRO being issued was mistakenly omitted from it.

[38] In *Andrews v. Andrews,* 2007 NSSC 35, the judge indicated his intention was to divide all assets and liabilities of the parties in the CRO, but one existing asset was inadvertently not dealt with. He applied the slip rule to deal with the forgotten asset.

[39] In *McDonald v. Trenchard,* 2011 NSSC 105, the judge refused to amend the CRO stating:

> [40] I am persuaded that this R.78.08(b) has a limited application and this is to catch obvious over sights raised as part of an adjudication or over sights obvious from the pleadings. There is nothing inherently erroneous or obviously deficient about clause 29 [of the CRO]. …

[40] In *Ivey v. Ivey,* 2014 NSSC 108, the judge amended the CRO to give the wife 50% of the husband's pension, rather than the 25% provided for in the CRO, to conform with the settlement agreement read into the record during a pretrial conference.

[41] The slip rule can be used to "correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order" (78.08 (a)) and to "amend an order to provide for something that should have been, but was not, adjudicated on" (78.08(b)).

[42] Here it is clear the judge was not correcting a clerical or accidental mistake or omission when she ordered Mr. Woods to reimburse Ms. Ferguson for the trustee's deeds and payment of the CRA debt. The CRO properly memorialized Justice Gass' reasons. No provision was agreed to by the parties and not included in the CRO.

[43] Nor was the judge amending the CRO to provide for something that should have been, but was not adjudicated on. It was not an oversight that no provision was made in the CRO for the trustee's deeds and the CRA payment if it became a lien. They could not have been adjudicated on at the time the CRO was issued in

2014 when they did not exist. The judge's Order was an afterthought, an impermissible variation of the CRO made seven years after the CRO and following the intervening event of Mr. Woods' bankruptcy.

[44] The slip rule does not apply.

[45] The judge erred when she varied the CRO by ordering Mr. Woods to pay $41,052.82 to Ms. Ferguson.

[46] I would allow the appeal, without costs, as none of the grounds of appeal raised by Mr. Woods have merit. The basis on which the appeal is allowed was raised by the Court.

Hamilton J.A.

Concurred in:

Van den Eynden J.A.

Scanlan J.A.