CITATION: Permack v. Schachter, 2018 ONSC 4114
NEWMARKET COURT FILE NO.: FC-17-53304-00
DATE: 20180629

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Sharon Fay Permack Applicant – Appellant in Appeal	C. Goldhart/M. Sample, Counsel for the Applicant – Appellant in Appeal
– AND –	
Mark Schachter Respondent – in Appeal	H. Niman/C. Wirdum, Counsel for the Respondent –in Appeal
	HEARD: April 20, 2018

MCGEE J.

Introduction

[1] Ms. Permack appeals the Arbitration Award of Herschel Fogelman dated March 8, 2017, asking that it be set aside, that this court order a retrospective increase in spousal support from June 1, 2012 and that support continue in pay indefinitely, notwithstanding a *Spousal Support Advisory Guidelines* maximum duration of 18 years. In the alternative, she seeks a final Order that the matter be returned to the arbitrator for a new hearing.

[2] Her appeal is governed by the *Arbitration Act*, 1991, S.O. 1991 and is being heard in this court pursuant to section 45(6)(a) of that Act, which provides that an appeal of a family Arbitration Award lies to the Family Court in areas where it has jurisdiction under section 21.1(4) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [as am. by S.O. 1991, c.46].

[3] The parties' July 13, 2012 Mediation-Arbitration Agreement only permits an appeal on a question of law in accordance with section 45(1) of the *Arbitration Act;* or on a question of mixed fact and law.

[4] Section 45(1) of the *Arbitration Act* requires leave to be obtained prior to an appeal on a question of law.

[5] The Amended Notice of Appeal dated August 21, 2017 has at paragraph 1 a request for leave for appeal, followed by 16 grounds for appeal. But leave was never sought prior to this full day appeal heard on April 20, 2018. Nor was leave for appeal and its component tests addressed in the appellant's Factum or submissions. I conclude that this is an appeal only on questions of mixed fact and law.

[6] To be successful, the appellant must demonstrate a palpable and overriding error on a question of mixed fact and law. For reasons that follow, I find that she has not done so. The arbitrator's Award is confirmed and the appeal is dismissed.

Background Facts

[7] The relevant background facts are fully set out in the arbitrator's reasons and need only be summarized as follows.

[8] The parties separated on September 1, 2002 after an 18 year marriage. At the time of separation Mr. Schachter was 45 and Ms. Permack was 43. Their children were 15 and eight. The parties divorced in 2007. By the time of the arbitration, both children were independent.

[9] The parties had a more or less traditional marriage. Throughout, Mr. Schachter was employed by a business started by his family in 1924. He did not become an owner in the business until after separation, following the receipt of two separate inheritances. In 2014 he and his remaining partners acquired additional shares, with the effect that directly or indirectly he now owns one third of the shares.

[10] Ms. Permack worked full-time as a special education teacher until 1986, and thereafter worked a series of full-time and part-time placements until 2010. There was some ambiguity in her evidence regarding periods of self-employment from 2005 forward. The arbitrator observed that she currently has three or four home-based businesses.

[11] The parties were unable to resolve the issues arising from their separation. An Application for Divorce was issued in May 2005. In either 2006 or 2007 they agreed to a mediation/arbitration with Mr. Philip Epstein. On May 26, 2008 a mediated agreement was achieved, just prior to the scheduled arbitration. The terms of agreement were eventually placed into a Separation Agreement dated June 10, 2009.

[12] Only certain terms in the Separation Agreement are relevant to this appeal. Mr. Schachter was to pay $7,000 per month in spousal support, with annual increases to reflect the cost of living. Ms. Permack was to use her best efforts to achieve self-

sufficiency, to the extent that she was capable. The amount of support was fixed until June 2012 and thereafter, either party could request a variation of spousal support provided there had been a material change in circumstances, foreseen or unforeseen.

[13] Contemporaneously, there was to be a mandatory review of child support and the parties' proportionate sharing of education expenses as September 2012 marked the youngest child's start in post-secondary studies.

[14] In May of 2012 Mr. Schachter gave notice of his intention to seek a variation in spousal support. The reader is referred to the arbitrator's reasons which set out the chronology of the next few years in greater detail. Suffice it to say that the review and the variation were resisted, Mr. Epstein resigned in February 2014 and despite the replacement arbitrator's (Mr. Fogelman) best efforts, an arbitration scheduled for June 2014 did not occur.

[15] The delay appears to have had two major causes. First, Ms. Permack asked in April 2014 that she be given a litigation guardian in response to a request to schedule questioning. Mr. Schachter did not agree and Ms. Permack brought a motion to that effect in October 2014. The arbitrator dismissed the motion and directed Ms. Permack to undergo a capacity assessment should she wish to further pursue that relief.

[16] Ms. Permack never complied with that Award, delivering unrelated medical reports a year later in October 2015. Ultimately, she did not pursue an appointment for a litigation guardian and she was questioned, a full two years after the initial request.

[17] Second, neither party trusted the other's disclosure. Mr. Schachter's post-separation ownership interests in the family business had increased his income dramatically, the value of which was not easily ascertained. Ms. Permack engaged her valuator to conduct complex valuations of her former spouse's corporate interests and income.

[18] Meanwhile, she was also receiving increased income by way of dividends on corporate interests acquired post-separation. Some were quite significant. For example, she received a one million dollar, non-taxable dividend in the fiscal year end of January 2011.

[19] After the June 2009 Separation Agreement, a real estate holding company owned in part by a company whose shares were owned by Ms. Permack and her two siblings sold a major property – resulting in the million dollar dividend. Just after, the sibling-held company was reorganized and ownership of Ms. Permack's shares in the sibling-held company and the real estate company were transferred to a new company that she wholly owns and controls. Her company's interests in the corporation previously held by the siblings, and her interests in the real estate holding company were never fully disclosed.

[20] Throughout, Mr. Schachter continued to meet all his child support obligations and pay spousal support and cost of living adjustments. By the time the arbitration was finally heard: July 2016, four years after effective notice; the cost of living adjustments had

pushed up the monthly spousal support to $7,428.46 and Mr. Schachter had significantly overpaid child support.

The Arbitrator's Award

[21] The arbitration was conducted over four days: July 25, 26, 27 and 28, 2016.

[22] Mr. Schachter sought an immediate termination of spousal support and a repayment of $124,161.40 in excess child support paid from June 2012 to October 2014.

[23] Ms. Permack acknowledged the overpayment, opposed the termination of spousal support and asked for an increase in spousal support to $49,306 per month commencing August 1, 2016 with net arrears of spousal support to be fixed at $886,289.81.

[24] It was agreed that the SSAG duration calculated at the time of separation was 9-18 years, and that support had been in pay at the time of the hearing for almost 14 years.

[25] Each party had an expert testify to Mr. Schachter's income in 2008 and his present income. Although the experts did not agree on Mr. Schachter's present income, (there was an issue of how to treat corporate losses) they did agree that his present income had dramatically increased since separation. It was not disputed that almost, if not all of that increase derived from inheritances received after the date of separation. Mr. Schachter took the position that only his employment income should be considered in the variation.

[26] Despite having retained a top valuator to challenge and independently calculate Mr. Schachter's income, Ms. Permack never engaged him to value her own income.

[27] Her failure to disclose key documents regarding her corporate interests meant that Mr. Schachter's valuator could not assess her income. Even at the time of arguing this appeal, there was no clear understanding of the value of her corporate interests, or the source and amount of dividends to which she is entitled.

[28] In an Award released March 8, 2017, the arbitrator found that there had been a material change as required by the Separation Agreement, and moved on to the second stage of the inquiry. He explored the objectives of section 15(6) of the *Divorce Act* as they applied to the circumstances before him.

[29] The arbitrator rejected Ms. Permack's submissions that she ought to be entitled to share in post-separation increases in Mr. Permack's income. He touched on the compensatory nature of the support claim and found that Ms. Permack had been adequately compensated for her role during the marriage. He gave full reasons for not applying the SSAGs to Mr. Schachter's present income.

[30] While addressing the nature of entitlement, the arbitrator's focus was on the post-separation improvement in Ms. Permack's financial circumstances and his inability to determine her actual income, given the failures to disclose. He looked at Ms. Permack's ability to earn income, appreciating that it was limited.

[31] The arbitrator determined that any disadvantage arising from the end of the marriage had been ameliorated by the support paid and received to date.

[32] At the same time, he was not satisfied that the payments of spousal support had fully discharged Mr. Schachter's obligations. He examined Ms. Permack's Financial Statement, made a finding on her available dividend income and deemed the overpayment of child support to be a lump sum of net spousal support. In doing so, he rejected Mr. Schachter's claim for termination of spousal support and repayment of the child support arrears.

[33] The arbitrator concluded that the periodic spousal support ought to continue to be paid until September 2020, inclusive of cost of living adjustments. This set the termination exactly 18 years after the date of separation – the uppermost range of the SSAGs.

Grounds for Appeal

[34] Within her Amended Factum, the appellant sets out 17 grounds of appeal: eight that are framed as questions of mixed fact and law, three as questions of law, and six unspecified grounds. Many grounds overlap. Many grounds are not subject to appeal as they are questions of fact which the Mediation-Arbitration Agreement specifically excludes from appeal. Those which are proposed as questions of mixed fact and law are:

1. The arbitrator erred in determining that the appellant will continue to receive ongoing distributions of dividends consistent with historical distributions.

2. The arbitrator erred by making an adverse inference against the appellant on the basis of incomplete disclosure, after stating that the appellant's health issues were a factor to be considered in determining what, if any, inference was to be drawn.

3. The arbitrator erred in concluding by way of inference, without any evidentiary foundation, that the appellant will continue to receive distributions of dividends that relate to corporations in which she does not have a controlling interest or discretion.

4. The arbitrator erred in finding that the appellant's financial circumstances had significantly improved since the making of the Separation Agreement in 2008 [and] [w]ithout limiting the generality of the forgoing, the arbitrator erred in finding that the appellant's financial circumstances had significantly improved when only the form of the appellant's assets had changed; not the value.

5. The arbitrator erred by determining that the appellant's financial situation had materially changed for the better from the time of the making of the Separation Agreement in 2008, to the time of the arbitration.

6. The arbitrator erred by failing to recognize that the majority of the dividends that have been received by the appellant, which can be traced to the capital that she had at the time of the making of the Separation Agreement in 2008 was spent on her health-related treatments and not available to support her other expenses. The arbitrator failed to conclude that the appellant relies on the spousal support to cover the remainder of her expenses.

7. The arbitrator erred by finding and concluding no nexus between the appellant's health and her entitlement to support.

8. The arbitrator erred by not properly or adequately applying the facts of the case to all of the factors as set out within the spousal support provisions of [the] *Divorce Act* and the common law. The arbitrator misapprehended the facts and failed to apply the facts to the applicable law.

Standard of Appellate Review

[35] An appeal is not a retrial.

[36] In reaching an Award, an arbitrator sits in the same position as a judge in a lower court, and when a decision is appealed to a higher court, and for a decision to be overturned on appeal, the appellate court must find that the reasons amount to an error in law and that the decision is not correct; or that a palpable and overriding error was made on a question of mixed fact and law.[1]

[37] In *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), the Supreme Court of Canada discussed in detail the standard of appellate review. The following principles emerge.

(a) an appellate court should not interfere with a trial judge's reasons unless there is palpable and overriding error; stated another way, an appellate court is prohibited from reviewing a trial judge's decision if there is evidence upon which the trial judge could have relied to reach that decision;

(b) the role of appellate court judges is to review the reasons in light of the arguments of the parties and relevant evidence, and then to uphold the decision unless a palpable error leading to the wrong result has been made by the trial judge ;

(c) on a pure question of law, the standard of review is that of correctness;

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[1] *Gray v. Brusby*, 2008 CarswellOnt 4045 (S.C.J.) at para. 27, and *Palmer*, supra, at para. 5

(d) the standard of review for findings of fact is such that findings are not to be reversed unless the trial judge has made a "palpable and overriding" error;

(e) appellate courts must treat a trial judge's findings of fact with great deference, this rule being based principally on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony;

(f) a court of appeal is clearly not entitled to interfere merely because it takes a different view of the evidence; the finding of facts and the drawing of evidentiary conclusions from the facts is the province of the trial judge, not the Court of Appeal;

(g) the standard of review for factual inference is the same as for findings of fact – there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge – that of palpable and overriding error;

(h) a question of mixed fact and law involves the application of a legal standard to a set of facts; where a decision-maker applies the wrong law to a set of facts, then this will constitute an error of law subject to the standard of correctness; and

(i) matters of mixed fact and law lie along a spectrum; where a legal principle is not readily extricable so as to characterize the error as an error of law subject to the standard of correctness, then the matter is a matter of mixed fact and law subject to the more stringent standard of palpable and overriding error.

[38] In *Hickey v Hickey,*[2] L'Heureux-Dube J. emphasized the highly deferential standard of review on appeal, with specific reference to family law support cases. An appeal court should only intervene where there is a material error, a serious misapprehension of the evidence or an error of law. This flows from both the discretion involved in making support orders, and the importance of finality in family law litigation.

[39] The principle of finality was recently referenced by the Ontario Court of Appeal in *Johanson v Hinde*:[3]

> The deferential standard of review of decisions of trial judges on questions of fact, and questions of mixed fact and law, is designed to promote finality and to recognize the importance of trial judges' appreciation of the facts. If anything, this is more accentuated in family litigation.

[40] In summary, the decision of an arbitrator deserves as much deference on appeal as does the decision of a trial judge.[4] An appellate court does not hear the evidence, or see the

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[2] [1999] 2 S.C.R. 518 paragraphs 10 to 12
[3] 2016 ONCA 430 at para 1
[4] *Palmer v. Palmer*, 2010 ONSC 1565 (S.C.J.) at para. 3

demeanor of the witnesses.[5] A trier of fact is presumed to be in a better position to make findings of fact than is an appeal court. So an appellate court must not overturn a decision because, "it might have reached a different result or balanced factors differently.[6]"

Analysis – Grounds of Appeal

[41] The grounds of appeal set out in Ms. Permack's Amended Factum are not mirrored in the organization of her Factum. The following reflects my best efforts to ascertain a structure in which to address the appellant's proposed errors of mixed fact and law.

Did the arbitrator err in making an adverse inference on the basis of incomplete disclosure that Ms. Permack will continue to receive dividends from her corporate interests consistent with historical distributions and/or will continue to receive dividends that relate to corporations in which she does not have a controlling interest?

[42] It is not contested that Ms. Permack never disclosed documents necessary to the valuation of her corporate interests, and that she did not value her income - despite being admonished in February 2014 by the previous arbitrator that such failures could result in adverse inferences.

[43] The arbitrator carefully reviewed the disclosure that Ms. Permack did chose to produce: her actual receipt of dividends in each of the post-separation years of 2012 to 2016, and the corresponding Financial Statements for each year.

[44] The arbitrator reviewed the law on disclosure and the ability of a decision maker to make an adverse inference in the face of a failure to disclose. But he did not exercise that discretion. Rather, he turned his mind to what finding would be appropriate on the disclosure that Ms. Permack had provided.

[45] He rejected Mr. Schachter's proposal that Ms. Permack be found to be self-sufficient and that support terminate forthwith. Instead, he found that the appropriate inference was that the distributions of dividends in each of the years since 2012 would continue within the same ranges of value. He noted that her receipt of dividends was net of tax.

[46] This was a conclusion open to him to make, because he observed that capital assets in the appellant's personal company (previously held within a company owned with her siblings) were never reduced by the distribution of dividends.

[47] There is no basis to interfere with that finding as there is sufficient supporting evidence and it is within his discretion to so decide.

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[5] *Patton-Casse v. Casse* 2011,ONSC 4424

[6] *Hersey v. Hersey* 2016 ONCA 494 at para 12-14

Did the arbitrator err in finding that Ms. Permack's financial circumstances had significantly improved since the making of the Separation Agreement in 2008?

[48] At paragraph 74 of his reasons, the arbitrator concludes his analysis of Ms. Permack's financial circumstances. He compares her assets on the date of separation to those presently held, exclusive of corporate interests,[7] her receipt of dividend income and he considers the shareholder loan and retained earnings in her personal company, which did not exist at date of separation.

[49] Ms. Permack's counsel urges the court to find that there has been no actual improvement in Ms. Permack's financial circumstances, and that only the nature of her client's holdings has changed since separation, not their value.

[50] In considering this submission, I have no better view than that of the arbitrator. By refusing to value her income or corporate interests, and by not providing key disclosure, there is no way to trace the equity owned by Ms. Permack on the date of separation to that presently held.

[51] Ms. Permack chose not to call her accountant to the arbitration. She chose not to produce the most recent corporate Financial Statement for her personal corporation which would have been prepared two months prior to the arbitration.

[52] I reject this ground of appeal as I can find no basis to interfere with the arbitrator's findings as to Ms. Permack's financial means. The arbitrator made no error in principle, nor any palpable or overriding error, nor did the arbitrator misapprehend the evidence.

Did the arbitrator err in failing to address Mr. Schachter's post-separation increase in income?

[53] Underscoring this ground of appeal appears to be a proposal that the arbitrator erred in his application of the test of whether there had been a material change.

[54] Throughout his reasons, the arbitrator addresses Ms. Permack's often contradictory assertions as to whether there has been a material change in circumstances. He carefully analyses whether the proceeding is a review or a variation, concluding that it is the latter and that two questions must be asked: first, has Mr. Schachter satisfied the onus to establish a material change, and if so, what remedy follows. Second, if Mr. Schachter fails, has Ms. Permack satisfied the onus to establish a change, and if so, what remedy follows.

[55] The change sought by Mr. Schachter was a termination of spousal support on notice given four year prior. The end of duration is the end of entitlement to spousal support. When duration ends and support stops, "there may still be – and usually is – an income

[7] Which, as above, were never valued.

disparity between the spouses.[8]" The promotion of self-sufficiency as set out in the *Divorce Act* does not mean parity of income.

[56] The arbitrator found that Mr. Schachter had established a material change. He then extensively reviewed and balanced the objectives of spousal support as set out in the *Divorce Act,* and commented on the lack of any evidence of ongoing economic disadvantage to Ms. Permack arising from the marriage or its breakdown.

[57] He reviewed Mr. Schachter's post-separation increases in income and their origin. His extensive analysis takes him back to the terms of the Separation Agreement, the nature of the entitlement and forward through the intervening years including all the years during which Mr. Schachter funded the children's post-secondary expenses.

[58] Ultimately, the arbitrator found that Mr. Schachter had met the onus to establish a material change, but he then provided no remedy - dismissing Mr. Schachter's claim to terminate support prior to the maximum range of duration; which ironically, would have been the same outcome had he found that Mr. Schachter had not established a change.

[59] The second question is the real issue on appeal: did Ms. Permack satisfy the onus to establish a material change allowing for a retrospective increase in spousal support? And if so, what amount is then appropriate?

[60] The arbitrator's reasons are not as clear within this second issue, as he appears to move directly to a finding that there has been a material change. He then calculates the net effect of not requiring the appellant to repay the child support overpayment of $124,161.40 as being equivalent to an increase to $13,000 per month in spousal support for the prior four years.

[61] By characterizing the overpayment of child support as lump sum spousal support, the arbitrator in effect, permitted a retrospective increase in spousal support.

[62] In doing so, he clearly put his mind to the appellant's cross-motion for an increase in retrospective support.

[63] With respect to ongoing spousal support, the arbitrator did not strictly structure his reasons around the material change test, or whether the basis for spousal support entitlement allowed Ms. Permack to participate in Mr. Schachter' post-separation increases in income. Nonetheless, he covered all the principles relevant to a determination of ongoing entitlement and quantum when there has been a post-separation increase in the payor's income.

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[8] Revised Users Guide to the *Spousal Support Advisory Guidelines*, page 11

[64] The arbitrator gave extensive reasons why a strict application of the SSAG would not be appropriate, including the uncontested fact that Mr.Schachter's increase in income derived from shares inherited post-separation.

[65] His reasons for rejecting an ongoing increase in spousal support[9] are amply supported by the record and it was open to him to find that applying the SSAGs to Mr. Schachter's present income would be inappropriate.

[66] The arbitrator referenced the SSAG User's Guide in exploring the various contexts in which an Award/Order for ongoing spousal support ought to be made. Deference to a lower court's decision on spousal support is augmented when a payor earns over $350,000 on a variation.[10]

[67] The arbitrator was alive to the dilemma that the monthly deficit that would accrue to the appellant were support terminated, could not be calculated without "a true fix on her dividend income."

[68] This is really the nub of the decision. By his own admission, the arbitrator did not have an accurate picture of Ms. Permack's dividend income and the significant change to her capital base since separation. But it was Ms. Permack's obligation to put that evidence before him. She cannot now propose her own failure as an error of mixed fact and law.

[69] Spousal support recipients do not automatically share in post-separation increases in income.[11] In my view, the arbitrator completed an analysis sufficient to a finding that spousal support should continue to a maximum duration, but without further increases, but for cost of living increases; despite not structuring it around the specific language of compensatory or non-compensatory support. He made no error in principle, nor did he misapprehend the evidence. I see no basis on which to interfere with the arbitrator's application of the law to the facts of this case.

Did the arbitrator err by not appreciating the extent of Ms. Permack's health care expenses, the nexus between her health and her entitlement to support, and her need for spousal support to meet those expenses?

[70] The arbitrator addressed Ms. Permack's health limitations throughout his reasons, foremost through a balancing of her obligations for disclosure, and finally through an appreciation of her limited ability to earn income. He accepted that her health problems were "physically and emotionally debilitating." It is clear from the record that the arbitrator was generous in his understanding of Ms. Permack's restricted ability to participate in the paid workforce, even in the face of a number of useful skills and qualifications; and expert evidence that she was able to work.

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[9] paragraph 137 of the reasons

[10] *Berta v. Berta* 2017 ONCA 874, incorporating a view that the SSAGs may not even be applicable on a review/variation of spousal support.

[11] *Fisher v. Fisher* 2008 ONCA 11, *Patton-Casse v. Casse* 2012 ONCA 709, *Hersey v. Hersey* 2016 ONCA 494

[71] The appellant states that the arbitrator erred in finding no nexus between her health and her entitlement to support. I agree that this is an error because the arbitrator did not address the nature of her spousal support entitlement, and whether it had changed post-separation, in the specific context of her health.

[72] However, I do not find that it is a palpable and overriding error, because the arbitrator goes on to conclude that the appellant's primary income source (dividends) are unconnected to her state of health. Thus, the lack of nexus upon which he makes his decision is that between her health and the quantum of support, having earlier decided that duration would remain at the upper limit.

[73] It was within the arbitrator's discretion to make that determination.

[74] Although it is a question of fact outside the scope of this appeal, I will observe that the arbitrator appeared doubtful whether all of the appellant's claimed health care costs were necessary, or even incurred. A review of the appellant's July 6, 2017 Financial Statement lists a dizzying array of approximated monthly expenses, including cellular scans, acupuncture, Mora/biofeedback, oxygen treatments, laser treatments, lymphatic massage, therapy, supplements, in-home nursing, air filters; homeopath, osteograph, naturopath services, BodyTalk, massages, coaching, yoga and yoga therapy expenses, in addition to a fitness club membership and a chiropractor.

[75] The total stretches to $50,000 a month net of tax in her Financial Statement. On oral submissions, her counsel placed the figure at $5,000 a month ($60,000 a year).

[76] It was within the arbitrator's discretion to assess Ms. Permack's budget and make findings as to the actual deficit that would occur without a payment of spousal support. That was a finding of fact not open to appeal.

[77] If it is Ms. Permack's assertion that her health circumstances create a nexus for ongoing support, that is, a basis for unlimited duration, then that ground must fail on the same basis as earlier set out - the inability of the arbitrator to determine her true financial means.

[78] The arbitrator frames the duration issue at paragraph 115 as "whether on her dividend income and given her capital base she has achieved [a] measure of self-sufficiency and, or whether the economic hardships from the marriage and or breakdown have been addressed or minimized."

[79] With the limited disclosure available to him, the arbitrator finds that the economic hardships from the marriage, part of which has been a deterioration in Ms. Permack's health, have not yet been fully addressed, but will be, by the end of duration in September 2010. On the record before him, it was open for him to make that finding.

[80] The arbitrator heard the evidence directly and is entitled to a high degree of deference. His reasons are sufficient to a finding that spousal support should continue pursuant to the terms of the June 10, 2009 Separation Agreement, and terminate in September of 2020.

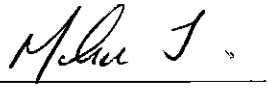
Order

[81] For reasons set out above, I make the following Order:

1. The Arbitration Award of Mr. Fogelman dated March 8, 2017 is confirmed.

2. The appeal is dismissed.

3. If the parties are unable to agree on costs, the respondent's costs submissions shall be served and filed within 14 days of the date of this Judgment; the appellant's responding costs submissions shall be served and filed 14 days thereafter; the respondent's reply, if any, shall be served and filed within seven days thereafter. Costs submissions shall not exceed three typed pages plus copies of any Offers, or Bills of Costs to be filed in the Continuing Record.



Justice H. McGee

Date: June 29, 2018