NOVA SCOTIA COURT OF APPEAL
Citation: *Klefenz v. Klefenz*, 2019 NSCA 6

Date: 20190207
Docket: CA 473097
Registry: Halifax

Between:

Dawn Marie Klefenz

Appellant

v.

Byron Kees Klefenz

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: November 13, 2018, in Halifax, Nova Scotia

Subject: Variation of spousal support

Summary: The parties were divorced in 2015 following a two-day trial. The Corollary Relief Order provided for the payment of indeterminate spousal support. In October 2017, two variation applications were simultaneously heard. The parties agreed their son was no longer a child of the marriage as defined by the *Divorce Act*, effective May 1, 2016. The appellant was seeking an upward variation of her spousal support based upon a change to the respondent's income. The respondent was seeking termination of his child support obligations and submitted that his spousal support should be adjusted due to a decrease in his income.

The application judge ordered the appellant to repay the respondent child support she had received from May 1, 2016 until the date of the variation hearing. The application judge further determined that the respondent's income had decreased. She specifically excluded from his income interest

payments generated from a 2013 loan and a dividend payment that was anticipated to be received by him in 2017. She ordered the respondent to pay spousal support to the appellant in the amount of $2,083.33 per month, a downward variation from the support of $2,600.00 per month ordered in the Corollary Relief Order.

The appellant appealed.

Issues: (1) Did the application judge err in determining the respondent's income for spousal support purposes?
(2) Did the application judge err in setting the quantum of support payable to the appellant?
(3) Did the application judge err in her determination of spousal support in light of the retroactive finding that the son was no longer a child of the marriage?

Result: Appeal dismissed with costs. There was an evidentiary foundation that supported the application judge's factual finding regarding the respondent's current income. The application judge was not mandated to apply the *Spousal Support Advisory Guidelines* in setting an appropriate quantum of spousal support. No error was demonstrated in relation to the application judge's approach to determining spousal support in light of the finding that the son was no longer a child of the marriage.

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Dawn Marie Klefenz

Appellant

v.

Byron Kees Klefenz

Respondent

Judges:	Bryson, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	November 13, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Kenzie MacKinnon, Q.C., for the appellant Janice Beaton, Q.C., for the respondent

Reasons for judgment:

[1] In 2015, the parties were divorced. Following a two-day trial, a written decision and subsequent Corollary Relief Order ("CRO") were issued by Justice Beryl MacDonald. Amongst other things, the trial judge ordered Mr. Klefenz (the respondent) to pay monthly child and spousal support to Ms. Klefenz (the appellant).

[2] In October 2017, two variation applications were simultaneously heard by Justice Cindy Cormier. The respondent had filed an application for variation seeking to terminate child support on the basis that the parties' son was no longer a child of the marriage as defined by the *Divorce Act*, R.S.C. 1985, c. 3. The appellant subsequently filed her own application seeking to vary the terms of the CRO in relation to both the child and spousal support payments.

[3] On November 28, 2017, the application judge rendered her oral decision. As had been agreed by the parties, she found the son to no longer be a child of the marriage as of May 1, 2016. She further found there to be a decrease in the respondent's income and an increase in the appellant's income since the issuance of the CRO. The application judge ordered the appellant to repay to the respondent the child support she had received since May 1, 2016. She further reduced his spousal support obligation from $2,600.00 per month to $2,083.33 per month, effective December 1, 2017.

[4] The appellant now appeals to this Court alleging that the application judge made a number of errors in the determination of the respondent's income and in reaching the quantum of spousal support ordered. For the reasons that follow, I would dismiss the appeal.

Decision under appeal

[5] The parties' marital history, employment backgrounds and assets, both matrimonial and business, were thoroughly described by the trial judge in her decision addressing the divorce and corollary relief (2015 NSSC 196).

[6] Before the application judge, both parties made frequent reference to the trial decision, including the trial judge's findings of fact, notably her classification of particular assets as being matrimonial or business in nature. Neither party had appealed the trial judge's CRO.

[7] Given the background noted in the earlier reported decision, it is my intention to provide only those facts that are necessary to put the issues raised on appeal in context. It is helpful, however, to outline the issues the parties had placed before the application judge. In reviewing the pre-hearing submissions, it is clear that both agreed that there had been a material change of circumstances since the issuance of the CRO. In particular, it was acknowledged that their son was no longer a child of the marriage. It was further recognized that there had been changes to each parties' income. The extent of those changes was central to the dispute. Without doubt, the most significant issue placed before the application judge was the determination of the parties' respective incomes for the purpose of setting an appropriate quantum of ongoing spousal support.

[8] For the purposes of spousal support, the trial judge had found in 2015 that the respondent's income was $106,826.00. She imputed annual income of $5,000.00 to the appellant. On the variation application, the respondent's current income was hotly contested. Although the appellant acknowledged the respondent had experienced a decrease in his employment income, she asserted the respondent had enjoyed an overall increase when one considered his other sources of income.

[9] In her submissions to the application judge, the appellant asserted the respondent's 2017 income for the purpose of calculating spousal support was $147,000.00. She argued this was comprised of:

- $62,352 from employment income;
- $24,000 in interest payments generated from a loan made by the respondent's holding company in February 2016;
- $16,916.94 (interest thereon payable at $1,409.72 monthly) generated from a shareholder's loan made by the respondent in July 2013; and
- $43,875.00, being a dividend payment owed and payable to the respondent relating to preferred shares he held.

[10] The respondent submitted that his 2017 income should only include his wages and the $24,000 loan repayment, for a total of $86,352.00. The application judge agreed, declining to include the dividend payment or the interest received in relation to the 2013 loan.

[11] With respect to the appellant's income, the respondent argued she had obtained employment since the issuance of the CRO and was capable of earning more than the $16,800.00 she acknowledged earning in 2017. He argued the

application judge ought to impute annual income of $20,000.00 to the appellant. The application judge agreed.

[12] Having determined their respective incomes, the application judge ordered monthly support payments to the appellant in the amount of $2,083.33, commencing December 1, 2017. Having found the son was no longer a child of the marriage as of May 1, 2016, the application judge further found that the appellant had received an overpayment of child support in the amount of $24,498.00. She directed this sum be repaid in monthly installments of $510.38, commencing February 1, 2018.

Issues

[13] In her Notice of Appeal, the appellant says the application judge erred in:

- Establishing the respondent's income for the purposes of determining spousal support;
- Determining the appropriate amount of spousal support payable to her; and
- Ordering her to return to the respondent child support he paid from May 1, 2016 to November 2017.

[14] In her factum, the appellant modifies the third issue above, arguing the application judge erred when she terminated child support without adjusting the spousal support payable to reflect the "without child formula" in the Spousal Support Advisory Guidelines (SSAG).

[15] In my view, the issues to be resolved on appeal are as follows:

1. Did the application judge err in determining the respondent's income for spousal support purposes?
2. Did the application judge err in setting the quantum of support payable to the appellant?
3. Did the application judge err in her determination of spousal support in light of the retroactive finding that the son was no longer a child of the marriage?

Standard of Review

[16] This Court applies a deferential standard of review when considering decisions on appeal respecting spousal support. In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, an appeal court's ability to intervene was described as follows:

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

Analysis

Did the application judge err in determining the respondent's income for spousal support purposes?

[17] Before delving into the above issue, it is helpful to set out a number of provisions of the *Divorce Act* relating to spousal support.

[18] Initial applications for spousal support are governed by s. 15.2 of the *Act*. The relevant sections provide:

> Spousal support order
>
> 15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> …
>
> Factors
>
> (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.
>
> …
>
> Objectives of spousal support order
>
> (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.

[19] Section 17 of the *Act* applies when a spouse seeks to alter an existing spousal support order. The relevant provisions state:

> Order for variation, rescission or suspension
>
> 17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> …
>
> Factors for spousal support order
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, *and, in making the variation order, the court shall take that change into consideration.*
>
> …
>
> Objectives of variation order varying spousal support order
>
> (7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time. (Emphasis added)

[20] In challenging the application judge's determination of the respondent's income, the appellant focused on two excluded sources—the monthly interest payments of $1,409.72 generated by a 2013 shareholder's loan; and a dividend payment of $43,875.00 owing to the respondent in relation to his preferred shareholdings. I am of the view that the application judge did not err in excluding either source of income.

The interest generated from the 2013 shareholder's loan

[21] The interest payments generated from the shareholder's loan, $1,409.72 per month, were in payment at the time of the divorce hearing. Justice MacDonald excluded those funds from the respondent's income for the purpose of calculating his spousal support obligation.

[22] Before this Court, the appellant argues the application judge should have added those funds into the respondent's income, and erred by not doing so. The respondent argues that the application judge was precluded from re-visiting the trial judge's conclusion on a variation application. He relies on the Supreme Court of Canada decision, *Droit de la famille – 091889*, 2011 SCC 64 in support of his position.

[23] In *Droit de la famille* (also referenced as *L.M.P. v. L.S.*) the Supreme Court considered variation of spousal support orders, including the need to demonstrate a material change in circumstances, and the scope of any subsequent changes to an original order. In writing for the majority (Justice Cromwell penned a concurring decision), Justices Abella and Rothstein first highlighted the statutory distinction between initial requests for spousal support and subsequent variations. They wrote:

> [22] While the *objectives* of the variation order are virtually identical in s. 17 to those in s. 15.2 dealing with an initial support order, the *factors* to be considered in ss. 17(4.1) and 15.2(4) are significantly different. Section 17(4.1) sets out "a change in the … circumstances" of the parties as the sole factor. On initial support orders, on the other hand, the factors are as follows:
>
> > **15.2** …
> >
> > (4) In making an order under subsection (1) [for spousal support] 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.
>
> [23] In other words, there are differences between what a court is directed to consider in making an initial support order and on a variation of that order. Notably, unlike on an initial application for spousal support under s. 15.2(4)(*c*), which specifically directs that a court consider "any order, agreement or

> arrangement relating to support of either spouse", s. 17(4.1) makes no reference to agreements and simply requires that a court be satisfied "that a change in the condition, means, needs or other circumstances of either former spouse has occurred" since the making of the prior order or the last variation of that order. Because of these differences in language, it is important to keep the s. 15.2 and s. 17 analyses distinct. (Emphasis in original)

[24] With respect to the appropriate considerations when faced with an application to vary a spousal support order, they directed:

> [29] In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1). A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse *since the making of the spousal support order*.
>
> [30] In our view, the proper approach under s. 17 to the variation of existing orders is found in *Willick v. Willick*, [1994] 3 S.C.R. 670, and *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. Like the order at issue in this case, *Willick* (dealing with child support) and *G. (L.)* (dealing with spousal support) involved court orders which had incorporated provisions of separation agreements. Both cases were decided under s. 17(4) of the *Divorce Act*, the predecessor provision to s. 17(4.1).
>
> [31] *Willick* described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.
>
> [32] That "change of circumstances", the majority of the Court concluded in *Willick*, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). *G. (L.)* confirmed that this threshold also applied to spousal support variations.
>
> [33] The focus of the analysis is on the prior order and the circumstances in which it was made. *Willick* clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the *Willick* approach to variation applications requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement. (Emphasis in original)

And further:

> [47] If the s. 17 threshold for variation of a spousal support order has been met, a court must determine what variation to the order needs to be made in light of the change in circumstances. The court then takes into account the material change, and should limit itself to making only the variation justified by that change. As Justice L'Heureux-Dubé, concurring in *Willick*, observed: "A variation under the Act is neither an appeal of the original order nor a *de novo* hearing" (p. 739). As earlier stated, as Bastarache and Arbour JJ. said in *Miglin*, "judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order" (para. 62).
>
> …
>
> [50] In short, once a material change in circumstances has been established, the variation order should "properly reflec[t] the objectives set out in s. 17(7), . . . [take] account of the material changes in circumstances, [and] conside[r] the existence of the separation agreement and its terms as a relevant factor" (*Hickey*, at para. 27). A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the *Divorce Act*.

[25] Much of the appellant's argument focuses on what she views as the rationale for Justice MacDonald's decision to exclude the interest generated from the loan. She argues that the trial judge did not intend her order to prohibit the inclusion of these funds in future calculations of spousal support. With respect, the appellant's arguments invite this Court to look behind the decision giving rise to the CRO, and to indirectly subject the trial judge's decision to appellate review.

[26] In my view, *Droit de la famille* makes clear that a proposed variation to an original order must have a nexus to the material change in circumstances underlying the application. The interest earned from the shareholder's loan was before the trial judge and had not changed. It was not open to the application judge to reconsider the treatment of these funds and, as such, she did not err in declining to do so.

The dividend payment of $43,875.00

[27] The respondent holds a number of non-voting preference shares in his employer's company. At the time of the divorce trial, these shares were found to be business assets, with any anticipated dividends not being expected until October of 2017.

[28] The appellant says the evidence at trial established that the dividends were owed to the respondent, with annual payments commencing in 2017, and continuing thereafter. She says the trial judge erred by ignoring this evidence, and further that there was "no evidence" the respondent would not be receiving this income. The respondent argues that contrary to the appellant's assertion, there was evidence before the application judge that permitted a conclusion that the respondent was not in receipt of the dividend payment for 2017, and that it would be deferred.

[29] At the appeal hearing, this Court asked whether there was some evidence, if accepted, that could give rise to a finding that the respondent had not, and likely would not, receive the 2017 dividend payment. Counsel for the appellant acknowledged there was some evidence, but it was deserving of "little weight", and that this Court ought to be highly skeptical of its veracity.

[30] From the application judge's oral decision, I conclude that she declined to include the 2017 dividend payment because she was satisfied the respondent had not received it and that the financial circumstances of the company prompted the deferral. In my view, there was evidence before the application judge which permitted her to reach such a conclusion. For example:

- In his trial affidavit, which was re-filed on the variation, the respondent had raised the issue of the dividend payment being dependent on the viability of the company;

- In his rebuttal affidavit in support of the variation application, and sworn September 14, 2017, the respondent stated:

> 6. Based on my experience and observations of financial decisions made at VC since 2012, payouts and dividends which are due are often deferred due to VC's cash flow issues. Decisions around the payout due to me will be decided around the company's year end of October 31, 2017. In short, I don't have a real idea of when or how dividend payments to me will get disbursed; however, there is a board meeting on September 19th to present financial information and discuss items concerning the payback of the high interest loans. I expect to know more after that.

- On October 13, 2017, the respondent testified at the variation hearing that the dividend payment for 2017 was deferred and the same would likely occur in 2018.

[31] It was the application judge's task to assess and weigh the evidence before her. I am satisfied there was evidence that supported her conclusions regarding the dividend payment. It is not our role to re-weigh this evidence.

[32] I see no error justifying this Court's interference with the application judge's determination that $86,352.00 was the respondent's 2017 income for spousal support purposes. I would dismiss this ground of appeal.

Did the application judge err in setting the quantum of support payable to the appellant?

[33] After determining the respondent's 2017 income, the application judge ordered him to pay monthly support to the appellant in the amount of $2,083.33. This was a downward variation from the $2,600.00 per month provided for in the CRO. The application judge did not reference the SSAG in setting the quantum of varied support.

[34] During oral submissions, the appellant conceded that should the first ground above be dismissed, she did not object to the application judge's determination of the quantum of support, including not utilizing the SSAG.

[35] The appellant's concession is appropriate. This Court has concluded that it is not an error for a judge to determine spousal support outside of the SSAG. In *Strecko v. Strecko*, 2014 NSCA 66, Justice Oland wrote:

> [48] The appellant drew our attention to cases which contained comments regarding the usefulness of the Guidelines. However, it is telling that she did not present any authority that stated that their application was mandatory.
>
> [49] In *Yemchuk v. Yemchuk*, 2005 BCCA 406, at ¶ 64, Prowse J.A. described the Guidelines as a useful tool, but only advisory rather than legislated or binding. In *Smith v. Smith*, 2011 NBCA 66, Quigg, J.A. for the New Brunswick Court of Appeal stated that:
>
> > [34] Although the *Guidelines* are not law *per se*, following them can enhance the legitimacy of a spousal support award, as the *Guidelines* promote consistency and therefore aid in the avoidance of arbitrary decision-making.
> >
> > ...
> >
> > [37] While the *Guidelines* help to promote consistency in judgments, and therefore a greater measure of certainty in law, they do not constitute law. Therefore, while judges would be wise to follow the *Guidelines*, and usually do so, they should not be mandated to do so even when their

> reasons for decision do not bring into play an exception listed in ch. 12 of the *Guidelines*.

See also *Fisher v. Fisher*, 2008 ONCA 11, where Lang, J.A. writing for the Court stated:

> [103] In my view, when counsel fully address the Guidelines in argument, and a trial judge decides to award a quantum of support outside the suggested range, appellate review will be assisted by the inclusion of reasons explaining why the Guidelines do not provide any appropriate result. This is not different than a trial court distinguishing a significant authority relied upon by a party.
>
> [50] Since the law does not oblige the judge to apply the Guidelines, I see no error in law in his choosing not to do so.

See also *MacDonald v. MacDonald*, 2017 NSCA 18 at paras. 27 – 29.

[36] I would dismiss this ground of appeal.

Did the application judge err in her determination of spousal support in light of the retroactive finding that the son was no longer a child of the marriage?

[37] The appellant does not challenge the application judge's decision to order her to repay the child support she received for 18 months after the son was no longer a child of the marriage. Her complaint is that the application judge, in retroactively varying the child support to May 1, 2016, failed to recognize that her spousal support ought to have been varied as of the same date.

[38] Specifically, the appellant says that the application judge, after concluding child support was no longer payable, should have calculated her spousal support based on the SSAG "without child support" formula as of May 1, 2016. She says this would have resulted in her receiving a higher amount of support, which would have offset the amount of child support she was found to owe the respondent.

[39] In support of her argument, the appellant provided this Court with Divorcemate calculations utilizing the "without child support" formula, which generated a low, mid- and high-range of spousal support in the amounts of $2,291, $2,673, and $3,055 respectively. In generating these calculations, the appellant utilized the annual incomes determined by the trial judge, $106,826.00 and $5,000.00. She asks that this Court increase her spousal support to $2,900.00, effective May1, 2016, an increase of $300 per month over what the respondent had been ordered to pay by virtue of the CRO.

[40] I am unable to accede to the appellant's request. To be successful in asking this Court to intervene, she must first demonstrate that the application judge erred. I am unable to identify any error on the application judge's part that would justify our intervention.

[41] As noted earlier, the application judge was not mandated to apply the SSAG. She can hardly be faulted for not applying the "without child support" formula, when she was not required to apply the SSAG at all.

[42] Further, even if the application judge had undertaken a retroactive consideration of her spousal support as suggested by the appellant, it is entirely possible that her support would not have been varied upwards as the appellant suggests. It is notable that the mid-range of the calculations endorsed by the appellant corresponds almost exactly with what she was receiving by virtue of the CRO. Indeed, were she to have undertaken the calculation the appellant says she ought to, the application judge may have chosen to vary the support downwards to be more in line with the lower end of the SSAG.

[43] I see no error on the application judge's part in failing to retroactively vary the appellant's spousal support to May 1, 2016. I would dismiss this ground of appeal.

Disposition

[44] For the reasons above, I would dismiss the appeal. The appellant shall forthwith pay the respondent costs in the amount of $2,000.00, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.