

CANADA / JUDGMENT

Eldridge v. Eldridge

2024 BCCA 21

COURT

British Columbia Court of Appeal

DECIDED

23 January 2024

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2024 BCCA 21 Eldridge v. Eldridge

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Eldridge v. Eldridge,

2024 BCCA 21

Date: 20240123

Docket: Docket: CA48579

Between:

Morley Thomas Eldridge

Appellant

(Respondent)

And

Anne Elizabeth Eldridge

Respondent

(Petitioner)

Corrected Judgment: The text of the judgment was corrected at para. 46
on January 29, 2024.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated
August 31, 2022 (A.E.E. v. M.T.E., 2022 BCSC 1534, Victoria Docket 211695).

Counsel for the Appellant:

N.J.W. Reid

Counsel for the Respondent:

A.R. Atwood-Brewka

Place and Date of Hearing:

Victoria, British Columbia

November 8, 2023

Place and Date of Judgment:

Vancouver, British Columbia

January 23, 2024

Written Reasons by:

The Honourable Madam Justice Stromberg-Stein

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

Summary:

The parties entered into a separation agreement governing division of property and spousal support, with a right of review under certain circumstances, including when the appellant turned 65. Upon the appellant reaching the age of 65, the parties arbitrated a review of spousal support. The arbitrator awarded prospective support on a declining basis leading up to an absolute termination date. The respondent appealed the arbitration award pursuant to s. 19.19 of the Family Law Act. The chambers judge held that the arbitrator had erred in law by basing support on a speculative assessment of the appellant's future income and ordered that the termination date for spousal support be set aside and that the appellant pay spousal support and support arrears as calculated by the formulas in the separation agreement.

The appellant submits the chambers judge erred in identifying and applying the standard of review, in interpreting the separation agreement, and in the remedy granted. Held: Appeal allowed in part. The chambers judge was correct that the arbitrator had erred in ordering that support be reduced over time and then terminated. The chambers judge's intervention was

justified under any standard of review, and accordingly, it is unnecessary to determine the standard of review that applies in an appeal from an arbitration award under the Family Law Act. However, the chambers judge erred by ordering the appellant to pay support calculated by the formulas in the parties' separation agreement. The only just remedy is to remit the matter back to the arbitrator to determine support based on updated financial information and in accordance with the applicable legal principles.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Introduction

- [1] A chambers judge allowed the respondent Anne Eldridge's appeal from a family law arbitration award, brought pursuant to s. 19.19 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The appellant, Morley Eldridge, appeals to this Court on the basis the chambers judge was incorrect to intervene in the arbitration award and erred by issuing a remedy which ignored the terms of the parties' separation agreement and the de novo nature of the review it provided for.
- [2] I would not accede to any of the appellant's grounds for appeal as they relate to the chambers judge's determination that the arbitrator erred by reducing and terminating the respondent's entitlement to spousal support. However, I am of the view that the chambers judge erred in the remedy she chose, by ordering that spousal support be calculated pursuant to the terms of the parties' separation agreement.
- [3] I would allow the appeal in part, set aside the chambers judge's order in part, and remit the determination of spousal support from May 1, 2021 onwards, based on proper legal principles and updated financial information, to the arbitrator.

Background

- [4] The appellant and the respondent were married in 1977, separated in 2010, and divorced in 2015. As of the date of this appeal, the appellant was 70 years old and the respondent was 66 (nearly 67) years old.
- [5] The parties were trained as archeologists. In 1985 they started an archeology consulting business called Millennia Research Limited ("Millennia"). The respondent eventually stepped away from the business to become the primary caregiver to the parties' four children, who were born between 1982 and 1992. Their children are adults now, but the youngest continues to require their support.
- [6] Following their separation in 2010, the parties engaged in several years of negotiations over division of property and spousal support. This culminated in a separation agreement (the "Separation Agreement"), entered into on September 8, 2015, which was the product of consultation with lawyers, accountants, a business evaluator, and a mediator, Mr. Eugene Raponi, K.C.

- [7] Pursuant to the Separation Agreement, the appellant became the sole owner of Millennia by purchasing the respondent's shares in the business. The respondent retained ownership of the family home. Equalization of the two assets was accomplished by reducing the appellant's payment to the respondent for her shares in Millennia by an amount equal to the appellant's one-half interest in the home.
- [8] The Separation Agreement set out detailed formulas for calculating each party's income for the purpose of support and the amount of support payable at those incomes. The respondent's income is imputed as \$24,000 per year under s. 5.1. The appellant's income is defined by a formula set out in s. 5.2:

Ongoing determination of MORLEY's income for support purposes:

MORLEY's income for support purposes ("MORLEY's Support Income") will be the total of:

5.2.1. the pre-tax corporate income from Millennia for its current fiscal year ending November 30, less:

any dividends paid to the Trust [for the parties' youngest daughter] by Millennia in the previous fiscal year for the benefit of [the parties' youngest daughter] but reflected in Millennia's current November 30 corporate Financial Statements and

any dividends paid to the Trust by Millennia for the benefit of the parties' other children in the previous fiscal year but reflected in Millennia's current November 30 corporate Financial Statements, provided ANNE has agreed to such payments,

plus

5.2.2 any wages paid to MORLEY from Millennia or any other employer for the current fiscal year,

plus

5.2.3 any other source of income set out under the heading "Total Income" in the T1 General form issued by the Canada Revenue Agency, subject to any adjustments required pursuant to Schedule III of the Child Support Guidelines, that are not included above.

- [9] Under ss. 5.4 and 5.5 of the Separation Agreement, the appellant owed spousal support "commencing on the 1st day of September, 2015 and in succeeding years up to and including [the appellant's] 65th birthday" at a base amount of \$5,000 per month plus 30% of the appellant's support income in excess of \$120,000.
- [10] Sections 5.16 and 5.17 of the Separation Agreement granted either party the right to request a full review of entitlement and quantum of spousal support under specified circumstances, including when either party reaches 65 years of age, if either party ceases employment after the age of 65, or if the income of either party increases or decreases by more than 20%.

- [11] In accordance with the terms of the Separation Agreement, the appellant paid support of \$5,000 per month from September 2015 to June 2017 and \$11,580.40 per month from July 2017 to June 2018. In July 2018, having turned 65 years old, the appellant requested a review of spousal support. In January 2019, the appellant further stipulated that he was entitled to a review because his income had increased by more than 20%. In the interim, the appellant continued to pay spousal support in the amount of \$11,580.40 per month.
- [12] The parties proceeded to mediation, conducted by Mr. Raponi, in July and December 2019, but were unsuccessful. They then entered into an agreement to arbitrate the review of spousal support, appointing Mr. Raponi as arbitrator. The issues submitted to arbitration were spousal support and "any other issues that remained to be determined between the parties".
- [13] The arbitration commenced in January 2020, and was conducted over four full days and two half days, concluding in December 2020. In June 2020, while the arbitration was ongoing, the appellant applied to reduce his spousal support obligations on an interim basis. One half day of the arbitration proceedings was allocated to hear the interim application. The arbitrator issued reasons dismissing the interim application on July 7, 2020.
- [14] The arbitration agreement stipulated that the arbitrator would only provide full reasons if requested by either party at the closing of argument. Neither party requested full reasons and the arbitrator issued the arbitration award, with summary reasons, on April 15, 2021.

The Arbitration Award

- [15] The arbitrator began with a review of the Separation Agreement and reproduced relevant portions of the agreement in his reasons. He stated that he was bound to consider the factors and objectives in ss. 15.2(4) and (6) of the Divorce Act as well as the Spousal Support Advisory Guidelines ("SSAG").
- [16] The arbitrator structured his analysis under the four factors that the appellant argued were relevant to a determination of spousal support:
- a. The Effect of [the appellant] Having Acquired [the respondent's] Interest in Millennia
 - b. [The appellant's] Available Income
 - c. The [\$350,000 income] "Ceiling" in the Spousal Support Advisory Guidelines
 - d. [The appellant] Attaining the Traditional Retirement Age of 65.
- [17] With regard to the first factor, the arbitrator concluded that the effect of the appellant's acquisition of Millennia was relevant to determining support:
41. If the spouse receives value based on "normalized" income and then receives support based on a higher income, then the spouse benefits both ways. Is that not by definition a double recovery?

42. One troubling aspect of [Bozak v. Bozak, 2008 BCSC 1458] and like decisions is that it is not even-handed in its analysis of the double recovery. On the one hand, the spouse assuming ownership of a business pays for the income-producing prospects of the business and then must pay spousal support on the same income. On the other hand, the spouse that obtains ownership of the family home in trade does not have to account for the return on that investment (as it is that spouse's accommodation). Moreover, real estate is also typically an appreciating investment and one whose increasing value is tax free.
43. Another troubling aspect of Bozak and like decisions is that it assumes that the business will continue to hold its value (or, indeed, increase in value) while at the same time generating a return. In my view, that is not a safe assumption. I find as a fact that it does not apply to Millennia which finds itself in difficult circumstances as well-detailed by [the appellant] in his affidavit material (I refer in that regard to [the appellant's] Affidavit #6, #7, #8 and #9) in which he sets out the challenges facing the company and the fact that it may no longer be saleable.
44. I found [the appellant] to be wholly credible. His honesty and integrity were obvious throughout these proceedings. I also found [the respondent] to be honest and credible but her knowledge of the Millennia's business and challenges were dated and, therefore, unhelpful. I prefer and accept [the appellant's] evidence in relation to Millennia's business and challenges.
45. I find there is merit to [the appellant's] argument and that this factor must be taken into account in a fair determination of his spousal support obligation.
- [18] The arbitrator also determined that the formula in the Separation Agreement for calculating the amount of support payable was no longer appropriate:
49. In my view, there may have been good reasons in the early years of the separation for striking the balance that the parties did in the annual adjustment formula. I note, for example, that even in a poor year when Millennia operated at a loss, [the appellant] was nonetheless required to pay [the respondent] spousal support of \$5,000 per month - in effect, out of his capital. That was appropriate during the years that [the respondent] was in the process of establishing a new career and [the appellant] was continuing to "grow" the business.
50. However, as the parties are in their retirement years, that formula is no longer appropriate. I conclude that this is likely the basis that led the parties setting [the appellant's] retirement age as a milestone for a full review of entitlement and quantum of support.
- [19] With regard to the second factor, the arbitrator rejected the appellant's argument that support should be determined based on the appellant's normalized income of \$150,000 that was used in the valuation of Millennia, but accepted that determining the appellant's income based on all of Millennia's pre-tax corporate income was flawed because Millennia "requires significant working capital to remain viable."

- [20] The arbitrator assessed the appellant's annual income for the years 2017-2020 as \$375,000, relying on an expert analysis of Millennia's pre-tax corporate income available to the appellant. The arbitrator found that the appellant's income fluctuated "dramatically", that his 2020 income was significantly lower than previous years, and that Millennia's income prospects were deteriorating.
- [21] With regard to the third factor, the arbitrator stated that the SSAG formulas were of limited assistance "in the circumstances of this case not only because [the appellant's] available income may be over the \$350,000 ceiling set out in the guidelines but also considering all the other circumstances in this case." He stated that the SSAG formulas should give way to a purely discretionary approach, using the SSAG as a "litmus test".
- [22] The arbitrator described the fourth factor, the appellant's age, as "the most significant factor" in determining support. In the arbitrator's view, the parties desired certainty when entering retirement as was evidenced by the parties' submissions and the provision in the Separation Agreement for a full review when the appellant reached the age of 65.
- [23] Finally, the arbitrator discussed the ongoing support requirements of the parties' youngest child and concluded that any financial support provided by either party was voluntary. The arbitrator concluded that the parties' financial choices were not a factor in determining support because both parties had sufficient resources to meet their reasonable needs.
- [24] The arbitrator summarized his disposition as follows:
79. In my disposition of [the appellant's] spousal support obligation and [the respondent's] spousal support entitlement, I accept the following factors as relevant:
- a. [the respondent's] entitlement to long-term spousal support,
 - b. the fact that [the appellant] purchased [the respondent's] interest in the business based on earnings over \$150,000, tempered by the parties' agreement that [the appellant] should be supported and rewarded for his efforts so as to increase the profitability of the linear for both parties' benefit,
 - c. the legitimate business needs of Millennia and its effect on the income available to [the appellant] to support purposes,
 - d. the SSAG ceiling,
 - e. the parties' need for certainty,
 - f. the difficult circumstances facing Millennia.
80. I refer to the Divorce Mate calculation set out as Schedule B. In that calculation, I have set [the appellant's] income at the four-year average, rounded, and [the respondent's] income at the imputed income as agreed by the parties.

81. I accept that, taking all of the factors set out above into account, spousal support should be set at no more than the low end of the SSAG calculation. That being so, the spousal support paid from September 1, 2018 to date is higher than the level that I consider appropriate by about \$1,000 per month.
82. However, that overpayment is compensated by the fact that [the appellant] should have paid the amount based on the annual adjustment formula for July and August 2018 (a total shortfall of about \$13,500) and that [the appellant] should be responsible for the arbitration costs related to the day spent hearing from Josh Matte and for the adjournment that was required on November 10, 2020, as set out below. For those reasons, I conclude that the amount paid by [the appellant] to date, should not be adjusted retroactively.
83. Based on the current trend, I anticipate that [the appellant's] future available income will be no more than \$150,000 to \$200,000 - and likely much less if he begins to work part time as he has suggested he wishes to or if he is able to sell Millennia either wholly or partially.
84. I direct that the amount currently being paid by [the appellant] be adjusted effective May 1, 2021.
85. Spousal support will be payable by [the appellant] to [the respondent] as follows:
 - a. From May 1, 2021 to June 1, 2022: \$7,500 per month,
 - b. From July 1, 2022 to June 1, 2023: \$5,500 per month,
 - c. From July 1, 2023 to June 1, 2024: \$3,750 per month,
 - d. From July 1, 2024 to August 1, 2025: \$2,500 per month.
86. Spousal Support will terminate absolutely on August 1, 2025 on the payment of the spousal support as set out above. At that point, [the appellant] will be turning 72 years of age and [the respondent] will be turning 69 years of age in November of that year.
87. My goal in establishing spousal support on a declining basis, with specified amounts that are not adjustable, is to create the certainty that both parties require so that they can plan for their retirement years.
88. It takes into account Millennia's deteriorating prospects, and accordingly, [the appellant's] available income prospects.
89. If [the respondent] knows and can rely on levels of support that are certain, she can plan accordingly. She will be able to plan when and if she needs to remediate and sell the former family residence. Her business ventures have not been very successful to date. However, [the respondent] has shown that she is both intelligent and resourceful and so her income prospects may improve. Moreover, she will shortly be entitled to CPP and OAS benefits to supplement her income.

90. [The appellant] needs certainty so that he can make decisions regarding the potential sale or winding up of his business. The declining support schedule gives substance to the parties' agreement that his work after age 65 should be voluntary. I anticipate that his income will decline over the next five years and then any choice he makes to continue to work should be his make without concern to his implication to spousal support.
91. My approach also dispenses with ongoing dispute resolution costs that have negatively impacted both parties' finances.
- [25] In his reasons concerning costs, the arbitrator stated that the respondent was entitled to costs in relation to "at least one of the arbitration days" taken up by testimony that the appellant disregarded and the costs related to adjournments on November 10 and 11, 2021 caused by the appellant's lack of notice to the respondent. The arbitrator concluded that the appellant's overpayment of spousal support, discussed at paras. 81-82 of the arbitrator's reasons, offset the respondent's entitlement to costs.

The Chambers Judge's Decision

- [26] The respondent appealed the arbitration award to the Supreme Court pursuant to s. 19.19 of the FLA, and sought, inter alia, to have the award amended to provide for indefinite support and support arrears. She also challenged the arbitrator's costs award.
- [27] The chambers judge stated the issues as follows (at para. 9):
- 1) Did the arbitrator err when determining [the respondent's] entitlement and quantum of spousal support on a prospective basis?;
 - 2) Did the arbitrator err in failing to award spousal support arrears?;
 - 3) Did the arbitrator err in making a declaration that [the respondent] was not entitled to anything from the sale of the business?; and
 - 4) Did the arbitrator err in failing to order costs to [the respondent]?
- [28] The chambers judge noted that the standard of review that applies in an appeal from a family law arbitration award remains unsettled following the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov]. In her view, it was unnecessary to decide the standard of review issue because the arbitrator had erred under any of the potentially applicable standards of review.
- [29] After reviewing the Separation Agreement and the arbitrator's reasons, the chambers judge held that the arbitrator had erred in law by terminating support prior to the appellant's retirement, and by basing the quantum of support on a speculative assessment of the appellant's future income. She reasoned:

- [35] While [the respondent] acknowledges that [the appellant] will at some point retire and her support will be terminated, she argues that while he is working, he should pay support. In an interim ruling dated July 7, 2020, the arbitrator noted that [the appellant] conceded that he is obliged to pay [the respondent] spousal support until he retires.
- [36] That is what this appeal is about: as long as [the appellant] is working, he must pay [the respondent] support. His support obligation cannot end until he actually retires. While I agree with the arbitrator (in para. 87 of his reasons) that certainty can be an important consideration "so the parties can plan for their retirement years", the arbitrator's final order was premised on speculative events that have not yet occurred. That, in my view, cannot be the basis for a final order.
- [37] After considering the record and the law, regardless of which standard is applied, I conclude that the arbitrator erred in law by ordering the termination of spousal support before [the appellant] retired.
- [38] The arbitrator additionally cited the "difficult circumstances facing [Millennia] as a reason he "anticipated" [the appellant]'s income would decrease in the future, and awarded support based on these projections. Like his finding that [the appellant] intended to retire, the impact of these business difficulties on [the appellant]'s income is speculative. It concerns events which may happen in the future, and cannot be a finding of fact. The arbitrator erred in law by basing the quantum of a final award on future events which had not yet occurred. If [the appellant] does not in fact, retire, or his income increases, rather than decreases, the result will be significantly unfair to [the respondent].
- [30] The chambers judge ordered that the termination date for spousal support be set aside and replaced with an order that spousal support will be calculated based on the formula in the Separation Agreement, which would continue until further court order or agreement of the parties.
- [31] With regard to support arrears, the chambers judge held that because the arbitrator had erred in terminating support he had also necessarily erred by failing to award the respondent arrears from July 2018 to June 2021. She ordered that the award be amended to reflect the respondent's entitlement to arrears of support as calculated by the formula set out in the Separation Agreement.
- [32] Turning to the issue of costs, the chambers judge held that the arbitrator had improperly mixed the costs award with what he saw as an overpayment of support. She found that the arbitrator's reasons were insufficient to show how the arbitrator concluded that the overpayment of support was balanced by the costs award. The chambers judge ordered that the award be amended to award costs to the respondent for three days of arbitration as discussed in the arbitrator's reasons.

[33] The respondent also challenged the portion of the arbitrator's award that ordered she not be entitled to any of the proceeds from the sale of Millennia. The chambers judge declined to set aside that portion of the award, stating that "[i]t was open, and prudent in the interests of finality, for the arbitrator to clarify that all proceeds of the sale were [the appellant's]."

On Appeal

[34] The appellant alleges numerous errors in the chambers judge's decision, including errors in identifying and applying the standard of review, in interpreting the Separation Agreement and in the remedy granted by the chambers judge.

[35] The appellant's arguments, considered together, raise three issues on appeal, which can be restated as follows:

- 1) Did the chambers judge err by applying the wrong standard of review, or by incorrectly applying the standard of review?
- 2) Did the chambers judge err by ordering support arrears and prospective support based on the Separation Agreement?
- 3) Did the chambers judge err by ordering the appellant to pay the respondent's costs for three days of arbitration?

Standard of Review

[36] In this Court's review of the chamber's judge's decision, questions of law are subject to a standard of correctness and questions of mixed fact and law are subject to a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 36. The onus is on the appellant to demonstrate an error in the lower court decision: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 34.

[37] The question of whether the chambers judge applied the correct standard of review to the arbitrator's decision is a question of law for which no deference is owed. If the standard employed by the chambers judge was incorrect, this Court is to apply the correct standard of review: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras. 42-43.

Discussion

Did the chambers judge err by applying the wrong standard of review or by incorrectly applying the standard of review?

[38] This issue encompasses two assertions made by the appellant. The first assertion, that the chambers judge applied the "wrong" standard of review, turns on what the correct standard of review is in an appeal from a family law arbitration award under the FLA. As the chambers judge noted, the issue "percolating in courts" is whether *Vavilov* requires appellate standards of review to be applied in a statutory appeal from an arbitration award: see *Nolin*

v. Ramirez, 2020 BCCA 274 at paras. 30-37, for a full discussion of the issue. The appellant submits that, despite Vavilov, the applicable standard of review has remained "almost always" reasonableness.

- [39] The appellant's second assertion turns on whether the chambers judge was justified in intervening in the arbitration award. The appellant submits that the award was legally supported and it was an error for the chambers judge to intervene under any standard of review.
- [40] As I will explain, I am of the view that appellate intervention was justified under any standard of review. Thus, in the circumstances of this case, it is unnecessary to make a final determination of the standard of review that applies in an appeal from an arbitration award under the FLA: see Mann v. Grewal, 2023 BCCA 88 at paras. 36-37.
- [41] I say this with appreciation of the authorities which, in my view, required the chambers judge to exercise a high degree of deference to the arbitrator regardless of the particular standard of review to be applied: see, e.g., Hickey v. Hickey, [1999] 2 S.C.R. 518 at para. 12; Barendregt v. Grebliunas, 2022 SCC 22 at paras. 100-104. As the chambers judge noted, a family law arbitration must not be treated as simply "one more layer of litigation". I am satisfied that the chambers judge did not overstep her role on appeal.
- [42] I will proceed by discussing the relevant legal principles and why, in my view, appellate intervention was justified.

The Legal Principles

- [43] Canadian courts have identified three grounds for entitlement to spousal support: compensatory, non-compensatory (also referred to as needs-based), and contractual: Chutter v. Chutter, 2008 BCCA 507 at para. 47, citing Bracklow v. Bracklow, [1999] 1 S.C.R. 420 at paras. 15, 41-42.
- [44] In this Court's recent decision in Cohoon v. Stobo, 2023 BCCA 479, Justice Voith described the principles underlying compensatory support as follows:
- [31] The Supreme Court of Canada first laid out the theoretical principles and basis for compensatory spousal support in Moge and later in Bracklow v. Bracklow, [1999] 1 S.C.R. 420, 1999 CanLII 715. Since then, a long line of cases from this Court have applied those principles. It is now well-settled that the underlying goal of compensatory support is the equitable sharing of the economic consequences of a marriage or its breakdown. It is intended to provide "redress from economic disadvantages arising from the marriage (such as diminished earning capacity and sacrificed career opportunities to take on childcare responsibilities) or the conferral of an economic advantage upon the other spouse (such as contributions to enhanced career development)": Hague v. Hague, 2022 BCCA 325 at para. 36, citing Parton v. Parton, 2018 BCCA 273 at para. 39 and Chutter at paras. 50-51. See also Moge at 864; Marquez v. Zapiola, 2013 BCCA 433 at para. 33 and Zacharias v. Zacharias, 2015

BCCA 376 at para. 44.

- [32] Marriage, in the eyes of the law, is an economic partnership. If one partner makes economic sacrifices, it is generally to improve the circumstances of the family as a unit. This arrangement of mutual benefit is disturbed upon the breakdown of a marriage. Absent some form of compensation, a spouse's financial sacrifices will often be borne exclusively by that spouse in the form of diminished earning capacity, and the financial benefits conferred on the other spouse will, absent compensation, exclusively benefit the advantaged spouse. Compensatory support, therefore, attempts to equitably share the economic consequences of a couple's roles and their choices during the marriage: Rozen at para. 34, citing Zacharias at para. 44; Moge at 863-865.
- [45] While each case must be decided upon its own facts, courts have consistently held that support of an indefinite duration is appropriate in cases involving a long marriage and a strong claim to compensatory support, even where the payee has achieved a degree of self-sufficiency: see, e.g., *Y.M.F. v. R.V.F.*, 2022 BCSC 699 at paras. 117, 115; *Parrett v. Parrett*, 2016 BCCA 151 at paras. 44-48; *Tedham v. Tedham*, 2005 BCCA 502 at paras. 56-61, 78; *Nataros v. Nataros*, 2000 BCCA 55 at para. 6; *Riad v. Riad*, 2002 ABCA 254 at para. 43; *H.S.S. v. S.H.D.*, 2018 BCCA 199 at para. 140; *Allaire v. Allaire* (2003), 170 O.A.C. 72, 2003 CanLII 26263; *Russell v. Russell* (1999), 180 Sask. R. 196, 1999 CanLII 12313 (SKCA) at para. 129; *Fisher v. Fisher*, 2008 ONCA 11 at para. 35. As a general rule, a limited term support order should only be made where the court is satisfied that the objectives of the order will be met within the specified time frame: *M.R. v. J.R.*, 2018 NBCA 12 at para. 67.
- [46] The justification for indefinite support on compensatory grounds arises from the fact that a spouse who has taken on a primarily domestic role in a long-term marriage will often experience a permanent and difficult to quantify economic loss, to the benefit of the other spouse: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 861-863. This principle is mirrored in the SSAG, which provide that where entitlement to support has been established, indefinite support should be ordered in cases involving parties who were married for more than 20 years or who satisfy the "rule of 65": *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice, 2016) [RUG] at 29. I will return to the significance of the SSAG in this case.
- [47] In *Moge*, the Court also discussed the relevance of the parties' standard of living in the context of compensatory support, at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement ... 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 ...

[Emphasis added, internal citations omitted.]

- [48] In *W. v. W.*, 2005 BCSC 1010, Justice Martinson explained that the preceding excerpt from *Moge* has been interpreted to mean that, for long marriages, the result will be a rough equivalency in standards of living. The standard of living equivalency has been used by courts in British Columbia as a method for assessing compensatory claims in long marriages: *W. v. W.* at paras. 11-12.
- [49] Non-compensatory support is intended to address the gap between the needs and means of spouses resulting from the breakdown of a marriage: *Chutter* at para. 54. It arises from the principle that, by virtue of marriage, spouses have some ongoing responsibility to care for one another: *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 27. The degree to which non-compensatory principles apply depends on the nature and duration of the marital relationship and the standard of living enjoyed by the parties before and after separation: *Chutter* at paras. 54-61; *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-50; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 69; *Tedham* at para. 55; *Fisher* at para. 53.
- [50] "Contractual" support obligations may also arise out of an agreement between parties. The parties' Separation Agreement is relevant because it contains statements of the parties' intentions and governed the division of property and spousal support following the parties' separation and prior to the review.
- [51] In the present case, the arbitrator noted that the review did not require the appellant to establish a material change in circumstances. Rather, the review was to be treated as an initial application for spousal support in which the parties' Separation Agreement was a relevant factor: *McEachern v. McEachern*, 2006 BCCA 508 at para. 32; *Morck v. Morck*, 2013 BCCA 186 at para. 17.
- [52] The arbitrator found that the respondent had a "long-term" entitlement to support "based on all three heads". Accordingly, the arbitrator was required to determine an appropriate quantum of spousal support with regard to ss. 15.2(4) and (6) of the Divorce Act, which provide:
- (4) In making an 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 cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- []
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for 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.

[53] As this Court explained in *Zacharias*, ss. 15.2(4) and (6) of the Divorce Act "take into account factors that would support both compensatory and non-compensatory support", but even where there is more than one basis for a spouse's entitlement to support, the resulting award is "single and indivisible": at para. 39.

[54] To achieve a fair and equitable distribution of resources, each of the objectives in s. 15.2(6) must be examined in light of the means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4): *Chutter* at para. 46, citing *Moge* at 850-853. The manner in which family property has been divided is also relevant, because the division of property affects the relative condition, means and needs of the parties: *Chutter* at para. 75.

[55] The arbitrator correctly observed that he was required to consider the SSAG, which are intended to reflect the law in Canada and to provide guidance for the appropriate amount of support at the time of an initial application: *Nicholl v. Nicholl*, 2020 BCCA 173 at para. 42. Where a review raises issues similar to those in an initial application, support should be determined with the guidance of the SSAG: *Domirti v. Domirti*, 2010 BCCA 472 at paras. 39-41; *Helle v. Helle*, 2019 BCCA 97 at paras. 13, 63.

[56] The SSAG formulas rely on an assessment of income as defined by the Federal Child Support Guidelines, SOR/97-175 [FCSG]. The primary approach to assessing a party's income is set out in s. 16 of the FCSG, which provides:

Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[57] Sections 17 and 18 of the FCSG give the court discretion to adjust income in the event that s. 16 does not provide the "fairest determination". Under s. 17(1), the court may "have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable".

[58] Section 18 of the FCSG concerns situations in which a spouse derives income from a corporation. Section 18 provides:

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
 - (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[59] Where s. 18 applies, the starting point for determining the payor's income is the entire amount of pre-tax corporate income; the burden then falls on the payor to lead evidence to support the conclusion that re-investment is necessary to sustain the company as a viable enterprise: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52.

[60] Finally, s. 19 provides the court with a discretion to impute income to a spouse as it considers appropriate, without the restrictions set out in ss. 16, 17 and 18: *Oulette v. Oulette*, 2012 BCCA 145 at para. 66.

[61] In every case, regardless of the method used to assess income, support must not be determined on the basis of speculative future events, which include uncertain changes in a party's income: *Carey v. Carey*, 2021 BCSC 1537 at para. 37; *Regisford v. Regisford*, 2017 ONSC 489 at para. 63; *Schmidt v. Schmidt*, 1998 CanLII 14586 (B.C.C.A.) at para. 25, 44 B.C.L.R. (3d) 223. Future events that are contemplated by the parties at the time of the order but are too speculative or uncertain may be addressed by a subsequent review if the uncertainty will be resolved in the not too-distant future: *Leskun v. Leskun*, 2006 SCC 25 at paras. 36-38. In every case, a spousal support order remains subject to variation.

[62] Chapter 11 of the SSAG describes an income "ceiling" and "floor", which encompass "the typical case, for which guidelines formulas can generate acceptable results." The ceiling in the SSAG is not an "absolute" cap, however: *Smith v. Smith*, 2008 BCCA 245 at para. 31. The authors of the SSAG clarify that, above the "ceiling of \$350,000, the formulas should no longer be automatically applied to divide income beyond that threshold": SSAG at ch. 11, emphasis added. In the RUG, the authors further state that "[w]here the payor's income is not too far above the ceiling, the formula ranges will often be used to determine the amount of spousal support, with outcomes falling in the low-to-mid range for amount." Thus, the SSAG remain relevant and may be used to determine support even where a payor's income is

in excess of the \$350,000 ceiling: see *Hathaway v. Hathaway*, 2014 BCCA 310 at paras. 44-50.

- [63] An award that is substantially above or below the range provided for in the SSAG, in the absence of exceptional circumstances to explain the anomaly, may attract appellate intervention: *Redpath v. Redpath*, 2006 BCCA 338 at para. 42; *Lightle v. Kotar*, 2014 BCCA 69 at paras. 62-63.

The Errors in the Arbitration Award

- [64] I would note that the appellant has taken an overbroad approach to defending the arbitration award. Many of his arguments are irrelevant to the errors identified by the chambers judge, which relate to the arbitrator's decision to gradually reduce and then terminate support.
- [65] I agree with the chambers judge that the arbitrator erred in ordering that the respondent's spousal support be reduced and terminated prior to the appellant's retirement. The appellant's age, which the arbitrator described as the "most significant" factor to determining support, should have had little bearing on the determination of support. As a result of the arbitrator's reliance on the appellant's age, as well as several other extraneous considerations, the arbitrator failed to ground the award in the mandatory objectives as set out in the Divorce Act. In my view, nothing in the record or the arbitrator's reasons indicates that a limited-term support order was appropriate in these circumstances.
- [66] As the chambers judge noted, this appeal does not concern the sufficiency of the arbitrator's reasons. The arbitrator provided reasons justifying the award on account of the appellant's age, the parties' need for finality and certainty, the challenges facing Millennia, and the amount of income available to the appellant for support, but these considerations were simply incapable of grounding the order reducing and terminating support in the face of the respondent's continuing entitlement. The summary nature of the arbitrator's reasons cannot serve to insulate the award from appellate review where the reasons provided contain manifest errors. Although it was open to the parties to specify that no reasons would be provided by the arbitrator (FLA s. 19.14), where reasons are provided they should reflect that the arbitrator was alive to the analysis required to determine support in accordance with the Divorce Act.
- [67] Finality and certainty, while relevant, cannot supplant the mandatory objectives of a support order; nor do they justify the arbitrator's order for a schedule reducing and terminating support. Finality and certainty are not inconsistent with an ongoing obligation to provide support.
- [68] Likewise, the challenges facing Millennia and the amount of income necessary to Millennia's operation were relevant to a determination of the appellant's income and the amount of support payable, but also could not justify the order reducing and terminating support. This is not a case in which the appellant was no longer capable of generating any income for the purposes of support. The arbitrator found that the appellant was capable of

generating income, despite the challenges facing Millennia. The appropriate question, which the arbitrator appears to have lost sight of, is the amount of support that should have been awarded in light of the respondent's "long-term" entitlement. As the Saskatchewan Court of Appeal succinctly stated in Russell:

- [129] Where marriages create economic dependence, time limited support should not be awarded. However, in calculating the quantum of support, weight must be given to the amount of property already awarded, and to post-divorce circumstances which determine both spouses' income.
- [69] As the chambers judge held, the arbitrator's apparent reliance on the appellant's retirement, based on the fact that he had reached the "traditional age of retirement" (whatever that means by contemporary standards), was speculative and could not be the basis for a final order. The arbitrator did not find that the appellant was going to, or even intended to, retire. Nor did the arbitrator find, contrary to the appellant's submission, that the appellant had been unable to retire due to his support obligations.
- [70] The appellant's age was relevant because it triggered the review of spousal support under the Separation Agreement, but nothing in the Separation Agreement supported the arbitrator's decision to gradually reduce and terminate support because the appellant had reached the age of 65. The Separation Agreement also provided for a review in July 2024, and every three years after, which contemplates spousal support being paid beyond the appellant reaching the "traditional age of retirement".
- [71] "Recital EE" in the Separation Agreement is relevant and provides:
- EE. MORLEY intends to work full-time until age 65, and then begin working part-time. Morley's employment after age 65 will be voluntary, and his income will decrease as he works less hours. It may also decrease if he partially or wholly reduces his ownership interest in Millennia.
- [72] The arbitrator relied on Recital EE to justify the award as giving effect to the parties' "agreement that [the appellant's] work after age 65 should be voluntary", which, in the arbitrator's view, meant that "any choice [the appellant] makes to continue to work should be his to make without concern to its implication to spousal support". In my respectful view, this is a flawed interpretation of the Separation Agreement. Recital EE does not entitle the appellant to make a voluntary decision to continue working free from any support obligations. It simply expresses the parties' agreement that the appellant's work beyond the age of 65 would be voluntary. At the time of the arbitration, the appellant had not decided to work less or to retire, which made Recital EE of little relevance.
- [73] The appellant relies on *Dunsmore v. Dunsmore*, 2018 ONSC 4842, and submits it is "on all fours" with this case. I do not agree; nor do I find that *Dunsmore* supports the arbitrator's decision to terminate support.

- [74] Dunsmore concerned an appeal from a family law arbitration award brought pursuant to ss. 45(2), (3) and (6) of the Ontario Arbitration Act, S.O. 1991, c. 17. The parties were married in 1982, separated in 2006, and entered into a separation agreement in 2011. The parties' separation agreement provided for support payable in the amount of \$19,500 per month beginning in 2010 and continuing until a mandatory review of spousal support was completed upon the payor reaching the age of 65. The payor turned 65 in 2014, but for various reasons, the review was not completed until October 2017. The arbitrator's award provided that the payor was liable for support in the amount of \$19,500 per month until the end of December 2017, after which the support payments would reduce each year and terminate absolutely in 2020. The payee in Dunsmore appealed the arbitration award on the basis that it improperly stepped-down and terminated support. The appeal was dismissed by the Ontario Superior Court of Justice.
- [75] With regard to the step-down order, the Court held that the rationale for the order--to encourage the payee to achieve economic self-sufficiency by liquidating her assets in preparation for retirement--was "within the framework of a step-down order": at para. 55. Notably, the arbitrator had determined that the payee's net worth was at least \$3,128,636 and the payor's net worth was \$719,670.
- [76] With respect to the termination of support, the Court held that appellate intervention was not justified because the arbitrator had determined that the payee's compensatory entitlement to spousal support had been satisfied, which the Court called "a prerequisite to the termination order": at para. 59 (emphasis added). The arbitrator had relied on *Puiu v. Puiu*, 2011 BCCA 480, a decision of this Court in which it was held that a payee's entitlement to compensatory support had been satisfied where, after several years of support payments and the payor's retirement, the payor was no longer in an advantaged state in terms of his ability to generate income.
- [77] Dunsmore is distinguishable from the present case by differences in the parties' financial circumstances, the duration of their marriage and the total amount of support paid. Critically, Dunsmore also concerned a payee who was in a superior financial position when compared to the payor, and whose entitlement to support on compensatory grounds was found to have been satisfied.
- [78] Aside from describing the respondent's entitlement to compensatory support as "long-term", and stating that the respondent was "a stay-at-home mother and raised four children while [the appellant] was often away for significant periods of time working on Millennial projects", the arbitrator did not engage in any detailed analysis of the respondent's entitlement to compensatory support; nor did he suggest that adequate compensation had been achieved. Given that the respondent has not been capable of earning more than the \$24,000 imputed to her under the Separation Agreement, there is simply no support for the proposition that the respondent would be able to maintain parity with the appellant's standard of living while receiving support on a declining basis, and while the appellant continues to earn a significant income.

- [79] The chambers judge clearly appreciated the significance of the respondent's ongoing entitlement to compensatory support. While not explicitly set out in her reasons, the judge's statement that "as long as [the appellant] is working, he must pay [the respondent] support" accords with the principle that support awarded on a compensatory basis must generally continue until compensation is achieved: *Tedham* at para. 60; *Chutter* at para. 79. See also *Parton v. Parton*, 2018 BCCA 273 at para. 45.
- [80] The chambers judge also correctly noted that if the appellant does not in fact retire, the result would be significantly unfair to the respondent. As I have already discussed, the purpose of the respondent's entitlement to compensatory support "is to ensure that, going forward, the economic consequences of choices made by the couple during the course of their marriage will be shared equitably": *Zacharias* at para. 44. In these circumstances, ordering that the respondent's support be reduced on a gradual basis and terminated while the appellant may continue to work and thereby enjoy his economic advantage ignored the basic principles which underly the respondent's entitlement on compensatory grounds.
- [81] The arbitrator noted that the respondent's "business ventures have not been very successful to date", but commented that the respondent "is both intelligent and resourceful and so her income prospects may improve" and that "she will shortly be entitled to CPP and OAS benefits to supplement her income." This statement, in my view, reflects the "sink or swim" stance which the Court cautioned against in *Moge*. The arbitrator appeared to assume that the respondent would be capable of swimming; that is, increasing her income to enable her to continue to enjoy a standard of living similar to that of the appellant, who was undoubtedly in a superior position to earn income. I note that the arbitrator also found that "each of the parties has had sufficient resources to meet their reasonable needs", but this finding had little bearing on the respondent's future means in the event her support was reduced.
- [82] The prematurity of the arbitrator's decision to reduce and terminate support is further evidenced by the SSAG, which in these circumstances, given the length of the parties' marriage (33 years) and the respondent's age when the parties separated (54 years), provided for support of an indeterminate duration. For reasons largely unexplained, the arbitrator adopted a purely discretionary approach to justify disregarding the SSAG when determining prospective support. The resulting order was a substantial departure from the quantum suggested by the SSAG, which lessened the justifications for showing deference to the arbitrator's decision.
- [83] The appellant submits that the use of a discretionary approach on a review is accepted law, relying on a number of cases in which a discretionary approach was applied: *S.R.M. v. N.G.T.M.*, 2014 BCSC 442; *D.L.D. v. R.C.C.*, 2013 BCSC 590; *S.G. v. K.G.*, 2012 BCSC 1937; *J.L.A. v. M.J.C.C.*, 2014 BCSC 1391; *Younger v. Younger*, 2016 BCSC 990; and *Smith v. Smith*, 2016 BCSC 1709.

- [84] In each of the authorities relied on by the appellant, with the exception of Smith, the payor was earning substantially more than the \$350,000 ceiling, ranging from \$652,000 (D.L.D.) to \$1,256,000 (S.G.). In Smith, which was a variation application, the Court declined to apply the SSAG given the payor's declining income and the fact that support had already been paid for 16 years following an 11-year relationship, which was beyond the maximum duration set out in the SSAG.
- [85] The authorities relied on by the appellant do not stand for the proposition advanced by the appellant, which is that the \$350,000 ceiling can be used to justify disregarding the SSAG where a payor's income is slightly more than the \$350,000 ceiling. As I have already explained, the \$350,000 ceiling simply means that the SSAG formulas should not be automatically applied to divide income beyond \$350,000. The \$350,000 ceiling cannot be used to justify awarding support that is less than otherwise would be awarded for an income at or below \$350,000.
- [86] The appellant also relies on Beninger v. Beninger, 2007 BCCA 619 for the proposition that the SSAG should be used with caution on a review because the SSAG are not designed to address some of the more complex issues that may arise, such as retirement. In Beninger, this Court's comments were in relation to a variation application, which is distinct from a review. In Domirti, Justice Smith remarked on the applicability of the cautionary statement from Beninger in the context of a review:
- [41] In my view, these comments are apposite to review applications of the type that was ordered in this case. Reviews that are broad in scope in regard to the issues to be reconsidered are similar to an initial application for support. Once the issue of the respondent's continued entitlement to support was determined, the quantum (both amount and duration) of that support would properly be reconsidered with the guidance of SSAG
- [Emphasis added.]
- [87] Neither Beninger nor Domirti stand for the proposition that the SSAG should, or even may, be completely disregarded in a review of spousal support. Both cases stand for the opposite: where the matters to be reviewed are similar to those in an initial application, it is "proper" and "appropriate" to use the SSAG: Domirti at para. 41; Beninger at para. 55. See also Morck at para. 17.
- [88] In the present case, as the respondent submitted in arbitration, little had changed for the parties following their separation and prior to the review. The "complicating factors" that indicate a need for caution before applying the SSAG on review were not present: neither party had remarried or retired, and the appellant had raised no issue concerning whether the post-separation increases in his income were attributable to something other than the economic advantage conferred on him by the parties' division of labour during their marriage. Even using the SSAG as a "litmus test", as the arbitrator stated he would do, should have indicated that a limited term order was inappropriate in these circumstances. In my view, the arbitrator erred in principle in his treatment of the SSAG, by concluding that the

SSAG formulas were of limited assistance "not only because [the appellant's] available income may be over the \$350,00 ceiling but also considering all the other circumstances in this case."

- [89] Finally, I also agree with the chambers judge that the arbitrator erred in law by relying on a speculative assessment of the appellant's future income. While it would have been open to the arbitrator to impute an income to the appellant, the "anticipated" future income of \$150,000-\$200,000 mentioned in the arbitrator's reasons was not anchored to any sufficiently precise assessment of the appellant's income at the time of the order. The reduction in Millennia's income-generating prospects may indeed be permanent, but at the time of the order the appellant's future financial situation remained uncertain. The Covid-19 pandemic clearly had a significant negative impact on the appellant's income, even if it was not the only source of the decline.
- [90] This error, in my view, was secondary to the arbitrator's errors in reducing over time and terminating the respondent's support. In other words, even if it could be said that the appellant's "anticipated" future income was not speculative, the award did not fix support based on that income for any significant period of time. Instead, support was ordered on a declining basis commencing one month after the award, which was erroneous for reasons I have already explained.
- [91] In sum, the arbitrator's decision to reduce and terminate the respondent's support was the product of several errors which justified the chambers judge's intervention under even the most deferential standard of review. The arbitrator erred in law by relying on speculative considerations and by giving undue weight to the parties' need for finality and certainty, rather than the mandatory factors and objectives as set out in the Divorce Act. The award was contrary to the respondent's ongoing entitlement to support, which in these circumstances required the appellant's greater ability to generate income to continue to be shared between the parties until a point at which the non-compensatory and compensatory objectives of support had been achieved or the appellant was no longer capable of generating income for the purposes of support. This conclusion is buttressed by the SSAG, which the arbitrator inexplicably concluded were of limited assistance.
- [92] In my view, an acceptable approach in these circumstances would have been to award support of an indeterminate duration at an amount determined with the guidance of the SSAG. I see no fault with the arbitrator's determination of retroactive support in accordance with the parties' Separation Agreement in July and August 2018, and in accordance with the SSAG from September 1, 2018 to April 30, 2021. However, as I have already discussed, the decision to reduce support beginning May 1, 2021, leading up to an absolute termination date on August 1, 2025, was in error. Uncertainties concerning the appellant's future income stemming from the Covid-19 pandemic, the difficulties facing Millennia, or the appellant's future retirement, rather than justifying stepping-down and terminating support, could have been addressed by way of a variation or review order.

The Appellant's Other Arguments Concerning the Arbitration Award

- [93] The appellant raises a number of other arguments in support the arbitration award. I do not find these arguments to be helpful or relevant to the issue of whether the arbitrator was justified in reducing and terminating support. Properly understood, the appellant's submissions concern the determination of the appellant's income for the purposes of support, but they do not lead to a conclusion that the arbitration award was valid in the circumstances. For completeness, I will address the authorities relied on by the appellant.
- [94] The appellant relies on *Russell v. Russell*, 2002 BCSC 1233, *G.M.S. v. J.B.S.*, 2003 BCSC 146 and *Cochrane v. Cochrane*, 2013 BCSC 2114, for principles concerning double recovery.
- [95] In *Russell*, the Court found that the payor's "normalized" income, which had been used in the valuation of a family business, should be considered his income for the purpose of determining support. The payee would otherwise be "double-dipping" by receiving the benefit of the business valuation based on a lower normalized income and spousal support based on a higher income. In *Cochrane*, the Court found that there was not a double recovery issue because the family business had been evaluated on the basis of asset values. In *G.M.S.*, the Court noted one party's argument that their income should be fixed at the amount used to assess the value of a business but it is unclear whether the party's income was ultimately fixed at that level.
- [96] In the case at bar, the arbitrator rejected the appellant's argument that his income should be fixed at \$150,000 for the purposes of support. This was because the parties had negotiated a valuation for *Millennia* which was \$40,000-\$50,000 less than the value assessed by the parties' business valuator and because the parties agreed that increases in *Millennia's* income should benefit both parties.
- [97] The appellant relies on *McKenzie v. McKenzie*, 2014 BCCA 381 and *N.A.J. v. P.L.J.*, 2014 BCSC 948, to argue that using corporate pre-tax income to determine a payor's income for the purposes of support is not the mandatory or default approach. This argument does not relate to the arbitrator's decision to reduce and terminate support. It relates to the determination of the appellant's income for the purposes of support. As I have already said, I find no fault with the arbitrator's determination of the appellant's income for the purpose of determining the amount of support payable from September 1, 2018 to April 30, 2021.
- [98] The appellant relies on *Chutter* as an example of an award falling below the low range in the SSAG where one spouse retained income-producing assets and the other retained the family home. In *Chutter*, this Court applied the SSAG and awarded indefinite support because the payee had a strong claim to compensatory support and the parties' relationship exceeded 25 years. The appropriate amount of support, in the circumstances of the case, fell below the low range in the SSAG. *Chutter* does not support the arbitrator's decision to disregard the SSAG altogether when determining prospective support and to order that support be stepped-down and terminated.

[99] The appellant also relies on *Cramer v. Cramer*, 2000 BCCA 272, which the appellant says is analogous to the case at bar, except that the payor had retired. In *Cramer*, the payor retained his interest in the business in which he worked and the payee retained the family home. The payor retired and sold his interest in the business and this Court held that to require him to pay support out of the funds he received from selling the business would be a redivision of assets. *Cramer* is not analogous to the case at bar. The appellant had not sold *Millennia* nor had he retired and the chambers judge did not interfere with the arbitrator's order that the respondent is not entitled to the proceeds of sale of *Millennia*. Requiring the appellant to pay support out of his income, rather than the value of *Millennia*, is not inconsistent with *Cramer*. It bears repeating that the arbitrator did not find that the appellant was unable to generate any income for the purposes of support.

[100] The appellant relies on *Shen v. Tong*, 2013 BCCA 519, for the proposition that trial courts should resist making orders subject to review and should instead resolve the controversies before them. In *Shen*, the parties had been married for three years. The payee did not have an entitlement to compensatory support and was awarded non-compensatory support of a limited duration. *Shen* is obviously distinguishable, as the chambers judge noted. In the circumstances of that case the Court determined that the limited term order could give effect to the non-compensatory objectives as set out in the Divorce Act. *Shen* does not stand for the proposition that support may be reduced and terminated where a limited-term order would fail to achieve the non-compensatory and compensatory objectives of support.

[101] In sum, the other legal arguments advanced by the appellant do not support the arbitrator's decision to step-down and terminate support, which was correctly found to be in error by the chambers judge.

Did the chambers judge err by ordering support arrears and prospective support based on the parties' separation agreement?

[102] After concluding that the arbitrator had erred by reducing and terminating support, the chambers judge was tasked with deciding an appropriate remedy. Section 19.19(3) of the FLA provided the chambers judge with several options:

- (3) On an appeal, the Supreme Court may do one or more of the following:
 - (a) confirm, amend or set aside the arbitration award;
 - (b) remit the arbitration award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

[103] The chambers judge held that the appellant was obligated to pay the respondent support as calculated under the formulas in the Separation Agreement from July 2018 forward.

- [104] The appellant submits that the chambers judge erred by disregarding the arbitrator's findings of fact and by failing to appreciate that the Separation Agreement provided for a de novo review. The appellant's primary contention is that the arbitrator's findings of fact supported his decision to step-down and terminate support. I do not agree, for reasons I have already explained. None of the findings of fact that the appellant relies on are capable of grounding the arbitrator's decision to step-down and terminate support.
- [105] The more important issue raised by the appellant is whether the chambers judge nonetheless erred by ordering support arrears and prospective support under the terms of the Separation Agreement.
- [106] In my view, it was an error for the chambers judge to order support pursuant to the Separation Agreement without assessing whether the Separation Agreement formulas would provide a remedy in accordance with the Divorce Act, the SSAG and a fair determination of the appellant's income under the FCSG: see *S.E. v. J.E.*, 2013 BCCA 540 at para. 57. The arbitrator's findings, especially concerning the amount of Millennia's pre-tax corporate income available to the appellant for the purposes of support, appear to be contrary to such a conclusion.
- [107] The chambers judge's error appears to flow from her misapprehension as to the scope of the review, which led her to assume that the formulas in the Separation Agreement necessarily applied. This is evident in the chambers judge's statement at para. 6 of her reasons:
- [6] According to [the appellant], the formula in the agreement did not reflect his efforts in operating [Millennia] and the method of calculating support was flawed as it was based on 100% of pre-tax corporate income less amounts paid to his holding company, rather than his "true" income available for distribution. Nonetheless, he agreed to the clause. I do not find this to be relevant to the issues before me. Neither the arbitrator nor this court are reopening the previous final agreement only looking forward.
- [Emphasis added.]
- [108] It is also evident in the judge's reasons concerning support arrears, in which she stated:
- [42] Given my finding that the arbitrator erred in terminating support, I necessarily find, regardless of which standard is applied, that he erred in failing to award support arrears. [The appellant] is obligated to pay [the respondent] spousal support calculated under the formula set out in the separation agreement from July 2018 forward.
- [Emphasis added.].
- [109] Under the Separation Agreement, the appellant was entitled to a de novo review of entitlement and quantum of support and it was open to the arbitrator to depart from the formulas in the Separation Agreement. After determining that the arbitrator had erred in reducing and terminating support, the chambers judge was placed in a similar position.

- [110] The respondent submits that the chambers judge did not err by ordering support payable pursuant to the Separation Agreement, which the respondent says was a relevant consideration on review and which provides advantages for both parties. In the respondent's submission, the review was not the forum to rebalance the appellant's issues with the Separation Agreement and its formulas. I disagree; a full review of quantum and entitlement of support is precisely the forum to determine a fair assessment of the appellant's income for the purposes of support and the amount of support payable on that income.
- [111] I acknowledge that the Separation Agreement was the product of considerable negotiation and consultation with lawyers, accountants, and other experts. However, the Separation Agreement provides for review. In a full review of entitlement and quantum of support, it must be possible for the formulas to be modified, terminated, or left in place. By returning the parties back to the formulas, the chambers judge failed to give effect to the terms of the Separation Agreement, which contemplated a broader scope of possible outcomes on review. As the appellant submits, to defer to the formulas in the Separation Agreement was effectively the same as not conducting a review at all.
- [112] In my view, the chambers judge should have set aside the portion of the arbitrator's award which scheduled reductions in support leading up to the termination date, and proceeded to either remit the matter back to the arbitrator or conduct her own review of spousal support on a prospective basis. She failed to do so and her decision to award support calculated under the Separation Agreement was in error.
- Did the chambers judge err by ordering that the appellant pay the respondent's costs for three days of arbitration?
- [113] In the chambers judge's view, it was improper for the arbitrator to mix what he saw as an overpayment of support with the costs of the arbitration, and further, the arbitrator's reasons were insufficient to explain how he had concluded that the overpayment balanced the costs.
- [114] While I would not condone the arbitrator's approach to determining costs, I respectfully disagree with the chambers judge's conclusion.
- [115] In *Jamieson v. Loureiro*, 2010 BCCA 52, Justice Kirkpatrick discussed the issue of whether an equitable set-off is available against child and spousal support awards and concluded that because spousal support is an obligation between spouses, the considerations that normally make it unjust to offset costs against an award of child support do not apply. The Alberta Court of Appeal has held, relying on *Jamieson*, that a trial judge's decision to offset costs against spousal support arrears does not disclose a reviewable error: *S.A.L. v. B.J.L.*, 2019 ABCA 350 at para. 24.

- [116] I can find no reviewable error in the arbitrator's decision to order that the costs owing to the respondent be set off against the arrears of support. It was not a reversible error for the arbitrator to decide to deal with the issue of costs and overpayment of support with a set-off. Both costs and set-off are discretionary remedies and the arbitrator's decision to deal with them in the manner he did was entitled to deference.
- [117] The more difficult question is whether the arbitrator's reasons were sufficient to justify the costs order. In my view, reading the arbitrator's reasons contextually and in light of the record, the arbitrator's decision to set off the costs award against the overpayment of support was sufficiently explained.
- [118] The arbitrator had found that the appellant overpaid spousal support by approximately \$1,000 per month from September 1, 2018 to April 2021, which equates to approximately \$32,000. He also found that the appellant had underpaid support in July and August 2018, in the amount of "about \$13,500". The net overpayment was approximately \$18,500, which is the amount the arbitrator set off against the costs owing to the respondent.
- [119] In his reasons concerning costs, the arbitrator stated that "at least one day of the arbitration days was taken up considering the evidence of Josh Matte the cost thrown away in relation to that exercise should be borne by [the appellant]." Additionally, the arbitrator stated that the respondent was entitled to the costs of "the arbitration session scheduled for November 10 and 11, 2021", which "had to be adjourned because insufficient notice was given by [the appellant] of Izard Angus' opinion".
- [120] Part of the confusion in determining the number of days of costs awarded to the respondent is caused by the arbitrator's prior statement, in the award disposition, that "[the appellant] should be responsible for the arbitration costs related to the day spent hearing from Josh Matte and for the adjournment that was required on November 10, 2020". No mention was made of the adjournment on November 11.
- [121] In my view, this lack of clarity in the arbitrator's reasons is resolved by reference to the arbitration award itself, which provides a list of the days of arbitration. The November 11 date is not listed as a date during which the arbitration was scheduled to occur, but November 10 was listed for a half day of arbitration. However, that was adjourned. This, in my view, confirms that the arbitrator intended to set off the costs of one and one-half days of arbitration (one full day for the evidence of Josh Matte, and one-half day for the adjournment on November 10) against the appellant's overpayment of support. Further, a set off of \$18,500 for one and one-half days of arbitration was reasonable.

[122] The chambers judge awarded the respondent costs of three days of arbitration. In doing so, she incorrectly stated that the arbitrator had previously held, in his decision on the appellant's interim application, that the respondent was entitled to the costs of the interim application. In the arbitrator's interim decision, he in fact stated that costs would be determined at the conclusion of the arbitration. I am of the respectful view that the chambers judge's award of costs was in error.

Remedy

[123] This Court is now placed in the difficult position of determining an appropriate remedy given that the arbitrator's award of prospective support and the chambers judge's remedies, concerning support and costs, cannot stand.

[124] In my view, the appropriate remedy is to uphold the arbitrator's award of retroactive support from July 1, 2018 to April 30, 2021, and costs, and to remit the determination of support from May 1, 2021 onwards to the arbitrator. It would not be appropriate for this Court to fix support on the basis of what is now dated financial information.

[125] This remedy limits the remaining issues to be determined between the parties and permits support to be determined in accordance with the law and on the basis of updated financial information. I would not disturb the arbitrator's costs award or retroactive support award, which reveal no error and which reasonably dealt with several of the outstanding issues between the parties at the time.

Disposition

[126] I would allow the appeal in part, set aside the chambers judge's order in part, and remit the determination of spousal support from May 1, 2021 to the arbitrator.

[127] In my view, the parties should bear their own costs on this appeal.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Groberman"

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