



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *Pike v. Wight*, 2025 NLCA 33

**Date:** September 29, 2025

**Docket Number:** 202401H0020

**BETWEEN:**

ARNOLD FRANCIS PIKE

APPELLANT

**AND:**

SHERRY ANGELA FAYE WIGHT

RESPONDENT

**Coram:** L.R. Hoegg, W.H. Goodridge and K.J. O'Brien JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador,  
Family Division 201802F0809  
(2023 NLSC 163)

**Appeal Heard:** January 16, 21, 2025

**Judgment Rendered:** September 29, 2025

**Reasons for Judgment by:** K.J. O'Brien J.A.

**Concurred in by:** W.H. Goodridge J.A.

**Dissenting in Part by:** L.R. Hoegg J.A.

**Counsel for the Appellant:** Jean V. Dawe K.C.

**Counsel for the Respondent:** Sarah J. Clarke

**Authorities Cited:****CASES CITED:****K.J. O'Brien J.A.:**

*Wight v. Pike*, 2023 NLSC 163; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Cabana v. Wells*, 2024 NLCA 4; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Temple v. Peddle*, 2019 NLCA 2; *Barendregt v. Grebliunas*, 2022 SCC 22, [2022] 1 S.C.R. 517; *R. v. Mohan*, [1994] 2 S.C.R. 9; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182; *Westerhof v. Gee Estate*, 2015 ONCA 206, leave to appeal to SCC refused, 36445, 36451 (29 October 2015); *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249; *Laing v. Sekundiak*, 2015 MBCA 72; *Saskatchewan v. Racette*, 2020 SKCA 2, leave to appeal to SCC refused, 39060 (7 May 2020); *Yukon (Government of) v. Norscope Enterprises Ltd.*, 2024 YKCA 6, leave to appeal to SCC refused, 41395 (16 January 2025); *Kaul v. The Queen*, 2017 TCC 55; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *Stassis v. Amicus Bank*, 2014 NLCA 38; *Cooper v. Cooper*, 2001 NFCA 4; *R. v. Kruk*, 2024 SCC 7; *Osmond v. Clarke*, 2007 NLCA 11; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Kinsella v. Mills*, 2020 ONSC 4785; *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC refused, 33002 (28 May 2009); *Schleiber v. Schleiber*, 2024 ONCA 191; *Virgili v. Virgili*, 2017 NBCA 31; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *Dawe v. Morgan*, 2023 NLCA 11; *Hiscott v. Hall*, 2015 NLCA 1; *Walsh v. TRA Company Limited*, 2023 NLCA 23; *Dillon v. Dillon*, 2025 NLCA 4.

**L.R. Hoegg J.A. (dissenting in part):**

*Wight v. Pike*, 2023 NLSC 163; *R. v. Bingley*, 2017 SCC 12, [2017] 1 S.C.R. 170; *Compton v. Toyota Canada Inc.*, 2019 NLCA 79; *Aylward v. Terra Nova Motors Limited*, 2024 NLCA 24; *R. v. Abbey*, 2017 ONCA 640; *R. v. Abbey*, [1982] 2 S.C.R. 24; *Downey v. Burroughs*, 2021 NSSC 147; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC refused, 33002 (28 May 2009); *Berta v. Berta*, 2014 ONSC 3919, var'd on other grounds 2015 ONCA 918.

**STATUTES CONSIDERED:**

**K.J. O'Brien J.A.:**

*Family Law Act*, RSNL 1990, c. F-2, sections 8(1), 18(1)(c), 22.

**L.R. Hoegg J.A. (dissenting in part):**

*Divorce Act*, RSC 1985, c. 3 (2nd Supp.), sections 15.2(5), 15.2(6)(a), 15.2(6)(c);  
*Family Law Act*, RSNL 1990, c. F-2, sections 29, 18(1)(c)(iv).

**RULES CONSIDERED:**

**K.J. O'Brien J.A.:**

*Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rules 55 (Appendix), 55.04(2); *Court of Appeal Civil Rules, 2025*, NLR 44/25, rule 37(3); *Supreme Court Family Rules*, being Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rule F33.02(2).

**TEXTS CONSIDERED:**

**L.R. Hoegg J.A. (dissenting in part):**

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington, VA: American Psychiatric Association, 2013).

**OTHER:**

**K.J. O'Brien J.A.:**

*Spousal Support Advisory Guidelines: The Revised User's Guide* (April 2016);  
CRA, Income Tax Folio S1-F3-C3, "Support Payments" (16 May 2019).

**L.R. Hoegg J.A. (dissenting in part):**

*Spousal Support Advisory Guidelines: The Revised User's Guide* (April 2016).

**K.J. O'Brien J.A. (W.H. Goodridge J.A. concurring):**

[1] This is an appeal of a family law decision dealing with spousal support, matrimonial property division, and occupation rent.

**OVERVIEW**

[2] Sherry Wight and Arnold Pike married in July 2011 and separated in September 2016. They had no children together, although both had adult children from prior relationships. Before marrying, they dated on and off for several years. The Judge found that, other than a brief separation of about three months, they lived together consistently starting in the fall of 2009. As such, their combined common law and marital relationship was approximately seven years long.

[3] Mr. Pike works as a self-employed insurance adjuster, having started his own adjusting firm in September 2009. Upon starting the firm, Mr. Pike invited Ms. Wight, who had been living in Pasadena, to move to Portugal Cove to work with him. This was the start of their common law relationship and their working relationship. Ms. Wight continued to provide administrative support to Mr. Pike's business until four months after the couple separated, when she left the matrimonial home and returned to Pasadena.

[4] Following separation, Ms. Wight applied to court for spousal support, division of matrimonial property, including the matrimonial home, and occupation rent. Mr. Pike opposed her claims. The matter went to trial.

***The Decision Appealed From***

[5] Following trial, the Judge gave a written decision (*Wight v. Pike*, 2023 NLSC 163 (the "Decision")).

[6] The Judge awarded equal division of the matrimonial property, including the matrimonial home and deposits into the parties' Registered Retirement Savings Plans ("RRSP") and Tax-Free Savings Accounts ("TFSAs") during the marriage. The Judge found that the balance in Mr. Pike's business bank account on the separation date was a matrimonial asset, and so she ordered equal division of those funds and of the business's accounts receivable as of that date. Additionally, the

Judge ordered that Mr. Pike pay Ms. Wight occupation rent of \$50,000 and lump sum spousal support of \$54,117. As Ms. Wight was largely successful in her claims, the Judge awarded her costs at Column 3 of the Scale of Costs under the Appendix to Rule 55 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D.

[7] Ms. Wight and Mr. Pike gave different accounts of key aspects of their relationship. As a result, the Judge had to assess credibility and make factual findings on disputed matters. One of the Judge's findings was that Mr. Pike subjected Ms. Wight to verbal, emotional and, to a lesser extent, physical abuse throughout their relationship (Decision, at para. 186). Ms. Wight's family doctor testified that she suffered from Post-Traumatic Stress Disorder ("PTSD"), anxiety, depression and fibromyalgia to the extent that she had a disability. The Judge accepted the doctor's opinions on her disability (Decision, at para. 188).

### *Issues on Appeal*

[8] Mr. Pike appealed the Decision on numerous grounds, which raise the following issues:

1. Did the Judge err by permitting Ms. Wight's family doctor to give opinion evidence about Ms. Wight's mental health and by relying on that evidence?
2. Did the Judge err by drawing an adverse inference from Mr. Pike's failure to call his accountant as a witness?
3. Did the Judge rely on inadmissible hearsay evidence, specifically, an email from a real estate agent about rental values?
4. Did the Judge err in her credibility assessment by ignoring or misapprehending evidence?
5. Did the Judge err by dividing funds in each party's TFSA that could be traced to Mr. Pike's Canada Pension Plan ("CPP") receipts?
6. Did the Judge err by dividing funds in each party's RRSP that could be traced to Mr. Pike's business bank account?

7. Did the Judge err by not excluding from division the balance in the business bank account as of the marriage date?
8. Did the Judge err by not awarding Mr. Pike \$2,500 plus taxes he paid on that amount in relation to a car loan?
9. Did the Judge err by not properly accounting for the tax implications when dividing the business's accounts receivable?
10. Did the Judge err by not ordering unequal division of the matrimonial home in Mr. Pike's favour?
11. Did the Judge err in awarding Ms. Wight occupation rent?
12. Did the Judge err in awarding Ms. Wight spousal support?
13. Did the Judge err in awarding Ms. Wight costs?

[9] Mr. Pike also sought to introduce additional evidence on appeal that relates to a loss of consciousness and head injury that he suffered in August 2023 and his follow-up medical treatment.

### ***Summary of this Decision***

[10] For the following reasons, I would dismiss Mr. Pike's application to admit additional evidence on appeal. I would also dismiss the appeal on all grounds.

### **STANDARD OF REVIEW**

[11] The standard of review on appeal is set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. For questions of law, the standard is correctness. For questions of fact and of mixed fact and law, the standard is palpable and overriding error. On this standard, the appellate court can only intervene if there is an obvious error in the trial decision that is determinative of the outcome of the case. The fact that an alternative factual finding could be reached based on a different assignment of weight does not mean that a palpable and overriding error has been made. However, if the Judge made an extricable error in principle with respect to the characterization of the legal standard in question or its application, that error

amounts to an error of law and the applicable standard is correctness (*Housen*, at paras. 8, 10, 26-27, 36-37; and *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33).

[12] For discretionary decisions, an appellate court can only intervene if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being “so clearly wrong as to amount to an injustice”) (*Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at para. 41; and *Cabana v. Wells*, 2024 NLCA 4, at para. 10).

### **ADDITIONAL EVIDENCE**

[13] When a party seeks to introduce additional evidence on appeal, the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, applies (*Temple v. Peddle*, 2019 NLCA 2, at para. 25). The test ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties should narrow rather than expand as a case proceeds up the appellate ladder (*Barendregt v. Grebliunas*, 2022 SCC 22, [2022] 1 S.C.R. 517, at paras. 30-34).

[14] The test is set out in rule 37(3) of the *Court of Appeal Civil Rules, 2025*, NLR 44/25:

37. (3) In determining the application, the Court shall consider

- (a) whether, by due diligence, the evidence could have been brought in the court appealed from;
- (b) the relevance of the evidence in the sense that it bears upon a decisive or potentially decisive issue in the appeal;
- (c) the credibility of the evidence;
- (d) whether the evidence, if believed, could reasonably have affected the result;  
and
- (e) any other relevant factor.

[15] Mr. Pike filed his application seeking to admit additional evidence ten minutes before the hearing of the appeal was scheduled to begin. The evidence he seeks to

introduce is his own affidavit describing a head injury that he suffered in August 2023, after the trial, when he temporarily lost consciousness and fell. The affidavit describes his follow up medical treatment and has attached to it medical notes from Eastern Health related to the head injury and his on-going problem with dizziness. In the affidavit, Mr. Pike states that he feels the need to retire but cannot afford to do so.

[16] Mr. Pike's application might have been rejected because of its late filing. However, given that Ms. Wight's counsel was prepared to make submissions on the application's merits, without requiring a delay in the hearing, the Court proceeded to hear the application and reserved its decision until now.

[17] The proposed evidence does not satisfy the *Palmer* test because it is not relevant to the issues under appeal and, even if credible, could not reasonably have affected the Decision. As will be seen, the issues under appeal are not affected by Mr. Pike's current health. There is no on-going spousal support order and none of the orders made depend on Mr. Pike continuing to work for any particular period. Mr. Pike was 67 during the trial and, although he was working and in good health at the time, changes in his work status in the coming years were to be reasonably expected. Consequently, I would dismiss the additional evidence application.

**ISSUE 1: Did the Judge err by permitting Ms. Wight's family doctor to give opinion evidence about Ms. Wight's mental health and by relying on that evidence?**

[18] Ms. Wight asked that her family doctor, Dr. Osborne, be qualified to give expert opinion evidence as to Ms. Wight's current medical diagnosis and cause. Mr. Pike did not object to Dr. Osborne being qualified as a family physician but did object to his ability to diagnose and testify to a mental disorder.

[19] Following a *voir dire*, the Judge qualified Dr. Osborne as follows:

I have no difficulty qualifying Dr. Osborne as a family physician and I will allow him to give testimony on [Ms. Wight's] condition. I'm satisfied that the treating [of] mental health disorders as well as other physical and mental disorders is part of the general purview of the family practitioner, but depending on certain questions and certain conclusions or whatever that he may be asked, obviously if it's something that is better opined by a specialist, as in a psychiatrist, well, that may cause some difficulty. But, you know, a family practitioner is a family practitioner and it's a general medicine, and so I'm not finding that he [has] special expertise in psychiatric disorders but as

part of the general purview. And I'm satisfied that he has experience and training to be able to treat and diagnose certain or, you know, mental health disorders but as he says, the management of the more severe ones would...

(Transcript, 22 September 2022, at 34-35)

[20] The Judge did not continue further, but her reference to “as he says” was likely to Dr. Osborne’s testimony that a family doctor having made a more severe mental health diagnosis would rely on a psychiatrist to take over. Dr. Osborne gave examples of more severe diagnoses as someone who “is schizophrenic or has a psychosis or is threatening suicide” (Transcript, 22 September 2022, at 31-32).

[21] Dr. Osborne proceeded to give testimony, which the Judge summarized in the Decision:

[173] Dr. Osborne is Ms. Wight’s family physician and was qualified as an expert witness at trial to provide an opinion as to Ms. Wight’s mental health. Dr. Osborne provided the medical opinion to [CPP] in support of Ms. Wight’s claim for disability benefits. Despite rigorous cross-examination, Dr. Osborne remained steadfast in his opinion that Ms. Wight was suffering from PTSD, anxiety and depression and that this condition arose from the abusive relationship with Mr. Pike.

[22] Dr. Osborne did not treat Ms. Wight prior to her separation from Mr. Pike. The chart of Ms. Wight’s previous family physician, Dr. Sutton, was entered in evidence at trial by consent. The Judge found that Dr. Sutton’s chart included entries dating back to February 2012 in which Ms. Wight reported a history of verbal and emotional abuse in her marriage (Decision, at para. 178).

[23] Mr. Pike submits that the Judge erred by qualifying Dr. Osborne to give opinion evidence about PTSD, a mental disorder, which he considers to be outside the area of Dr. Osborne’s expertise. Even if the Judge did not err by permitting Dr. Osborne to provide his opinion that Ms. Wight had PTSD, he submits that the Judge erred in allowing into evidence, and relying upon, Dr. Osborne’s opinion as to the cause of the PTSD, namely, the abusive relationship with Mr. Pike.

[24] Before admitting expert evidence, a trial judge must first ensure that the threshold requirements of admissibility set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, are met: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert. Even if the

threshold is met, the judge should nevertheless exclude the evidence if the prejudicial effect or “cost” of admitting it outweighs the probative value or “benefit” (*Mohan*, at 20-25; and *White Burgess*, at para. 19).

[25] An expert’s opinion should be independent, impartial and objective. Accordingly, an expert’s impartiality and independence are relevant at both stages of the admissibility analysis and, even if the evidence is admitted, concerns regarding an expert’s bias may be considered by the judge in deciding what weight to give the expert’s opinion.

[26] The type of expert being evaluated may affect how independence and impartiality are assessed. Recent jurisprudence describes four categories of “witnesses with expertise” (*Westerhof v. Gee Estate*, 2015 ONCA 206, leave to appeal to SCC refused, 36445, 36451 (29 October 2015); *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249; *Laing v. Sekundiak*, 2015 MBCA 72; *Saskatchewan v. Racette*, 2020 SKCA 2, leave to appeal to SCC refused, 39060 (7 May 2020); *Yukon (Government of) v. Norscope Enterprises Ltd.*, 2024 YKCA 6, leave to appeal to SCC refused, 41395 (16 January 2025); and *Kaul v. The Queen*, 2017 TCC 55):

- a. Litigation expert (or independent expert) – an independent expert retained by a party to provide an opinion for the purpose of, or in contemplation of, litigation.
- b. Participant expert – a witness with expertise who was involved in underlying events that gave rise to the litigation, but was not hired for the purpose of, or in contemplation of, litigation. These experts attest to facts, which they observed or examined by participating in the underlying events, and “opinions” which they formed during their participation based on their expertise. Treating physicians, such as Dr. Osborne, fall into this category.
- c. Non-party expert – an expert retained by a non-party to the litigation, such as by a statutory accident benefits insurer, to give an opinion for a purpose other than the litigation.
- d. Litigant expert – a party, or employee or officer of a party, who has expertise in the job they were hired to perform and may be permitted to give their opinion evidence to explain why they did what they did.

[27] Courts have consistently held that the requirements of *Mohan* and *White Burgess*, including the requirements of independence and impartiality, must be strictly applied for the first category of witnesses, litigation experts. There has been some difference of approach for witnesses in the other three categories.

[28] Formal qualification of participant experts is not always considered to be required, although it is recommended. As explained in *Kon Construction*:

[37] It is sometimes argued that the evidence of witnesses in the second category is not “opinion” evidence: *Westerhof* at paras. 60-1. To some extent they are testifying about what they observed, and what they actually did. In that sense, they are not opinion witnesses. On the other hand, it is challenging for them to explain why they acted as they did without engaging their professional expertise. For example, the family doctor cannot explain why he or she endorsed any particular treatment without expressing a medical opinion about it. It is difficult to set the boundary between what they did and their expert opinions about what should have been done. Where witnesses with expertise (who are not litigants) are to testify about events within the scope of their expertise, it is generally prudent to have them formally qualified as expert witnesses, particularly when they propose to express opinions on collateral issues like the employment prospects of the patient. ...

[29] In the present case, much of Dr. Osborne’s evidence was factual: he testified as to what he observed, the diagnoses he made, and the treatment he recommended. His evidence also included opinion, in that his diagnoses and prognosis for Ms. Wight were based on his medical opinion. Ms. Wight wanted the Judge to accept Dr. Osborne’s opinion that she was disabled and the reasons for which she was disabled, and so it was appropriate that Ms. Wight sought to have him formally qualified as an expert.

[30] I am satisfied that the Judge made no reversible error in qualifying Dr. Osborne as she did. Dr. Osborne testified as to his training and experience in diagnosing and treating mental health disorders as both a family practitioner and emergency doctor. The Judge was sensitive to the boundary between Dr. Osborne’s expertise in general medicine and the more specialized expertise of psychiatrists who work exclusively with mental health disorders. Dr. Osborne had diagnosed Ms. Wight with PTSD and was treating her for it.

[31] As expressed in her dissenting reasons, my colleague Justice Hoegg is of the view that Dr. Osborne should not have been qualified to give expert evidence

because he was not an independent or impartial witness. Respectfully, I cannot agree.

[32] Dr. Osborne's independence and impartiality were not a focus of the *voir dire* on his qualifications because Mr. Pike accepted his expertise as a family doctor. The focus was on his qualifications to diagnose and testify with respect to a mental disorder. That said, there was nothing to indicate that Dr. Osborne's medical opinion was not the product of his own independent, professional judgment, without influence from others or from the outcome of the litigation (*White Burgess*, at para. 32). The Judge rejected Mr. Pike's assertion that Ms. Wight had manipulated Dr. Osborne into writing supporting medical letters to CPP (Decision, at para. 188).

[33] While it is true Dr. Osborne's diagnoses relied, at least in part, on information that he received from Ms. Wight, this is neither unusual nor surprising. Treating physicians regularly rely on patient-provided information such as feelings of pain or reports of incidents that resulted in injury. Physicians diagnosing PTSD, even specialists, are unlikely to have witnessed the underlying traumatic events. That Dr. Osborne believed what Ms. Wight told him, is not reason to disqualify him from testifying to his medical opinion of her condition.

[34] That said, Dr. Osborne's belief of Ms. Wight did not make her more credible. I agree with Justice Hoegg that Ms. Wight's previous reporting of domestic abuse to Dr. Osborne did not make her in-court assertions more likely to be true. Additionally, I agree that Dr. Osborne's reporting of what Ms. Wight told him was hearsay, which could not be accepted by the Judge for the truth of its contents. However, there were permissible uses for his evidence. For example, Dr. Osborne's observations of Ms. Wight when she presented at his office could be accepted for their truth and might also confirm or corroborate some aspects of Ms. Wight's evidence, such as the timing of events. Also, Ms. Wight's statements of abuse, as recorded by Dr. Osborne, could be probative of Ms. Wight's credibility because Mr. Pike alleged that Ms. Wight had fabricated at least some of her allegations of abuse (*R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at paras. 37-38).

[35] The Judge explained the basis for her finding of abuse:

[186] I am satisfied on the balance of probabilities, based on the evidence of the parties, Dr. Osborne, and a review of the medical charts, that Mr. Pike subjected Ms. Wight to verbal, emotional and to a lesser extent, physical abuse throughout their relationship. I find some of the examples of abuse, many of which were not denied by

Mr. Pike, to be particularly egregious and calculated to cause Ms. Wight the greatest emotional harm.

[187] Ms. Wight's reports to her medical doctors regarding the effect of Mr. Pike's conduct towards her is consistent throughout. Mr. Pike's assertion that Ms. Wight fabricated this to her doctors for the calculated purpose of using this information in the event of their divorce, some years later, is implausible.

[36] Although these paragraphs do not specify exactly how the Judge used the evidence listed, there is nothing in the Decision to indicate that the Judge improperly used Dr. Osborne's evidence of Ms. Wight's statements to him or his opinion on the cause of Ms. Wight's PTSD in making her findings as to what happened during the relationship.

[37] There was ample evidence from Ms. Wight and Mr. Pike to support the Judge's finding of abuse. The Judge believed Ms. Wight's testimony (Decision, at paras. 177, 187-188, 191). Moreover, Mr. Pike admitted to many of the events Ms. Wight described, although did not agree that they constituted abuse (Decision, at para. 180).

[38] A review of the trial transcript reveals that the Judge understood that Dr. Osborne had no direct knowledge of Ms. Wight's allegations of abuse. For example, in response to an objection by Mr. Pike's counsel, the Judge assisted Ms. Wight's counsel in reformulating a question to clarify that Dr. Osborne could only repeat what Ms. Wight told him (Transcript, 22 September 2022, at 94-96).

[39] In the result, I am not persuaded that there is any reversible error in the Judge's use of Dr. Osborne's evidence.

[40] Justice Hoegg raises a further concern about the scope of Dr. Osborne's testimony going beyond what was expressed in his letter dated April 25, 2021. She states that this letter did not give appropriate notice to Mr. Pike to enable him to counter Dr. Osborne's proposed expert evidence with his own expert.

[41] Mr. Pike did not raise this issue at trial. Nor did he raise it on appeal and so it was not argued before us. Nevertheless, having reviewed the record, I am not persuaded that there was any deficiency in notice to Mr. Pike or any unfairness to him.

[42] First, the April 25, 2021 letter does more than simply state that Ms. Wight had “symptoms” of PTSD. It references Ms. Wight’s reported mental and physical abuse by her ex-husband. It states that she is “currently unable to function, mentally, at any occupation, due to her excessive social and generalized anxiety, PTSD, depression and fibromyalgia.” It goes on to state that “[t]hese mental disorders are permanent issues but can be controlled and stabilized with continued counselling.” (Appeal Book, Part II, Book I, Tab 19, at 410)

[43] In addition to the April 25, 2021 letter, Dr. Osborne’s medical file was disclosed to Mr. Pike. According to a Response to Demand to Disclose that forms part of the appeal record, it was disclosed on May 13, 2021, approximately 16 months before trial (Appeal Book, Part I, Book II, Tab 13, at 291-292). The medical file includes numerous mentions of Dr. Osborne’s diagnosis of PTSD. In my view, Mr. Pike had ample notice of Dr. Osborne’s medical opinion to permit him to seek a countering expert if he wished.

[44] Before leaving the issue of Dr. Osborne’s evidence, I wish to emphasize that the cause of Ms. Wight’s mental health condition and the Judge’s finding of an abusive relationship were of minimal consequence to the outcome of this case. What was important was the Judge’s acceptance of Dr. Osborne’s opinion that Ms. Wight had a disability, because her disability impacted her right to spousal support. The reason for Ms. Wight’s disability, be it PTSD, anxiety, depression, fibromyalgia or some other illness, is not relevant to the assessment.

[45] The Judge was alive to this distinction and acknowledged that misconduct is not to be taken into consideration when assessing spousal support. In considering entitlement to spousal support, she wrote:

[153] In addition, a “court shall not take into consideration any misconduct of a spouse in relation to the marriage ([*Divorce Act*] subsection 15.2(5))”. The Court in *Leskun v. Leskun*, 2006 SCC 25, confirms that the legislation “sought to eliminate misconduct” as a relevant consideration regarding making an award for spousal support, but *Leskun* further explained that there are distinctions between “consequences of misconduct and the misconduct itself” (emphasis in original). The court used an example of serious depression triggered by spousal abuse, which would make the spouse unemployable. In that example, the court explained the consequences of the misconduct would be highly relevant “to the factors which must be considered in determining the right to support, its duration and its amount” (para. 20-21).

[46] Ms. Wight’s disability was relevant to her entitlement to non-compensatory spousal support. The Judge’s finding of non-compensatory entitlement has not been

appealed. I am not persuaded that there is any reversible error in the Judge's use of Dr. Osborne's evidence.

**ISSUE 2: Did the Judge err by drawing an adverse inference from Mr. Pike's failure to call his accountant as a witness?**

[47] Some background is necessary to explain this issue.

[48] One of the points upon which Ms. Wight and Mr. Pike gave differing testimony was whether Mr. Pike ever intended Ms. Wight to be a 25% shareholder in his business. The documentary evidence was inconsistent on this point. The company had repeatedly issued T5s to Ms. Wight for shareholder dividend income based on her being a 25% shareholder, and she declared this dividend income on her personal tax return. Yet the corporate Income Tax Returns of the business, at least from 2012 to 2020, reported Mr. Pike as the sole shareholder.

[49] The Judge summarized Mr. Pike's position on the issue, noting that Mr. Pike's accountant (Mr. Murphy) had not testified:

[106] Despite being aware that Ms. Wight was declaring dividends from the Business on her tax returns and the fact that Mr. Pike testified that he knew that one could not receive dividends unless one was a shareholder, Mr. Pike was steadfast in his position that Ms. Wight was never a shareholder in his Business.

[107] Mr. Murphy, the accountant involved from the Business' inception up to 2019 or 2020, was not called to corroborate Mr. Pike's evidence as to the instructions with respect to the corporate structure. Share certificates were never issued, nor were minutes prepared to indicate otherwise.

[50] At trial, Ms. Wight was not seeking an interest in the business, notwithstanding her belief that Mr. Pike had intended her to be a 25% shareholder. The disagreement would thus have been irrelevant but for the fact that Mr. Pike challenged Ms. Wight's testimony on this issue to support his assertion that Ms. Wight was not a credible witness. The Judge addressed that assertion and found that Ms. Wight's evidence on the point was more credible than Mr. Pike's. The Judge explained her decision:

[110] ... [Ms. Wight's] evidence on this point is more credible than Mr. Pike's. Her testimony was corroborated by the email exchange between the couple and Mr. Murphy, their personal tax returns, and the company's financial statements. On the other hand, Mr. Pike's position that he was the sole shareholder from the beginning is

supported only by Schedule 50 of the corporate Income Tax Returns from 2015 onwards. This is inconsistent with the fact that dividends were attributed to Ms. Wight prior to their separation.

[111] Evidence from Mr. Murphy would have been helpful on this point. It would have been beneficial for Mr. Pike to have subpoenaed Mr. Murphy to clarify the discrepancy between what Mr. Pike asserted was the case against what was actually done. I find that Mr. Pike has not established that Ms. Wight lacked credibility on this point.

[51] Mr. Pike submits that the Judge erred in drawing an adverse inference against him for not calling Mr. Murphy to testify because Mr. Murphy had no material evidence to give and was not under Mr. Pike's exclusive control.

[52] Mr. Pike's argument is predicated on the Judge having drawn an adverse inference. I am not satisfied that she did.

[53] Adverse inferences are founded on the common-sense logic that if a party has evidence and chooses not to bring it forward it must not have been favorable (*Stassis v. Amicus Bank*, 2014 NLCA 38, at para. 36). The Judge did not state that she was drawing an adverse inference. Nor does the Decision show that the Judge inferred that Mr. Murphy would have given evidence unfavorable to Mr. Pike. The Decision shows that the Judge resolved the issue of credibility by considering the documentary evidence presented that corroborated each party's assertion. She found that more of the evidence corroborated Ms. Wight's version of events (at para. 110).

[54] The Judge explicitly made no determination of fact on the shareholder issue (at para. 109); her conclusion was merely that Mr. Pike had not established that Ms. Wight lacked credibility on the relevant point (at para. 111). That the Judge observed that evidence from Mr. Murphy would have been helpful does not equate to her inferring what his evidence would have been. Mr. Pike has not shown any reversible error in the Judge's consideration of his failure to call Mr. Murphy.

**ISSUE 3: Did the Judge rely on inadmissible hearsay evidence, specifically, an email from a real estate agent about rental values?**

[55] This issue can be resolved summarily. Mr. Pike submits that the Judge erred in admitting an email from a real estate agent opining on the rental value of the matrimonial home because it was hearsay and improper opinion evidence.

[56] There is nothing in the Decision to suggest that the Judge relied on the email. As will be discussed, she assessed the appropriate amount of occupation rent using evidence from a witness called by Mr. Pike, not the real estate agent. Even if the Judge was wrong in admitting the real estate agent's email into evidence, nothing turns on the error as it was not relied on. As such, Mr. Pike has not established a reversible error with respect to the real estate agent's email.

**ISSUE 4: Did the Judge err in her credibility assessment by ignoring or misapprehending evidence?**

[57] At trial, Mr. Pike argued that Ms. Wight's credibility was "a significant issue" (Decision, at para. 11). Consequently, the Judge addressed credibility assessment directly in the Decision:

[13] The parties supplied the Court with extensive documentary evidence supporting their positions. Where the credibility of a party was a concern, I have noted my findings in that regard. Where there was documentation or a witness who testified to corroborate a party's *viva voce* evidence, credibility was determined having regard to all the circumstances as noted in *Cooper*. There were also instances when a party took a position and provided no documentary or other corroborating evidence to support it.

[58] The Judge's reference to *Cooper* is to *Cooper v. Cooper*, 2001 NFCA 4, which she cited to explain what credibility is and how it is assessed. The relevant excerpt of *Cooper* is:

[11] ... Credibility means simply worthiness of belief. If evidence is credible, it is of such a character that it is capable of being relied on by the trier of fact. When a court purports to rely on any piece of evidence, it in essence is making an assessment that that evidence is worthy of belief. In making that determination the court will rely, depending on the circumstances of each case, on a host of factors including the consistency with other known facts, its rational strength when viewed against common experience, the reputation and means of knowledge of the witness presenting the evidence and the language employed in its presentation, in addition to the performance of the witness in the courtroom.

[59] Before this Court, Mr. Pike submits that the Judge erred in assessing credibility. He supports his argument, in part, with his allegation of the Judge drawing an improper adverse inference, which I have already addressed. He alleges other errors too, primarily objecting to how the Judge interpreted particular aspects of the evidence.

[60] For example, Mr. Pike disagrees with the Judge's consideration of Ms. Wight's redaction of three entries in her medical chart before turning it over to Mr. Pike's counsel. Mr. Pike asserts that this should have negatively impacted Ms. Wight's credibility. This argument was made before the Judge, and she addressed it in the Decision:

[172] While it was inappropriate for Ms. Wight to have redacted evidence without notice to Mr. Pike, Ms. Wight explained that there was information regarding herself and her son that she felt Mr. Pike was not entitled to have. She feared that Mr. Pike would have used this information to continue his emotional abuse. I find the redacted entries are not relevant to the parties' claim and therefore have no effect on any finding in this matter. Ms. Wight was forthright in her testimony when the redaction was discovered and responded appropriately.

[61] The Supreme Court of Canada recently reviewed the standard of review applicable to findings of credibility and reliability in *R. v. Kruk*, 2024 SCC 7. The Court affirmed that absent a recognized error of law, such findings are entitled to deference unless a palpable and overriding error can be shown (at para. 82). The Court went on to explain:

[82] ... Credibility and reliability findings typically do not engage errors of law, as at their core they relate to the extent to which a judge has relied upon a particular factor and how closely that factor is tied to the evidence. Although such findings may be overturned on correctness if errors of law are disclosed, in most cases it is preferable to review them using the nuanced and holistic standard of palpable and overriding error — which defers to the conclusions of trial judges who have had direct exposure to the witnesses themselves.

[62] The Court also explained why appellate courts show deference to judges' factual and credibility findings:

[83] Trial judges have expertise in assessing and weighing the facts, and their decisions reflect a familiarity that only comes with having sat through the entire case. The reasons for the deference accorded to a trial judge's factual and credibility findings include: (1) limiting the cost, number, and length of appeals; (2) promoting the autonomy and integrity of trial proceedings; and (3) recognizing the expertise and advantageous position of the trial judge (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 12-18). In light of the practical difficulty of explaining the constellation of impressions that inform them, it is well-established that "particular deference" should be accorded to credibility findings (*G.F.*, at para. 81). Appellate courts are comparatively ill-suited to credibility and reliability assessment, being restricted to reviewing written transcripts of testimony and often focussing narrowly, even telescopically, on particular issues as opposed to seeing the case and the evidence

as a whole (*Housen*, at para. 14, citing R. D. Gibbens, “Appellate Review of Findings of Fact” (1991-92), 13 *Advocates’ Q.* 445, at p. 446).

[63] Mr. Pike has not shown any recognized error of law in the Judge’s credibility assessment. He disagrees with her conclusions from the evidence, narrowly focusing on particular issues, but he has not shown any palpable and overriding error.

**ISSUE 5: Did the Judge err by dividing funds in each party’s TFSA that could be traced to Mr. Pike’s CPP receipts?**

[64] When Mr. Pike turned 60 years old, during the marriage, he began receiving his CPP retirement allowance. At his direction and with his knowledge and consent, Ms. Wight alternated depositing his monthly CPP income in each of their TFSA accounts. At trial, Mr. Pike argued that because he earned most of his CPP credits before their marriage, his CPP retirement allowance income was not a matrimonial asset and so should not be subject to equal division.

[65] The Judge rejected this argument:

[84] ... This is not a case of double-dipping where a spouse is entitled to a share of the other spouses’ CPP credits on separation and seeks a share of the pension income as well. The income received during the couple’s marriage, whether it be by pension or earnings, does not require special treatment. It was an income stream available to the couple because of Mr. Pike’s eligibility having reached the qualifying age. These funds, had they not been redirected to the parties’ TFSAs, would have been available to support their lifestyle or accumulated as savings. The funds accumulated in the parties’ accounts during the marriage are therefore matrimonial assets and are divisible between the parties.

[66] Mr. Pike raises the same issue on appeal, asking this Court to find the Judge erred by dividing the TFSA accounts as matrimonial assets.

[67] The Judge made no reversible error in dealing with the TFSA funds. She properly treated the CPP income as income received by Mr. Pike during the marriage and used by the couple to augment their joint savings. The Judge properly treated the increases to the TFSA accounts during the marriage as matrimonial assets, subject to equal division.

**ISSUE 6: Did the Judge err by dividing funds in each party's RRSP that could be traced to Mr. Pike's business bank account?**

[68] Approximately seven months after their marriage, Mr. Pike contributed \$34,055 to his own RRSP and \$11,840 to Ms. Wight's RRSP. The funds came from the business bank account. The Judge found that the business bank account was a marital asset because the parties treated it as their personal account throughout their relationship. They retained profits in the business bank account to fund the shortfall in their day-to-day expenses and as a form of savings for the future because of the preferential tax treatment (Decision, at paras. 96, 100).

[69] Mr. Pike does not appeal the Judge's finding as to the status of the business bank account. However, he does appeal the Judge's treatment of the RRSP contributions because he says that those funds came from pre-marital earnings. Essentially, his argument is that the funds in the business bank account that were invested in the RRSPs were earned by his business prior to the marriage date and so should not be treated as matrimonial property.

[70] The Judge rejected this argument at trial:

[78] A review of the Business' financial statements supports significant income earned between the parties' marriage in 2011 and when the funds were deposited to the RRSPs in 2012. As well, the parties had been cohabiting as an economic unit prior to their marriage and were sharing in the earnings of the Business.

[79] The RRSP accounts grew in value during the parties' marriage. The increase in value during the parties' marriage is ordinarily divisible between the parties. There is no evidence to support the position that Mr. Pike used pre-marital funds to deposit to Ms. Wight's account.

[80] The corporate financial statements, for the period in which the RRSP deposits were made, support a finding that the funds totaling \$34,055 came from the corporate earnings accumulated in the Business during the parties' marriage, which I have found to be a matrimonial asset.

[71] Before this Court, Mr. Pike makes the same argument by challenging the Judge's factual findings. To demonstrate that the Judge made a palpable and overriding error, he highlights that debits exceed credits in the business bank account statements from the date of marriage to the date of the RRSP investments. However, the Judge did not make her findings based on the bank statements alone. She considered the corporate financial statements, and the income earned in the relevant

period. It was undisputed that the couple was operating the business at that time. She also considered that the parties were living as an economic unit, sharing the profits of the business, before their marriage. There was evidence to support her findings.

[72] Mr. Pike does not agree with the Judge's interpretation of the evidence, but he has not shown any palpable and overriding error in the Judge's treatment of the RRSP amounts.

**ISSUE 7: Did the Judge err by not excluding from division the balance in the business bank account as of the marriage date?**

[73] This issue is related to the previous one. Mr. Pike submits that if this Court does not accept that the Judge erred in finding that the funds invested in the RRSPs were marital assets, then the balance of the business account on the marriage date, \$76,832.33, should be exempt from division. He relies on the definition of "matrimonial assets" in section 18(1)(c) of the *Family Law Act*, RSNL 1990, c. F-2, which includes all real and personal property acquired by either or both spouses during the marriage, subject to certain exceptions. While accepting the Judge's finding that the balance in the bank account on the separation date is a matrimonial asset, he submits that an adjustment must be made because the funds in the account on the marriage date were not acquired "during the marriage".

[74] Although the legal treatment of the business bank account was at issue at trial, Mr. Pike did not make this argument to the Judge and so she did not address the bank account's balance on the marriage date in the Decision. That said, I am satisfied that the record enables this Court to address it.

[75] Mr. Pike's argument is predicated on Ms. Wight having no valid claim to the money in the business bank account as of the marriage date. This is far from certain, as the Judge found that the parties had been cohabiting as an economic unit prior to their marriage and were sharing in the earnings of the business. However, even if Ms. Wight had no valid claim to these funds when they married, Mr. Pike could have chosen to spend money he had pre-marriage during the marriage for family or business purposes. And the evidence supports that he did. The balance in the business account rose and fell regularly during the marriage. For example, the balance fell as low as \$519.98, rose to over \$60,000 and then was depleted to less than \$2,500 again (Appeal Book, Part II, Book IV, Tab 64(12), at 1226, 1242).

[76] As noted by the Judge, Mr. Pike and Ms. Wight appeared to throw their respective lots in together “for better or for worse” (Decision, at para. 81). They intermingled their personal and business funds and spent and saved together. Mr. Pike has not shown that the Judge erred by failing to exclude from division an amount equal to the balance of the business bank account on the marriage date.

**ISSUE 8: Did the Judge err by not awarding Mr. Pike \$2,500 plus taxes he paid on that amount in relation to a car loan?**

[77] During the relationship, Ms. Wight sold her old vehicle to Mr. Pike’s son for \$2,500, but he was unable to pay her immediately. As she needed this amount to make a down payment on her new car, she wrote a cheque for \$2,500 from the business account for this purpose. She testified that she did this with Mr. Pike’s consent and that his son eventually repaid the \$2,500. At trial, Mr. Pike claimed repayment of the \$2,500 plus the taxes he paid on those funds, which he had to declare as a corporate dividend on his tax return.

[78] After reiterating her finding that the business account was a matrimonial asset used by the couple for family purposes, the Judge dealt with Mr. Pike’s claim as follows:

[73] Mr. Pike’s request for an accounting of the principal and the income tax paid on the loan, which he acknowledged was repaid, is tantamount to requiring a calculation of the minutiae of the parties’ financial transactions over the course of their marriage. I find this contrary to the spirit and intent of matrimonial property law. It undermines the concept of marriage as a joint endeavor and an interdependent economic unit. It is also inconsistent with Mr. Pike’s exclamation at trial that he was “all in” when it came to his marriage to Ms. Wight.

[79] As noted, except for the question of the balance as of their marriage date, Mr. Pike does not appeal the Judge’s finding that the business account was a matrimonial asset. The Judge found that both parties used the account for personal expenses throughout their relationship. The Judge declined to treat Ms. Wight’s down payment on her vehicle or loan to his son differently than any other expenditures during the party’s marriage. Mr. Pike has not shown any reversible error in the Judge’s decision on this issue.

**ISSUE 9: Did the Judge err by not properly accounting for the tax implications when dividing the business's accounts receivable?**

[80] As noted, the Judge found that the accounts receivable of the business earned prior to separation were a matrimonial asset, subject to equal division. Mr. Pike does not appeal this finding. The gross amount at issue was half of \$46,767.70, or \$23,383.85. Mr. Pike submits that the Judge erred in calculating the net amount to be divided. The Judge wrote:

[117] ... The amount earned during this period should be reduced by Mr. Pike's marginal tax rate on the dividend he would have to declare, to transfer the funds to Ms. Wight.

[118] In his written post-trial submissions, Mr. Pike states that his marginal tax rate in 2016 was 10%. I did not receive any evidence as to whether and by how much any expenses should be deducted from these funds, so that I could make an accurate calculation. I therefore assess the amount payable by Mr. Pike to Ms. Wight as \$21,045.46 ( $\$23,383.85 \times 90\%$ ).

[81] The Judge's reference to Mr. Pike's post-trial submissions relates to Mr. Pike's argument that Ms. Wight owed him for the car loan. Mr. Pike's post-trial submission was that Ms. Wight owed him \$2,500, the amount withdrawn from the business account, plus the amount of tax he had to pay on that amount because he had to report it on his 2016 income tax return. In his submission he wrote, "The amount of tax paid, calculated at [Mr. Pike's] effective tax rate of 10% (see Exhibit AP #2, Tab 16) was  $10\% \times \$2,500 = \$250$ " (Mr. Pike's Factum, appendix). He thus claimed \$2,750.

[82] Before this Court, Mr. Pike alleges two errors in Judge's calculation of the net amount of the accounts receivable to be divided, which I will address in turn. First, he alleges that the Judge erred because, contrary to her statement quoted above, she did have evidence of expenses that should have been deducted from these funds. He points to a summary table of the \$46,767.70 worth of invoices the business issued on September 30, 2016 (Exhibit AP #5), which broke down the fees and "other expenses" (Appeal Book, Part II, Book V, Tab 3).

[83] I do not accept Mr. Pike's characterization of the "other expenses" in Exhibit AP #5 as evidence of the type the Judge was seeking. The "other expenses" in the table are disbursements that were included on each invoice in addition to Mr. Pike's professional fees. Ms. Wight had argued that she was entitled to share in the

disbursement portion of the invoices, because those disbursements had been paid by the business prior to separation and so their reimbursement was divisible (Transcript, 3 November 2022, at 78-82). It is implicit in the Judge's Decision that she accepted Ms. Wight's position.

[84] Disbursement expenses invoiced to clients are the same thing as business expenses that are deducted from income to calculate profit. Mr. Pike has not identified for this Court any evidence of "whether and by how much" any business expenses should have been deducted from the gross receipts. As such, he has not established that the Judge made a palpable and overriding error on this point.

[85] The second error Mr. Pike alleges is that the Judge erred in using his stated effective tax rate in 2016 of 10% as the appropriate marginal rate by which to reduce the amount owing. Mr. Pike has not identified for this Court any evidence that was before the Judge that would show what he considers to be the correct deduction. Although he asserts that the correct after-tax value is much less than 90%, he submits that, if this Court were to find an error, the parties would need to either agree on an amount or have an accountant determine it.

[86] As is evident from the portion of the transcript cited above, Ms. Wight's claim for equal division of the accounts receivable was a live issue at trial. Had Mr. Pike wanted the Judge to account for the tax implications of dividing this asset in a particular way, he ought to have presented the necessary evidence and made the argument before the Judge. He did not. Consequently, the Judge used the best information she had to account for the tax consequences of the division. Before this Court, Mr. Pike has not shown that she was clearly wrong or exercised her discretion arbitrarily. As such, I would not interfere with the Judge's Decision.

**ISSUE 10: Did the Judge err by not ordering unequal division of the matrimonial home in Mr. Pike's favour?**

[87] At trial, Mr. Pike argued for unequal division of the matrimonial home.

[88] Section 8(1) of the *Family Law Act* states that, notwithstanding the manner in which the matrimonial home is held by either or both spouses, each spouse has a half interest in the matrimonial home, and has the same right of use, possession and management of the matrimonial home as the other spouse has.

[89] Section 22 of the *Family Law Act* gives a court discretion to divide matrimonial assets, including the matrimonial home, unequally when equal division would be “grossly unjust or unconscionable”, having regard to listed factors:

22. The court may make a division of matrimonial assets that is not equal where the court is satisfied that a division of these assets in equal shares would be grossly unjust or unconscionable taking into account the following factors:

- (a) the income, earning capacity, property and other financial resources that each of the spouses has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities that each of the spouses has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the spouses before the breakdown of the marriage;
- (d) the age of each party;
- (e) the duration of the marriage;
- (f) a physical or mental disability of either of the spouses;
- (g) the contributions made by each of the spouses to the welfare of the family, including a contribution made by a spouse in looking after the matrimonial home or caring for the family;
- (h) the loss of a potential benefit to a spouse by reason of a dissolution or annulment of the marriage;
- (i) the unreasonable impoverishment or dissipation of matrimonial assets by either of the spouses;
- (j) the length of time that the spouses have lived separate and apart from each other during the marriage; or
- (k) the date of acquisition of each matrimonial asset.

[90] Mr. Pike relied on factors (d), (e), (g), (i) and (k). The Judge considered section 22, recognizing that the onus was on Mr. Pike to establish that equal division would be grossly unjust and unconscionable:

[25] The onus rests on the party asserting the claim for unequal division. Thus, in order to invoke section 22 of the *Act*, the Court must have clear evidence that one party failed to contribute to the marriage in the extreme, such that an equal division of marital assets would be grossly unjust and unconscionable.

[91] The Judge’s statement that there must be clear evidence that one party “failed to contribute to the marriage in the extreme” is not the best articulation of the test, but reading the Decision as a whole, it is evident that the Judge understood that Mr. Pike had a heavy onus to discharge (*Osmond v. Clarke*, 2007 NLCA 11, at para. 21). Mr. Pike has not established that the Judge made any error of law.

[92] Mr. Pike submits that the Judge made palpable and overriding errors of fact in her assessment. However, I cannot agree. The Judge considered at some length the factors that Mr. Pike alleged were applicable. Mr. Pike disagrees with how she evaluated the evidence, but that does not mean the Judge erred. For example, he objects to the Judge stating that Ms. Wight contributed “all that she had” to the marriage. In context, it is clear that the Judge’s statement had evidentiary support:

[43] Ms. Wight put all that she had into the relationship, including selling her home and moving from Pasadena to Portugal Cove. She provided administrative support to the Business and looked after the management of the household, including cooking meals, grocery shopping, cleaning and some yard work. Unlike the cases referred to above, Mr. Pike did not bring the matrimonial home into the relationship without contribution from Ms. Wight. She contributed a substantial amount to its purchase. Ms. Wight worked and contributed to the family throughout, both before and after their marriage.

[93] Mr. Pike also objects to the Judge stating that Ms. Wight was his only employee as of April 2010, when there was documentary evidence showing that another person was employed by him until October 2010. However, if this is an error, it is not an overriding one.

[94] Section 22 of the *Family Law Act* gives a judge discretion. Mr. Pike has not established any basis for this Court to intervene in the Judge’s exercise of discretion to refuse unequal division because she was not satisfied that an equal division of marital assets would be grossly unjust and unconscionable.

#### **ISSUE 11: Did the Judge err in awarding Ms. Wight occupation rent?**

[95] The Judge found that Ms. Wight was entitled to occupation rent from mid-April 2017, when Mr. Pike changed the locks on the matrimonial home, until

December 2023, when the Decision was released. During this period, Mr. Pike occupied the matrimonial home exclusively.

[96] Mr. Pike does not appeal Ms. Wight's entitlement to occupation rent. He appeals the Judge's calculation of the rent payable.

[97] To calculate the amount of rent, the Judge relied on the evidence of an appraiser called by Mr. Pike:

[135] Mr. Pike's appraiser, Mr. Croke, opined in his 2022 appraisal report under the "Market Rate Addendum" that: "The market for rental accommodations in the local market is considered to be stable with supply and demand being in balance at this time."

...

[137] Mr. Croke opines that an appropriate monthly rental value in 2022 would be between \$1,650 and \$1,850. In his evidence, Mr. Croke placed the rental value for the matrimonial home at the higher end of the range, although he conceded it could fall anywhere in the range.

[138] Having regard to all the circumstances, I find it reasonable to fix the rental value of the property at the midpoint of Mr. Croke's range, or \$1,750 per month for the entire period.

[98] Mr. Pike asked that the Judge take judicial notice of the downturn in the rental market during the relevant period. Ms. Wight did not agree that there was such a downturn. The Judge declined to take judicial notice. She noted that there was no evidence as to the effect of the pandemic on market rental rates during the applicable period and no reliable evidence as to the rental rates for each of the 6.5 years for which occupation rent was due (Decision, at para. 136). Ultimately, the Judge used the best evidence available and chose the mid-range of that suggested by Mr. Croke. From that, she deducted the cost of property taxes, insurance and maintenance. The result was that Mr. Pike owed Ms. Wight \$53,618.78, which the Judge rounded down to \$50,000.00.

[99] Although he recognized that the Judge's chosen method of calculating occupation rent is one commonly used, Mr. Pike submits that the choice on the facts of this case constitutes an error of law for failure to exercise discretion judicially. He submits that the Judge should have calculated the rent due based on the amount of rent that Ms. Wight had to pay for housing during the relevant period.

[100] I do not find any merit in Mr. Pike’s argument. First, the Judge did not err by failing to take judicial notice of rental market rates. The threshold for taking judicial notice of fact is well-established: “a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy” (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48). Rental market rates, which fluctuate and may differ regionally, will rarely, if ever, be the proper subject of judicial notice.

[101] Moreover, this was a discretionary decision, for which the Judge applied the correct law and made no palpable and overriding errors. There is nothing to indicate that the Judge did not exercise her discretion judicially, or exercised it arbitrarily, or that she was “so clearly wrong as to amount to an injustice”. She used the best evidence available to do justice between the parties using a well-recognized method of calculating occupation rent. There is no basis for this Court to interfere.

#### **ISSUE 12: Did the Judge err in awarding Ms. Wight spousal support?**

[102] The Judge found that Ms. Wight was entitled to retroactive spousal support on a compensatory and non-compensatory basis. The Judge awarded lump sum spousal support of \$54,117, consistent with what Ms. Wight claimed. The award was calculated with reference to the *Spousal Support Advisory Guidelines*, which, based on annual income of \$96,749 for Mr. Pike and \$12,589 for Ms. Wight, provided a range of \$736-\$982 for monthly support for a duration of 3.5 to 7 years. The award was based on the mid-range (\$859) for a period of 5.25 years. No adjustment was made for tax consequences.

[103] Mr. Pike alleges several errors in the Judge’s spousal support assessment. First, although he does not dispute Ms. Wight’s entitlement for spousal support on non-compensatory grounds, he appeals the Judge’s finding of entitlement on compensatory grounds. He also disagrees with the Judge’s findings with respect to the length of their relationship, his income for spousal support purposes, the appropriate duration of spousal support, and the appropriateness of a mid-range award. Finally, he submits that the Judge erred by not accounting for the tax implications of a lump sum award.

[104] In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, the Supreme Court of Canada explained why 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:

[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.

[105] Compensatory spousal support awards are based either on the recipient spouse's economic loss or disadvantage because of the roles adopted during the marriage or following separation, or on the recipient spouse's conferral of an economic benefit on the payor spouse without adequate compensation (*Moge v. Moge*, [1992] 3 S.C.R. 813, at 859-861). There are many situations that can give rise to compensatory claims including that the recipient spouse assisted the payor spouse in establishing and operating a business that is the source of the payor's income (*Kinsella v. Mills*, 2020 ONSC 4785, at para. 97; and *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC refused, 33002 (28 May 2009)).

[106] The Judge made several findings of fact to support her finding that Ms. Wight was entitled to spousal support on a compensatory basis. She found that Ms. Wight assisted Mr. Pike in setting up his business and for the first several months she was on Employment Insurance and drew a minimal, if any, salary from the business (Decision, at para. 29). She also found that Ms. Wight made a regular and ongoing contribution to the marriage by virtue of her work in the home and in Mr. Pike's business (Decision, at para. 167). It is notable that when Mr. Pike hired someone to replace Ms. Wight, the new employee was paid the same salary as Ms. Wight but with fewer duties (Decision, at para. 34). Mr. Pike retained the business after separation and continued to earn his living from it.

[107] Although I would not assess Ms. Wight's entitlement to spousal support on compensatory grounds to be strong, the Judge did not err in principle or significantly misapprehend the evidence in coming to her conclusion. Further, there is nothing to suggest that the Judge mistakenly assessed the compensatory claim as being strong. In my view, her award of spousal support based on both compensatory and non-

compensatory grounds was reasonable both in quantum and duration. It does not meet the high bar of “clearly wrong”.

[108] The Judge assessed Mr. Pike’s income conservatively:

[199] In reviewing Ms. Wight’s calculations using the DivorceMate software, I am satisfied that Mr. Pike’s income is conservatively stated. The income used is based on Mr. Pike’s 2021 income which includes his CPP retirement income, OAP, salary from the Business and dividends declared from the Business. It does not reflect the income earned by the Business which Mr. Pike is entitled to draw down if he so wished, but instead is being deferred and accumulating as savings.

[109] Despite Ms. Wight’s disability, the Judge considered the mid-point of quantum to be appropriate, because Ms. Wight was receiving a property award that would help support her in the future (Decision, at para. 200). These factors were open for the Judge to consider (see *Spousal Support Advisory Guidelines: The Revised User’s Guide* (April 2016), (“*SSAG User’s Guide*”), at c. 9). Mr. Pike does not agree with the Judge’s assessment of the duration of the relationship, but has not shown any palpable or overriding error in her factual finding.

[110] Mr. Pike submits that the Judge made an error of law with respect to the tax treatment of the lump sum spousal support payment. The *SSAG User’s Guide*, at page 110, explains the tax issues with retroactive spousal support awards as follows:

Retroactive spousal support is paid in the form of a lump sum. Ordinarily, lump sum spousal support is neither deductible to the payor, nor taxable in the hands of the recipient. This means that any calculation of periodic spousal support, or increased support, must be discounted or netted down to arrive at an after-tax amount.

...

There is now an additional method of resolving these tax issues in the case of retroactive support. In 2013, the Tax Court ruled in *James v. Canada*, 2013 TCC 164, that a large lump sum retroactive top-up payment ordered by the B.C. Court of Appeal *could* be deducted by the husband. The Canada Revenue Agency has now accepted the policy underlying this decision, in its Income Tax Folio S1-F3-C3, which was updated effective March 5, 2015 (these Folios replace the older Interpretation Bulletins, in this case IT-530R). The payor is permitted to deduct the lump sum payment where it can be identified that:

- the lump sum payment represents amounts payable periodically that were due after the date of the order or written agreement that had fallen into arrears, or

- the lump sum amount is paid pursuant to a court order that establishes a clear obligation to pay retroactive periodic maintenance for a specified period prior to the date of the court order.

In these cases, the recipient who must pay tax can complete Form T1198 (Statement of Qualifying Retroactive Lump-Sum Payment) and CRA will adjust the recipient's relevant prior year taxes, to reduce the impact of the one-time payment. At the time of any settlement or order, it will be necessary to make an estimate of the tax implications for both parties, if this option is chosen. ...

(Emphasis in original.)

[111] In ordering that Mr. Pike pay what she found to be the appropriate periodic payments owing for a period of 5.25 years following separation as a lump sum, the Judge did not discount the amount to arrive at an after-tax amount. Nor did she indicate whether she intended the lump sum payment to qualify for tax deduction under Income Tax Folio S1-F3-C3 (CRA, Income Tax Folio S1-F3-C3, "Support Payments" (16 May 2019)).

[112] Although it would have been preferable had the Judge addressed taxation directly, I am not convinced that this is a reviewable error. Although Ms. Wight requested the lump sum award that was ordered (Decision, at para. 193), Mr. Pike did not provide the Judge with the information necessary to make an adjustment for tax consequences or request that tax consequences be addressed in any lump sum award. Following trial, the parties made written submissions only. According to the portion of his post-trial brief that Mr. Pike filed with this Court, his submission on spousal support was that Ms. Wight had not established entitlement. He did not make any submissions in the alternative.

[113] In these circumstances, I cannot characterize the Judge's failure to consider the tax consequences as an error of law (*Schleiber v. Schleiber*, 2024 ONCA 191, at para. 18; and *Virgili v. Virgili*, 2017 NBCA 31, at para. 26). Had Mr. Pike wanted the Judge to consider the tax implications of a lump sum spousal support award, he ought to have addressed that issue at trial. Considering the applicable standard of review, this Court's intervention is not warranted.

### **ISSUE 13: Did the Judge err in awarding Ms. Wight costs?**

[114] Finding that Ms. Wight was "largely successful in her claim", the Judge awarded her costs in accordance with Column 3 of the scale of costs in the Appendix

to Rule 55 of the *Rules of the Supreme Court, 1986*. Rule F33.02(2) of the *Supreme Court Family Rules*, being Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, creates a presumption that a successful party in a family law proceeding is entitled to costs. Column 3 is the middle of a five-column scale and is the default level of costs awarded if a judge does not order otherwise (*Rules of the Supreme Court, 1986*, at r. 55.04(2)).

[115] Mr. Pike disagrees with the Judge's finding that Ms. Wight was "largely successful" noting that she was not successful in all her claims and that trial time was lost due to Ms. Wight's removal of certain entries from her doctor's chart prior to disclosing the chart to Mr. Pike.

[116] Costs awards are discretionary orders, and the standard of appellate review is high. Costs decisions should only be set aside on appeal if the court below made an error in principle or if the costs award is plainly wrong (*Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27). This Court has stated that it will not intervene in costs awards unless the court below has made an error in principle, is plainly wrong, or has not exercised its discretion judicially (*Dawe v. Morgan*, 2023 NLCA 11, at para. 14; *Hiscott v. Hall*, 2015 NLCA 1, at paras. 6-8; and *Walsh v. TRA Company Limited*, 2023 NLCA 23, at para. 253). The same deference applies to the factual findings supporting the Judge's cost decision (*Hiscott*, at paras. 12-13; and *Walsh*, at para. 248).

[117] Recently, in *Dillon v. Dillon*, 2025 NLCA 4, this Court noted that determining success for the purpose of costs awards is a complex task when there are multiple issues that were not all resolved as one party requested (at paras. 107-108). It is not an exact science. In cases of divided success, determining whether one side was more successful than the other does not simply involve counting the number of issues and tallying which party won more of them. Rather, it requires a global and contextual analysis that may consider the importance and complexity of the issues, and the time and expense that were devoted to them.

[118] I would not interfere with the Judge's finding that Ms. Wight was largely successful in her claim. This case involved a variety of issues of differing levels of importance, value, and complexity. Ms. Wight was successful on her claim of spousal support, equal division of matrimonial assets, including the matrimonial home, and occupation rent. There is no basis to interfere with the Judge's cost award.

**DISPOSITION**

[119] For the foregoing reasons, I would dismiss the appeal. I would award Ms. Wight her costs in this Court at Column 3.

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K.J. O'Brien J.A.

**I concur :** \_\_\_\_\_

W.H. Goodridge J.A.

**L.R. Hoegg J.A. (dissenting in part):**

## **INTRODUCTION**

[120] I part company with my colleagues respecting some of the Judge’s decisions (*Wight v. Pike*, 2023 NLSC 163, (the “Decision”). In relation to spousal support, I am of the view that the Judge erred in admitting and accepting Ms. Wight’s family doctor’s opinion evidence that Ms. Wight was suffering from Post-Traumatic Stress Disorder (“PTSD”) caused by Mr. Pike’s abuse, and relying on this opinion evidence to support her award of spousal support to Ms. Wight. I am also of the view that the Judge erred in finding that Ms. Wight was entitled to compensatory spousal support. Further, I am of the view that the Judge ought to have explicitly addressed the tax implications of her lump sum spousal support award. Lastly, I am of the view that the \$76,832.33 in Mr. Pike’s business account on the date of the parties’ marriage was not matrimonial property.

[121] Some background is necessary. The parties met in 1999 and began seeing each other in 2000 while married to other persons (Decision, at paras. 1, 5). They lived in different parts of the province – Ms. Wight in Pasadena on the west coast of the island portion of the province and Mr. Pike in Portugal Cove, just outside St. John’s on the east coast (Decision, at para. 1). They carried on a tumultuous on-and-off distance relationship for several years during which Ms. Wight divorced her husband and Mr. Pike subsequently divorced his wife.

[122] In the fall of 2009, the couple attempted living together in Portugal Cove. After approximately two months, Ms. Wight went back to Pasadena. Ms. Wight returned to Portugal Cove in March or April 2010, and they stayed together, marrying in July 2011. The marriage was Ms. Wight’s second, and Mr. Pike’s third. They had no children together, although Ms. Wight had an adult son and Mr. Pike had two adult sons from previous relationships. None of the sons lived with them.

[123] The couple separated in late September 2016. Ms. Wight remained in their Holyrood home and continued to work for Mr. Pike until the end of January 2017, when she moved back to Pasadena.

[124] Ms. Wight had been unemployed since she stopped working with Provincial Adjusting in Corner Brook late in 2008 or early in 2009. She testified that she received Employment Insurance (“EI”) “sick” benefits following her loss of

employment, but her EI disability claim was converted to regular EI benefits when she moved to Portugal Cove.

[125] Shortly after her move to Portugal Cove in the spring of 2010, Ms. Wight sold her home in Pasadena. She and Mr. Pike purchased a home together in Holyrood, which they moved into in October 2010. Ms. Wight contributed funds from the sale of her Pasadena home to the cost of the Holyrood home, and when Mr. Pike sold his home in Portugal Cove in 2011, he paid off the balance of the cost with the funds from that sale as well as some money from other sources. The evidence respecting the amounts each party contributed is that Ms. Wight contributed approximately 1/3 of the purchase price and Mr. Pike approximately 2/3.

[126] Ms. Wight began working part-time in Mr. Pike's adjusting business when she moved to Portugal Cove, earning a small amount of money per week so as not to interfere with her EI benefits. Mr. Pike's administrative assistant remained employed by him through 2010, until the couple moved to Holyrood. Mr. Pike's assistant did not make the move to work in Holyrood. Ms. Wight then became the sole administrative assistant for Mr. Pike. She was paid \$2,500 per month for part-time work involving 2 to 3 days per week. Ms. Wight worked for Mr. Pike for this salary until she returned to Pasadena. This was the same employment arrangement enjoyed by Mr. Pike's new administrative assistant after Ms. Wight left Holyrood in 2017.

[127] The trial took place in the fall of 2022, roughly six years post-separation. Ms. Wight was then 57 years old and Mr. Pike was 67 years old. Mr. Pike was still working in his insurance adjusting business; Ms. Wight had not worked since she left Holyrood.

[128] At trial, Ms. Wight called her family doctor, Dr. Perry Osborne, to tender expert opinion evidence that she was suffering from PTSD caused by her husband's abuse of her, which resulted in her inability to work. Over the objections of counsel for Mr. Pike, the Judge qualified Dr. Osborne as a general practitioner with no special qualifications in psychiatric medicine, and admitted and accepted his expert opinion evidence (Decision, at paras. 173, 188).

[129] Mr. Pike argues that the Judge erred in admitting and accepting Dr. Osborne's opinion evidence. Mr. Pike maintains that Dr. Osborne was not qualified to diagnose Ms. Wight with PTSD, and that he was especially not qualified to opine that Mr. Pike *caused* Ms. Wight's disabling PTSD.

### **Did the Judge Err in Admitting and Accepting Dr. Osborne's Expert Evidence?**

[130] Dr. Osborne testified that he had no special training in mental health diagnoses, but as a family doctor, he was qualified to diagnose PTSD in a presenting patient and opine on its cause. He did not refer Ms. Wight to a mental health specialist for evaluation. While I agree that, in some circumstances, a family doctor could be qualified to diagnose PTSD in a patient, I do not agree that Dr. Osborne was qualified to diagnose Ms. Wight with disabling PTSD due to Mr. Pike's abuse of her. In my view, his evidence to this effect was not admissible, and was otherwise seriously flawed.

[131] Dr. Osborne provided a litigation report as required by law when a party seeks to tender expert evidence at trial. The report, dated April 25, 2021, states that Ms. Wight exhibited symptoms of depression, anxiety, and PTSD, and that she had been previously diagnosed with fibromyalgia. His report does not state a diagnosis of PTSD, nor does it state the cause of Ms. Wight's condition.

[132] It appears from the record that Dr. Osborne's report was not seriously considered when he was called to testify. Instead, Ms. Wight's counsel submitted orally that the doctor was being called to give expert evidence on Ms. Wight's current medical diagnosis *and its cause*.

[133] PTSD is a serious mental health condition. Mr. Pike submitted parts of the consensus reference work American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington, VA: American Psychiatric Association, 2013), (the "DSM-5"), for psychiatric care pertaining to PTSD as evidence and Ms. Wight did not object. Critically, the DSM-5 requires traumatic cause to be established for a diagnosis of PTSD. Such causes are particularized and specifically required to be evaluated by expert opinion involving the identification of actual or threatened traumatic cause that accords with the criteria set out in the DSM-5 linking the cause to the patient's history and symptoms. Such causes are not determined by observing or examining a patient.

[134] As noted above, Dr. Osborne's expert report does not diagnose Ms. Wight with PTSD. Referencing in a report that a patient exhibits symptoms of PTSD is not an expert opinion proffering such a diagnosis. Simply put, persons suffering from PTSD may well exhibit symptoms of anxiety, depression, and physical weakness. However, it does not follow that persons suffering from anxiety, depression, and physical weakness are suffering from PTSD. Moreover, and importantly, Dr.

Osborne’s expert report does not state his opinion as to the cause of Ms. Wight’s condition – whether it was PTSD, depression, or anxiety – that was disabling her from work.

[135] Ms. Wight’s counsel called Dr. Osborne to give specific expert opinion evidence that went well beyond what he had stated in his report. This approach was problematic because it did not give appropriate notice to Mr. Pike to enable him to counter Dr. Osborne’s proposed expert evidence with his own expert.

[136] In *R. v. Bingley*, 2017 SCC 12, [2017] 1 S.C.R. 170, the Supreme Court of Canada built on the Court’s jurisprudence in setting out the requirements for the admissibility of expert evidence:

[13] The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into “trial by expert” and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras. 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.

...

[15] If at the first stage, the evidence does not meet the threshold *Mohan* requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 82; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 47. It must be necessary “to enable the trier of fact to appreciate the matters in issue” by providing information outside of the experience and knowledge of the trier of fact: *Mohan*, at p. 23; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 57. Opinion evidence that otherwise meets the *Mohan* requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25....

[16] At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *Mohan*, at p. 21; *White Burgess*, at paras. 19 and 24.

[17] The expert opinion admissibility analysis cannot be “conducted in a vacuum”: *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized: see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.

[137] This Court’s decision in *Compton v. Toyota Canada Inc.*, 2019 NLCA 79, applied the law as directed by the Supreme Court of Canada in overturning a trial court decision which accepted opinion evidence that did not meet the test of admissibility.

[138] See also this Court’s summary of the requirements for admissibility of expert evidence in *Aylward v. Terra Nova Motors Limited*, 2024 NLCA 24, at paragraph 15.

[139] In *R. v. Abbey*, 2017 ONCA 640 (*Abbey 2017*), Laskin J.A. neatly summarized the long-standing law respecting the admissibility of expert evidence:

[48] The test may be summarized as follows:

Expert evidence is admissible when:

(1) It meets the threshold requirements of admissibility, which are:

- a. The evidence must be logically relevant;
- b. The evidence must be necessary to assist the trier of fact;
- c. The evidence must not be subject to any other exclusionary rule;
- d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert’s duty to the court to provide evidence that is:
  - i. Impartial,
  - ii. Independent, and
  - iii. Unbiased.

e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a. Legal relevance,

b. Necessity,

c. Reliability, and

d. Absence of bias.

[49] In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied then the expert evidence may be admitted; if the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirements

(Footnotes omitted.)

[140] Also relevant to this matter is the Supreme Court of Canada's reasoning in *R. v. Abbey*, [1982] 2 S.C.R. 24 (*Abbey 1982*). In *Abbey 1982*, the Supreme Court of Canada addressed the necessity for expert opinion evidence to have a solid factual basis. The Court stated that while "it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes the from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based." (*Abbey 1982*, at 46)

[141] Dr. Osborne confirmed in his evidence that the factual basis for his expert opinion evidence rested entirely on Ms. Wight's reports to him. In short, the factual basis for his expert opinion evidence was Ms. Wight's *ex post facto* interpretation of her relationship with Mr. Pike. Simply put, Dr. Osborne's expert opinion evidence was based on hearsay. Dr. Osborne's acceptance of his patient's interpretation of her past relationship with Mr. Pike and her allegations of abuse was an insufficient and unsound basis on which to rest his opinion that Ms. Wight was suffering disabling

PTSD caused by Mr. Pike. Dr. Osborne's opinion evidence was essentially a repeat of Ms. Wight's blame of Mr. Pike for her condition. Reference to the record shows how.

[142] Ms. Wight first consulted Dr. Osborne, an experienced family doctor practicing in Corner Brook, on April 25, 2017, almost seven months after separating from Mr. Pike and approximately three months after she returned to Pasadena. Dr. Osborne testified that Ms. Wight wrote "anxiety and depression, fibromyalgia, and reflux" as her complaints on his clinic's intake form.

[143] Dr. Osborne initially diagnosed Ms. Wight with anxiety. About three months later, Ms. Wight asked Dr. Osborne to support her application for Canada Pension Plan ("CPP") disability benefits. On August 3, 2017, he reported to CPP that she was disabled from work due to PTSD and depression, but that her prognosis for recovery was good. Dr. Osborne continued to treat Ms. Wight for these symptoms and other medical complaints until the time of trial. He provided two subsequent reports to CPP, dated December 13, 2017, and September 17, 2018, stating that Ms. Wight was suffering from PTSD caused by her ex-husband's abuse of her, following which her CPP claim was approved. While the reports to CPP are admissible as part of Dr. Osborne's chart, they do not constitute expert opinion evidence respecting the cause of Ms. Wight's condition. In this regard, see *Downey v. Burroughs*, 2021 NSSC 147, at paragraph 40, where the Court concluded that materials that formed part of a treating physician's narrative documents advocating on behalf of a patient may lack the objectivity required in an expert report.

[144] As Ms. Wight's treating physician, Dr. Osborne was a fact witness respecting his care and treatment of her. His initial diagnosis of anxiety, and then also depression and fibromyalgia, were based on patient history and his examinations of Ms. Wight as she presented to him. Dr. Osborne noted in his chart that Ms. Wight told him that she was overwhelmed by the realization of the stress she had endured and the losses she was incurring since her marriage ended, and that she had been verbally and physically abused for years.

[145] Ms. Wight's complaints involved allegations of Mr. Pike's alcohol abuse, belittling and unruly conduct, and according to Dr. Osborne's testimony, some pushes. She also complained to Dr. Osborne about several other health issues not related to her relationship with Mr. Pike.

[146] Dr. Osborne accepted what Ms. Wight told him. He did not question the veracity of her reports or her interpretation of her relationship with Mr. Pike. In fairness to Dr. Osborne, a treating physician cannot be expected to engage in an investigation of the veracity of a patient's verbal reports. Such reports are not susceptible to easy or objective verification. This is so when the reports are based solely on the patient's interpretation of past events respecting personal interaction with another person, and especially so when there is no supporting physical, documentary, or other evidence. A family doctor's care and treatment of a presenting patient involves trust, but that does not mean that the doctor must accept the patient's reports as absolute, or that a physician ought to rest a serious mental health diagnosis or causation opinion on them.

[147] Dr. Osborne's expert report does not provide a basis for his opinion that Ms. Wight was suffering PTSD or identify its cause. Neither do his chart entries or testimony provide a basis that could support such a diagnosis and causation. In particular, his expert opinion respecting the cause of Ms. Wight's PTSD was not based on specialized knowledge of PTSD nor was it linked to specific traumatic cause; it was based solely on what Ms. Wight told him.

[148] There was no indication in Dr. Osborne's testimony that he inquired of, or explored, other possible explanations for Ms. Wight's condition before opining that Mr. Pike's abuse was its cause. He seems to have been unaware that Ms. Wight had suffered bouts of anxiety and depression and that had disabled her from work for periods of time on three previous occasions in 2002, 2006, and 2009. As well, Dr. Osborne did not attach any significance to other issues in Ms. Wight's life which were causing her anxiety, despite his documentation of them. Ms. Wight had complained to Dr. Osborne about her son's medical and legal problems resulting from his addiction issues, and about how her father's suicide had affected her.

[149] During Dr. Osborne's cross-examination, it became obvious that the entries documenting the complaints relating to her son and father were missing from the doctor's chart. Ms. Wight admitted to having deliberately removed them.

[150] One might ask how it came to pass that Ms. Wight was able to remove entries from her doctor's chart. Ms. Wight testified that she obtained a copy of her medical chart from Dr. Osborne and redacted the references to the impugned entries before passing the chart onto her lawyer, who in turn disclosed it to Mr. Pike's counsel and ultimately to the Court. The usual practice is for counsel, with a litigant's consent, to request the litigant's medical chart directly from the doctor, and when received,

to pass it on to opposite counsel and the court as required. The unusual manner in which Dr. Osborne's chart was disclosed to opposite counsel and the Court provided Ms. Wight with the opportunity to tamper with it.

[151] One might also ask why Ms. Wight dishonestly removed the chart entries relating to her son and father.

[152] Ms. Wight stated she did so because they were "personal stuff" that Mr. Pike would only use against her. Of course Mr. Pike would use this material against her. Ms. Wight was placing the entire blame for her disabling condition on Mr. Pike and seeking indefinite spousal support until just before trial when she modified her support claim to cease as of the trial. If the entries respecting her other complaints to Dr. Osborne were no longer in the doctor's chart, other potential causes for her condition would not be so easy to identify.

[153] The Judge stated that the removed chart entries were of no relevance. I disagree. In a litigation where medical problems are an issue, very little in a doctor's chart is of no relevance. In my view, the subject matter of the removed entries was directly relevant to Ms. Wight's presenting condition of anxiety and depression. The entries were in Dr. Osborne's chart precisely because Ms. Wight saw fit to discuss her distress occasioned by their subject matter in the same manner as she had discussed her distress respecting Mr. Pike's treatment of her, and her other health complaints. Problems with Ms. Wight's son had plagued the marriage and according to the evidence from both parties, played a significant role in its breakup. As well, Ms. Wight's ongoing difficulty with the circumstances of her father's death was well documented in the evidence. I would expect that expert opinion respecting the cause of Ms. Wight's condition would, at a minimum, have considered the other stressors in her life before concluding that Ms. Wight's condition was caused solely by Mr. Pike.

[154] Dr. Osborne was firm in his testimony that Ms. Wight suffered PTSD caused by Mr. Pike. He buttressed his opinions by referring to the references of Ms. Wight's complaints about her husband's behavior to her previous doctor, Dr. Sutton. However, Dr. Osborne had not received Dr. Sutton's chart when he initially diagnosed Ms. Wight with PTSD. Further, while Dr. Sutton's chart documents Ms. Wight's complaints about trouble in the marriage, it contains no reference to PTSD. Rather, Dr. Sutton's chart references Ms. Wight's complaints respecting Mr. Pike's drinking and behaviour, and the recommendations the doctor made to Ms. Wight for individual and marriage counselling, and their varied success.

[155] In my view, Dr. Osborne's evidence respecting his care and treatment of Ms. Wight's limitations and information was generally in order. However, his expert evidence respecting the cause of Ms. Wight's disabling condition was not admissible because he was not qualified to give it. It is not that Dr. Osborne was not qualified by reason of education or experience; rather, he was not qualified to give expert evidence respecting Ms. Wight's case because he was not an independent or impartial witness, and his opinions were based on hearsay reports from Ms. Wight. Such a situation raises genuine concerns about the reliability of his expert evidence. This Court raised similar concerns in *Aylward*, where the proffered expert witness was an employee of the respondent, which called into question the neutrality required of an expert witness (at para. 18). As well, expert evidence must be based on a solid foundation. Neither Dr. Osborne's report nor his testimony provided an explanation of PTSD, its usual causes, and its diagnostic criteria, or outlined sufficiently specific information concerning relevant specific events causing Ms. Wight's PTSD.

[156] Even if Dr. Osborne's expert opinion evidence respecting causation could squeak by the admissibility requirements, which in my view it cannot, the Judge ought to have considered its necessity against its serious prejudice to Mr. Pike. Dr. Osborne's expert evidence that Ms. Wight had disabling PTSD caused by Mr. Pike, or that Ms. Wight was disabled by anxiety and depression because of Mr. Pike, was not necessary; Ms. Wight was able to testify to her condition and say why she believed she could not work.

[157] My colleague writes that there was nothing to indicate that Dr. Osborne's opinion was not the product of his own independent professional judgment. I disagree. Dr. Osborne's opinion as to the cause of Ms. Wight's condition was based entirely on what Ms. Wight told him. In the absence of Ms. Wight's reports, how could Dr. Osbourne possibly opine on the cause of her condition?

[158] My colleague also writes that nothing in the Judge's decision indicates that the Judge used Dr. Osborne's evidence improperly. I disagree. The Judge spent a considerable portion of her decision explaining that Mr. Pike abused Ms. Wight. In so doing, she specifically admitted and accepted Dr. Osborne's opinion evidence. In my view, the Judge, as the gatekeeper of the evidence, ought to have delineated the scope of Dr. Osborne's evidence and excised his opinion respecting the cause of Ms. Wight's condition. This is an error in principle that went directly to the Judge's spousal support order.

[159] I am of the view that when expert opinion evidence is tendered, it is necessary to follow correct legal procedure for its admissibility regardless of how a litigant frames their argument, and regardless of whether there may be other evidence that could support a basis for the specific expert opinion.

[160] In my view, Dr. Osborne's expert evidence was effectively tendered to support the truthfulness of Ms. Wight's interpretation of her marriage and blame of Mr. Pike for her condition. There is no question in my mind that by accepting Dr. Osborne's expert evidence that Mr. Pike caused Ms. Wight's disability, the Judge effectively relied on it for its truth. Dr. Osborne's imprimatur was essentially oath-helping. Dr. Osborne based his causation evidence on the truthfulness of his patient's *ex post facto* interpretation of her relationship with Mr. Pike, and the Judge accepted his evidence.

[161] I am of the view that Dr. Osborne's opinion evidence that Mr. Pike's conduct was responsible for Ms. Wight's condition had a prejudicial and unfair effect on the trial. He was the first witness. His opinion that Mr. Pike's abuse caused Ms. Wight's condition such that she was unable to work set the stage for Ms. Wight to assign Mr. Pike full responsibility for her reaction to the marriage breakdown and her inability to work from February 1, 2017 to the date of trial. In my view, Dr. Osborne's opinion evidence caused the trial to devolve into a trial by expert and distorted the fact-finding process by providing a clear lens through which Ms. Wight could blame Mr. Pike for her situation (*Bingley*, at para. 13).

[162] This is not to say that Ms. Wight did not suffer from some anxiety and depression related to the breakdown of her marriage. It is not uncommon for spouses to suffer depression and anxiety after their relationships or marriages break down. The stark realization that the future is and will be different after a marriage breakdown, as Ms. Wight realized, can certainly cause distress. This is also not to say that some of Mr. Pike's conduct was not abusive. Rather, it is to say that Ms. Wight's interpretation of her relationship with Mr. Pike, and the examples she relied on to support her allegation that his abuse was the sole cause of her inability to work, do not, in my view, show that Mr. Pike's conduct was the reason for her inability to work. Neither does any of Mr. Pike's conduct relieve Ms. Wight from taking some responsibility for her failure to return to work.

[163] Mr. Pike denied Ms. Wight's allegations that he was an abusive husband, although he admitted the substance of three of the four incidents which Ms. Wight relied on to blame him for her situation. While I agree with the Judge that Mr. Pike

had little insight into how his conduct affected the marriage, the same can be said of Ms. Wight.

[164] The push incident at the yacht club is an example of Ms. Wight's own problematic behavior. It occurred during boating season when Ms. Wight still lived in Pasadena, which places the incident at least as far back as 2009, well before the parties began living together let alone before they married.

[165] Mr. Pike testified to how Ms. Wight's demeaning comments to him respecting the effect of his treatment for bladder cancer, in the presence of others, precipitated the incident. While verbal insults do not constitute provocation justifying physical assault, what transpired respecting this incident and when it occurred make me unable to characterize his push of Ms. Wight as supporting a claim of spousal abuse causing an inability to work some 12 or more years later.

[166] Another incident that much was made of at trial is Mr. Pike's insult of Ms. Wight, and her mother and aunt, in the summer of 2011. Both parties had been partying and drinking, and Mr. Pike admitted he was heavily intoxicated. While Mr. Pike's insult, of which he said he was not proud and for which he subsequently apologized, was quite rude, it is not spousal abuse.

[167] The 2015 garage incident was bad. Not for a moment do I suggest that Mr. Pike's conduct, again fueled by alcohol, was justifiable, even if provoked by Ms. Wight's financial indulgence of her son, which plagued the marriage, or her pursuit of Mr. Pike into the garage. Mr. Pike's pulling Ms. Wight's hair, destruction of furniture and his motion to himself with his pellet gun were nasty. The pellet gun motion, as hurtful as it may have been to Ms. Wight, also shows her ongoing anxiety related to her father's death. As well, the incident was dated; Ms. Wight said it happened in the fall of 2015 and Mr. Pike said it was a year or two before that. The Judge did not resolve the issue, as there was little need to do so. Even accepting Ms. Wight's evidence on this point, the incident occurred approximately a year before they separated, and Ms. Wight continued to work for at least 15 months afterwards. I do not see the garage incident as demonstrating Ms. Wight's claim that Mr. Pike's conduct caused her disabling PTSD or inability to work from February 2017 until the trial in 2022.

[168] Another incident which Ms. Wight recounted to support her allegations of abuse occurred after the parties separated. In April 2016, Ms. Wight drove from Pasadena to Holyrood and paid a surprise visit to Mr. Pike. Mr. Pike made up a bed

for her in the house. One night after Ms. Wight returned home from spending time with friends, she went through some of Mr. Pike's and/or the couple's belongings downstairs and left the room in disarray. She then went into the living room and turned on the television. Mr. Pike was in his bedroom with the door locked. According to Mr. Pike, Ms. Wight was intoxicated, had the volume on the television turned up, was banging on his bedroom door, and was shouting names at him. He called the police. They came and defused the situation. The next day Mr. Pike discovered the mess downstairs. Argument ensued, and he called the police again. They came, met with the parties separately, and recommended that Ms. Wight leave the home. Mr. Pike subsequently changed the locks on the doors to the house.

[169] Ms. Wight minimized this incident, saying Mr. Pike called the police because she had the volume on the television turned up. It is uncontroverted that the incident was precipitated by Ms. Wight, that Mr. Pike called the police to intervene, twice, and that there was no physical violence. It seems to me that responsibility for this incident lies entirely at the feet of Ms. Wight. Moreover, it shows Ms. Wight's lack of insight into her own unruly and arguably abusive conduct. In any event, I do not see the incident as demonstrating support for Ms. Wight's contention that Mr. Pike's conduct was so abusive as to disable her from work years afterwards.

[170] In addition to the incidents described above, Ms. Wight interspersed her evidence on the property issues in dispute with comments about Mr. Pike's drinking and general conduct which she characterized as abusive.

[171] There appears to be no doubt that Ms. Wight's and Mr. Pike's relationship was problematic and fraught with conflict. The conduct Ms. Wight now asserts as Mr. Pike's abuse appears to have been present in their relationship for a long time. In any case, it began many years before the parties made the decision to live together, let alone marry. Ms. Wight testified she was well aware of Mr. Pike's conduct, especially when drinking, but she loved Mr. Pike and kept hoping that he would change. That said, Ms. Wight does not appear to take any responsibility for the tension and conflict in the relationship or appreciate that her conduct contributed to the breakdown of the relationship. Regardless, the parties coped in their relationship until Mr. Pike reached the end of his rope in September 2016, and Ms. Wight coped until she "crashed", as she put it, in the spring of 2017 after returning to Pasadena.

[172] In summary, to press her claim of abuse, Ms. Wight reached back to historical incidents which were of little or no significance and one significant incident which the parties had long since put behind them. She also relied on the post-separation

Holyrood incident which demonstrates Ms. Wight's conduct, not Mr. Pike's conduct, as abusive.

[173] This is not to endorse insulting or belittling conduct, or to excuse physical assault. Nor is it to normalize it. Rather, it is to acknowledge that marriages frequently involve conduct which can be subjectively or even objectively determined to be abusive, or other misconduct that becomes intolerable for one party or the other, and results in divorce. It is the rare relationship resulting in divorce that does not involve insults which could constitute verbal abuse, or other conduct that can be characterized as abusive. This is simply to say that facts such as those in this case do not rise to a level to influence a spousal support award.

[174] In the result, I do not see Ms. Wight's evidence respecting Mr. Pike's conduct in the marriage as causative of her inability to work many years later. Neither do I see that it is of such a nature and degree to override Parliament's specific rejection of misconduct as a factor in awarding spousal support. Accordingly, I do not share my colleague's view that Ms. Wight's evidence established that she had disabling PTSD, or that she was otherwise disabled from work, due to Mr. Pike's abuse of her.

### **Spousal Support**

[175] To my mind, Ms. Wight's position on spousal support was and is based on Mr. Pike's misconduct.

[176] It is contrary to the provisions of section 15.2(5) of the *Divorce Act*, RSC 1985, c. 3 (2nd Supp.), as well as established law, to consider a spouse's conduct in awarding spousal support. The section is unambiguous. It reads:

#### **Spousal misconduct**

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

[177] In *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at paragraph 20, Justice Binnie issued words of caution in this regard:

These provisions [section 15.2(5) and section 17(6)] make it clear that misconduct should not creep back into the court's deliberation as a relevant "condition" or "other

circumstance” which the court is to consider in making or varying a spousal support order (s. 15.2(4)). Misconduct, as such, is off the table as a relevant consideration.

[178] In my view, Ms. Wight’s reliance on longstanding relationship conflict of the nature to which she testified, and to the incidents referred to above, to blame Mr. Pike for her inability to work justifying lengthy spousal support many years later, is quite out of order. It is contrary to section 15.2(5) and the no-fault philosophy of the *Divorce Act*. This is especially so when the conduct complained of cannot be said to be of such a grave nature to overcome specific legislative direction.

[179] The Judge relied on *Leskun* to support her finding that the effect of Mr. Pike’s abuse caused Ms. Wight’s disability. The Judge explicitly cited key parts of *Leskun* which dealt with the statutory imperative of not accounting for spousal misconduct. However, the Judge also spent a significant portion of her decision explicitly discussing Mr. Pike’s misconduct without any reference to Ms. Wight’s conduct. The Judge’s concentration on Mr. Pike’s conduct was, in my view, well beyond what was necessary to account for Ms. Wight’s inability to work (Decision, at paras. 178-189). Moreover, the facts and circumstances of the *Leskun* couple’s 20-year marriage are a far cry from this case. Neither did *Leskun* involve the assignment of fault.

[180] Ms. Wight originally sought long-term spousal support, but shortly before trial, she modified her claim for spousal support to cease on the date of trial (Decision, at paras. 193-195). At the time the appeal was heard, Mr. Pike was 69 years old and still working; Ms. Wight was 59 and had not returned to work.

[181] The Judge found that Ms. Wight had established entitlement to spousal support on both a compensatory and a non-compensatory basis. I agree that Ms. Wight is entitled to non-compensatory spousal support. However, I see no basis in law for her entitlement to compensatory spousal support.

[182] Marriage per se does not automatically entitle a spouse to support (*Moge v. Moge*, [1992] 3 S.C.R. 813, at 864). Spousal support orders are discretionary. They are “based on certain objectives, values, factors, and criteria, determining whether support will be awarded ... and if so, the amount...”. The balancing of such factors involves the exercise of considerable discretion which must be given considerable deference on review (*Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 10).

[183] Further, income disparity does not necessarily lead to entitlement (*Spousal Support Advisory Guidelines: The Revised User's Guide* (April 2016), (the "SSAG User's Guide") at 8).

[184] In considering a claim for spousal support, the threshold issue is entitlement. Entitlement can be established on compensatory, non-compensatory, or contractual grounds (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 15).

[185] Compensatory support is meant to reimburse a spouse for "opportunities foregone or hardships accrued as a result of the marriage" (*Bracklow*, at para. 15). As noted at page 5 of the *SSAG User's Guide*, entitlement to compensatory support is "based either on the recipient's economic loss or disadvantage as a result of the roles adopted during the marriage or on the recipient's conferral of an economic benefit on the payor without adequate compensation."

[186] In *Moge*, L'Heureux-Dubé J. stated "[t]he doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown ... seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse." (at 864).

[187] In this case, Mr. Pike employed Ms. Wight when she had no employment, and paid her a salary, which she drew until the end of January 2017. There is no evidence that Ms. Wight lost career or work opportunities as a result of her cohabitation and subsequent marriage to Mr. Pike. Indeed, she did not appear interested in opportunities for career advancement, as indicated by her evidence respecting her loss of employment with Provincial Adjusting.

[188] Ms. Wight made no economic sacrifices by entering into her relationship with Mr. Pike. In fact, one could say she was advantaged by it. Mr. Pike employed her, and they lived essentially on his earnings. She enjoyed a very comfortable standard of living with him – boating, travel, etc., which doubtless was an improvement over her unemployed circumstances in Pasadena. Spousal support is not intended to enable Ms. Wight to enjoy this standard of living indefinitely.

[189] Neither, in my view, was Mr. Pike conferred economic advantage by Ms. Wight living with and then marrying him. Mr. Pike continued to do the same work he had done for years in his well-established career. The Judge portrayed Ms. Wight as a key part of Mr. Pike's business and found that he benefitted from her discounted

salary during the two-month period they lived together in the fall of 2009. I do not agree.

[190] In 2009, Mr. Pike secured an adjusting contract with a single large client and set up his own firm to handle the associated volume of business. Ms. Wight worked for him during this time but left after two months. While I agree with my colleague that assisting a payor spouse in establishing and operating a business can give rise to a compensatory support claim, I cannot agree that two months' work for reduced pay with living expenses covered is sufficient to ground entitlement to compensatory spousal support for Ms. Wight. The case *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC refused, 33002 (28 May 2009), which my colleague references is a good example of a contribution justifying a compensatory award. In *Chutter*, the recipient's degree of contribution to the payor's business was very significant and of long duration.

[191] Ms. Wight made no claim under section 29 of the *Family Law Act*, RSNL 1990, c. F-2, claim contribution. Claims not compensated under section 29 should not be exaggerated to influence spousal support. As noted above, Ms. Wight was paid for her work and also provided with access to Mr. Pike's business account for personal and family expenses.

[192] When Ms. Wight returned to Portugal Cove in 2010 and worked for Mr. Pike at reduced wages, Mr. Pike's administrative assistant remained employed by him. Ms. Wight's administrative support did not enhance Mr. Pike's income or career any more than his income and career had been enhanced by the administrative support provided by his previous employee.

[193] Further, both Ms. Wight and Mr. Pike performed the many tasks required to run a home and look after, and improve, a property. The evidence does not show that either party contributed more than equally to the marriage in a manner that would give rise to a compensatory spousal support order. There were no children to look after, and Ms. Wight did not stay out of the full-time workforce in order to enhance Mr. Pike's career.

[194] Accordingly, I see no basis on which entitlement to compensatory spousal support for Ms. Wight can rest. In my view, the Judge erred in so finding, and to the extent that this finding influenced her spousal support award.

[195] I agree that Ms. Wight is entitled to spousal support on a non-compensatory basis. She became disadvantaged by the breakdown of her marriage and suffered economic hardship as a result. She relinquished her part-time job with Mr. Pike when she left Holyrood, understandably finding that living in the matrimonial home with Mr. Pike while separated in order to stay employed by him was untenable. As well, she enjoyed a comfortable lifestyle while married to Mr. Pike (*Divorce Act*, at ss. 15.2(6)(a), 15.2(6)(c)), the loss of which she realized after leaving Holyrood. Accordingly, Ms. Wight needed some spousal support to enable her to collect herself, to find work, and to adjust to her new situation. At the same time, however, she was obligated to try to become self-sufficient within a reasonable period of time. Justice Binnie's words at paragraph 23 of *Leskun* pertain:

A break-up in the circumstances found here will perhaps inevitably precipitate a period of shock and emotional trauma for the jilted spouse, but Parliament has concluded that the attempt to get to the bottom of all the rights and wrongs that contributed to the break-up is likely impossible and in any event irrelevant to the task of sorting out the financial consequences. As to the "legal tsunami", I agree with the *amicus curiae* that for the most part parties will realize "that the only way out [of the financial difficulties consequent on the break-up] is if they pull themselves up by their own bootstraps".

(Underlining added.)

[196] I add that the fact that Ms. Wight became anxious and depressed by her post-separation situation, especially when she was previously diagnosed with depression and anxiety and had other stressful factors in her life, does not mean that Mr. Pike had to continue to support her. I also add that Mr. Pike's choice to continue working after the age when most people retire does not mean he has to share his accumulated savings with Ms. Wight.

[197] For all of the reasons outlined above, I would set aside the Judge's spousal support order, and order non-compensatory support as described below.

[198] Ms. Wight has done very well on the division of matrimonial property from her short marriage. She has been awarded (1) half of the business account and the accounts receivable, \$114,500 which she received at the time of separation, (2) half of a valuable home to which she contributed one-third of the cost, (3) \$50,000 in occupation rent, (4) equal shares of other valuable property like boats and cars the couple enjoyed while they lived together, and (5) contributions to Registered Retirement Savings Plan and Tax Free Savings accounts funded by Mr. Pike during their marriage. To my mind, these divisions of property impact the means and

circumstances of both parties such that, to my mind, Ms. Wight would be fairly compensated by a low spousal support order.

[199] In this regard, I rely on the reasoning in *Berta v. Berta*, 2014 ONSC 3919, at paragraphs 106, 122, var'd on other grounds 2015 ONCA 918, and *Chutter* at paragraphs 123-124, where the respective courts granted low spousal support orders because the matrimonial property awards were generous. While those cases involved significantly more property than what is involved in this case, the principles of fairness and even treatment of the parties are what matters, not the specific amounts of money involved.

[200] In the result, I agree with Mr. Pike's position. I would award non-compensatory support to Ms. Wight of \$500 per month for 30 months, commencing on February 1, 2017. This amount would also account for the required adjustment for tax implications as outlined in the *SSAG User's Guide*, which states that it is error not to consider the tax implications of lump sum awards (at 4) and that lump sum awards must be accordingly discounted. In my view, this award, together with the property awards the Judge ordered and this Court is upholding, would fairly compensate Ms. Wight for the economic consequences of the breakdown of her marriage.

### **Mr. Pike's Business Account**

[201] Lastly, as stated in paragraph 118 above, I am of the view that the \$76,832.33 in Mr. Pike's business account when the parties married is not matrimonial property.

[202] Ms. Wight made no claim to Mr. Pike's business - section 29 of the *Family Law Act* was not argued. Yet, when the couple separated in late September, Mr. Pike wrote a cheque to Ms. Wight for \$114,500, which was one-half of the money in his business account at the time. The parties have different views on the reason why he gave her this money. At paragraph 90 of the Decision, the Judge noted that the cheque stub referred to the payment as a "Retiring Allowance". Ms. Wight said the parties were building up their savings in Mr. Pike's business account and leaving it there to minimize taxes. Mr. Pike argued that the \$114,500 was a contribution toward settlement of the division of their matrimonial property and that the money in his business account was not matrimonial property.

[203] The Judge found that the money in Mr. Pike's business account was matrimonial property. On appeal, Mr. Pike does not challenge this finding in

principle, but he argues that the \$76,832.33 in his business account when he and Ms. Wight married must be deducted from the Judge's award.

[204] I am troubled by some of the Judge's reasons for finding that all of the money in Mr. Pike's business account was matrimonial, and my concerns inform my view that the \$76,832.33 must be deducted from the Judge's award.

[205] One of the reasons she gave for this finding was because the couple used the business account as a personal account and paid their personal expenses out of it. It is an acceptable practice for business owners to draw on their business accounts to pay personal expenses provided that the draws are properly accounted for as income. Doing so does not change the character of the money in the business account. The Judge also reasoned that Mr. Pike's business account was not used to generate business. I do not agree. Monies covering the operational expenses of Mr. Pike's adjusting business, like the costs associated with operating an office, professional fees, and investigating claims, which generated both income and new business, were paid from this account. The evidence did not show the balance in the account to be entirely income when Mr. Pike wrote the cheque. As for Ms. Wight's evidence, I must say that leaving money in a business's operating account is an odd way of saving for retirement. Further, I do not see the practice as minimizing tax consequences – it may delay tax payments, but it does not minimize the tax payable. In any case, I do not see Mr. Pike's generous splitting of the money in his business account with Ms. Wight as an acknowledgement that all of the money in his business account was matrimonial; rather, I see it as a payment pertaining to resolution of the couples' matrimonial property.

[206] The Judge did not isolate the \$76,832.33 from Mr. Pike's business account when he and Ms. Wight married. In fairness, she was not asked to do so, given how the parties' positions were argued. While Mr. Pike accepts the Judge's ruling on the division of the business account, he argues that the \$76,832.33 was his alone and that it ought to be deducted from the matrimonial property award.

[207] My colleague, exercising her discretion as a first instance judge, includes this money as part of the Judge's matrimonial property award. She reasons that because the balance in the business account had fallen to amounts lower than the \$76,832.33, it could have been spent on family expenses and thus, had become matrimonial. It is not known how this money was spent. It could also have been used to cover business expenses. Again, Ms. Wight's use of this account for personal or family expenses does not change the character of the \$76,832.33. Ms. Wight had no right to this

money when they married as it was excluded property under section 18(1)(c)(iv) of the *Family Law Act*. Moreover, and importantly, it was not money earned over the course of the marriage.

[208] In the circumstances of this case, and because it is not clear that the \$76,832.33 in Mr. Pike's business account was used as money for family reasons, I would exercise my discretion to deduct the \$76,832.33 from the Judge's matrimonial property award.

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L.R. Hoegg J.A.