# Court of King's Bench of Alberta

**Citation: Robinson v Marwood, 2026 ABKB 558**

**Date:** 20260807
**Docket:** 2401 04013
**Registry:** Calgary

2026 ABKB 558 (CanLII)

Between:

Alan Clarke Robinson

Appellant

- and -

Julie Lynn Marwood

Respondent

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**Reasons for Decision**
**of the**
**Honourable Justice J.T. Eamon**

**Appeal from the Arbitration Award made February 16, 2024 as clarified March 13, 2024**

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## Table of Contents


I Introduction .......... 2

II Scope of the appeal .......... 4

III Standard of review .......... 8

IV Errors of law ... 8

V Ground of Appeal 1: The Arbitrator erred in law with respect to property division because he failed to include contingent personal tax liabilities that are attached to each party's assets ... 11

VI Ground of Appeal 2: The Arbitrator erred "in failing to consider the Alberta Court of Appeal's decision in *Corbeil*, in deciding to award retroactive spousal support, and should have been considered in the property decision" ... 17

VII The merits of the other asserted grounds of appeal ... 23

(a) Erred in selecting valuation date for spec home ... 23

(b) Erred in treating third party book of business as income ... 25

(c) Failed to consider all elements in s 15.2(4) of the *Divorce Act* relative to both parties or all objectives as set out in 15.2(6) of the *Divorce Act* ... 27

(d) Failed to consider the test for determining retroactive spousal support. ... 27

(e) Claim for relief ... 29

VIII Conclusion ... 29

2026 ABKB 558 (CanLII)

## I Introduction

[1] The parties made a mediation/arbitration agreement dated October 8, 2020 to resolve their many family law disputes. On February 15, 2024, the Arbitrator issued an award on the financial issues of guideline income, child support (retroactive and ongoing), spousal support (retroactive and ongoing), and distribution and division of family property. He issued clarifications on March 13, 2024, in response to the Respondent's request.[1]

[2] The Arbitration Agreement permits an appeal on a question of law.

[3] The Appellant, Mr Robinson, commenced an appeal by Originating Application on March 21, 2024 as amended April 15, 2025. His appeal was on the following grounds:

> The Arbitrator also erred in law in respect of his finding on the division of family property, which is illustrated in Schedule A to the Award, which contains a property schedule. Specifically, the Arbitrator does not include contingent personal tax liabilities that are attached to each party's assets.
>
> Intrinsically related to the ultimate property award to the Respondent, the Arbitrator failed to consider the Alberta Court of Appeal decision ***Corbeil***, in deciding to award retroactive spousal support, and should have been considered in the property division.

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[1] The Arbitrator deferred some additional requests for clarification or directions pending input from the Appellant's counsel in the arbitration. The record does not disclose whether the Appellant responded nor whether the Arbitrator provided further directions, but neither side submitted that any pending directions have any bearing on the issues in the appeal.

[4] Appellant's counsel submitted in his written argument on the appeal that the Arbitrator made the following errors (as quoted from the Appellant's written brief filed February 7, 2026):

> 30. [The Appellant] submits that the issue(s) on appeal are as follows:
>
> (1) Whether the Arbitrator err [sic] in law in the division and distribution of family property, including by:
>
> a. Applying valuation dates other than the date of the arbitration hearing, contrary to *Hodgson v Hodgson*, 2005 ABCA 13 (Tab 9);
>
> b. Erred in his treatment the [sic] books of business, treating portions as income for support purposes rather than as a matrimonial property asset;
>
> c. failing to apply the required adjustments for tax consequences, including personal and corporate tax liabilities, in final distribution and division of family property.
>
> (2) Whether the Arbitrator err [sic] in law in awarding retroactive and ongoing spousal support, including by:
>
> a. Failing to consider the elements of the test in s 15.2(4) *Divorce Act* relative to both parties and the failing to consider all four objectives as set out in 15.2(6) of the *Divorce Act;*
>
> b. Failing to consider the test for determining retroactive spousal support; and
>
> c. Failing to consider the Court of Appeal's decision in *Corbeil v Corbeil*, 2001 ABCA 220 (Tab 12) and the link between retroactive spousal support and the division of family ion of family property;
>
> (3) What is the appropriate relief in light of the errors and wherein the arbitrator has terminated his mandate?

[5] As to the specific grounds in the Amended Originating Application, the Respondent submits that the Appellant did not provide evidence to the Arbitrator of the tax consequences or request the Arbitrator to apply a discount for contingent tax liabilities and cannot raise this matter for the first time on appeal. As to spousal support and property division, the Respondent submits that the Arbitrator applied the law and was not required to mention the case of ***Corbeil v Corbeil***, 2001 ABCA 220 by name.

[6] The Respondent submits that the additional grounds of appeal in the Appellant's brief which were not explicitly set out in his Amended Originating Application are not properly before the Court. Further and in any event, the additional grounds have no merit.

[7] The Appellant replies that his Amended Originating Application is wide enough to permit any question of law relating to the Arbitrator's decision on division of the parties' matrimonial property. He further submits that ***Corbeil*** discusses several legal principles pertaining to spousal support and he may invoke any of them in the appeal. Generally, the Arbitrator failed to consider all required elements of legal tests (and therefore also disregarded material evidence) and thereby erred in law. The Award so far as it deals with property division and spousal support must be set aside.

2026 ABKB 558 (CanLII)

[8] The issues are whether the Appellant may pursue grounds of appeal not explicitly stated in the Amended Originating Application and whether the Arbitrator erred in law in his findings on those grounds which are before the Court.

## II Scope of the appeal

[9] The issue over the scope of the appeal arises from an Order of Armstrong J made March 25, 2025. In that Order, Armstrong J struck out several of the Appellant's grounds of appeal in his Originating Application, required the Appellant to file an Amended Originating Application removing the struck out grounds, and prohibited the Appellant from adding grounds in the amended application.

[10] That Order led to the filing of the Appellant's Amended Originating Application on April 15, 2025, quoted verbatim in para 3 *supra*. The Respondent submits that the additional grounds that that are included in the issues in the Appellant's written brief (quoted verbatim in para 4 *supra*) are in defiance of Armstrong J's Order and should be struck out. These are paras 30(1)(a), 30(1)(b), 30(2)(a), 30(2)(b) and 30(3) of the brief.

[11] The Respondent further objects that the Appellant filed new evidence on the appeal without permission and the evidence should be struck out.

[12] The Appellant responds that he is not in breach of Armstrong J's Order because the surviving grounds of appeal in the Amended Originating Application are broadly worded and therefore allow him to particularize additional questions of law. He submitted at the hearing:

(a) The first ground is a "two-part paragraph". The first sentence alleges errors of law in the property division schedule. The second sentence is a specific example of an error of law in property division but does not preclude reliance on other errors of law in the property division.

(b) The alleged errors of law pertaining to spousal support fit under the second ground of appeal. The ***Corbeil*** decision references not only the interplay between spousal support and property division but also the mandatory elements of s 15.2 of the *Divorce Act*, RSC 1985 (2d Supp) which must be considered in a spousal support application. The additional alleged errors are not particularized in the Amended Originating Notice but are sufficiently related to the appeal grounds because the principles of law on which they are based are described in the ***Corbeil*** case which is cited in the second ground of appeal in the Amended Originating Application.

[13] Further, counsel for the Appellant noted in verbal submissions that the parties appeared before Jones J in January, 2026 where the Appellant sought an extension of time to file his written brief for the appeal and the Respondent did not raise the issue of the scope of the appeal. The suggestion appears to be a waiver of objections to the content of the Appellant's written brief.

[14] Counsel for the Appellant acknowledged that the scope of evidence admissible in an arbitration is limited. He responded that ultimately the issue is whether the Arbitrator committed errors of law.

2026 ABKB 558 (CanLII)

[15] The Order of Armstrong J was made on an application by Ms Marwood filed July 15, 2024 to strike out the Originating Application because (1) the Appellant commenced the appeal after the expiry of the 30 day non-extendable time limit for appealing arbitration awards under s 46(1) of the *Arbitration Act*, RSA 2000, c A-43 and (2) the Appellant was trying to relitigate issues outside the Court's jurisdiction to hear appeals on questions of law alone.

[16] Armstrong J found that the appeal was commenced within the time limit and struck out several grounds of appeal because they did not present questions of law. The surviving grounds are those before me and are quoted in para 3 *supra*.

[17] At the outset, I reject that the application for, or consent to, an order extending filing deadlines for the Appellant's written brief constitutes any approval or waiver of the content of the Appellant's written brief or has any bearing on the scope of the appeal. Extension orders are commonly granted because counsel find themselves unable to file the document on time for whatever reason. It cannot be reasonably suggested that routine extensions of filing deadlines constitute any approval of the content of the document sought to be filed.

[18] In assessing the Appellant's position that he can essentially add any question of law related to property division or relating to any question of law arising from any legal issue the Alberta Court of Appeal mentioned in the ***Corbeil*** case, it is useful to consider Armstrong J's verbal reasons for decision.

[19] In his reasons, Armstrong J construed the surviving grounds of appeal as follows:

> So that leaves us then with the only two paragraphs that raise questions of law, being paragraph 17 where the originating notice indicates that the arbitrator erred in law in respect of his finding on the division of family property where he does not include contingent personal tax liabilities that are attached to each party's assets and paragraph 18 where it is alleged that the arbitrator failed to consider the Alberta Court of Appeal's decision in *Corbiel* in deciding to award retroactive spousal support and should have been considered in the property division.
>
> So I am going to allow the originating application, the appeal, to go forward based on those two grounds only. So the paragraphs that survived the application are 1, 2, 17, and 18, and then the request for remedy is fine.

[20] Later in his reasons, Armstrong J stated:

> So in order to continue with the appeal, two things are going to have to happen within 30 days of the order today. First of all, Mr. Robinson must file an amended originating application in accordance with my order such that only the remaining issues on appeal are going forward. All of the paragraphs that I struck need to be removed from the amended application. That needs to be filed within 30 days. <u>And to be clear, this is not an opportunity to add additional grounds at this stage.</u> The amended application will reflect grounds 17 and 18 going forward. OK?
>
> Also within 30 days, Mr. Robinson must provide the security for costs in the amount of $18,900 to be held in trust by counsel for Ms. Marwood pending final determination of the appeal and the costs award. If Mr. Robinson fails to do either of these things, then his appeal shall be automatically struck without further application to this court.

2026 ABKB 558 (CanLII)

(Underlining added).

[21] After pronouncing his reasons, Armstrong J asked both counsel whether they had any questions of points of clarification they wished to raise. Neither raised any issues over the directions concerning scope of appeal.

[22] The directions are recorded in Armstrong J's formal Order as follows:

> 1. Paragraphs 3 through 16 of the Originating Application appealing the Arbitration Award are hereby struck.
>
> 2. The Respondent shall file an Amended Originating Application including only paragraphs 1, 2, 17, and 18 of the basis for the claim of the Originating Application, within 30 days of the pronouncement of this Order. The Respondent may not add additional grounds to the Originating Application.

[23] I agree with the Respondent Marwood that Armstrong J's Order precluded additional questions of law that are not explicitly set out in the surviving grounds of appeal.

[24] Armstrong J stated in his reasons that he was performing a gatekeeper function. Mr Robinson's position is contrary to Armstrong J's contemplation, expressed in his reasons, that the two surviving grounds presented the discrete questions of law particularized in paras 17 and 18 of the Originating Notice and that no other grounds would be permitted. The parties' arbitration agreement limited the Appellant's appeal rights to questions of law alone, therefore the judge's direction that no additional grounds were permitted means that there were no further questions of law permitted.

[25] I do not suggest that Mr Robinson was thereby precluded from seeking Court permission to add further grounds to the Amended Originating Notice. Rule 9.15(4)(c) permits a Court to vary a procedural interlocutory order if it is just in the circumstances to do so (***Custom Metal Installations Ltd v Winspia Windows (Canada) Inc***, 2020 ABCA 333 at paras 58 - 59; ***Hartson v Park Paving Ltd***, 2021 ABQB 742 at paras 76 - 87).

[26] In many cases, an incongruency between a written brief on a special application and grounds in an Originating Application would be overlooked or a late amendment permitted in the interests of resolving the entire dispute between the parties where there is a lack of prejudice arising from the delay. But in this case, the Respondent has objected to the additional grounds of appeal and the Appellant should bear the onus to explain why this Court should vary Armstrong J's Order in the context of the foundational objectives of the Rule 1.2 and the various considerations set out in the ***Hartson*** case at para 87.

[27] This is not a mere formality. The purpose of a commencement document in a proceeding challenging an arbitration award under s 44 or 45 of the *Arbitration Act* is to assist the respondent in "understanding the substantive grounds of appeal and the specific aspects of the award being challenged" (***Kwadrans v Kwadrans***, 2023 ABCA 203 at para 34) or to give "adequate notice of the issues" within the period to appeal or set aside an award (***Driscoll v Hautz***, 2018 ABQB 426 at paras 19-20, leave refused 2018 ABCA 272).

[28] These cases are consistent with the requirements of the Rules. An Originating Application commencing an appeal from an arbitration award must include a statement of the "Basis for the claim/reference/appeal/matter to be put before the Court" (Rule 3.2(2)(f) and Form 5). Requiring the parties to clearly specify the questions of law forming the basis of the challenge

2026 ABKB 558 (CanLII)

advances several of the foundational objectives under the *Alberta Rules of Court* namely to identify the real issues in dispute, facilitate the quickest means of resolving a claim at the least expense, encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable, and oblige the parties to communicate honestly, openly and in a timely way (Rule 1.2 (2)(a), (b), (c), (d)). The sooner the issues are on the table, the quicker the Court can schedule the appeal and the parties can try to resolve them.

2026 ABKB 558 (CanLII)

[29] In summary, Armstrong J characterized the grounds of appeal narrowly and limited them to the two specific errors particularized in the surviving grounds of appeal and prohibited additional grounds. Adding additional questions of law was contrary to Armstrong J's Order. There is no application before me to vary the Order and I see no principled reason to permit a departure from it without an application to vary.

[30] Further, I do not agree with the Appellant that the wording of the first ground of appeal is sufficiently wide to contemplate unspecified errors of law. The first ground plainly describes the error to be failure to deduct personal tax liabilities. Similarly, the second ground plainly asserts an error in awarding retroactive spousal support without considering the inter-relationship with property division. I do not accept that the mere citation of a case in the second ground of appeal opens up any alleged error in failing to apply any principle of law mentioned in the cited case.

[31] Although not cited by the parties, I am aware that a notice of appeal to the Court of Appeal under the *Alberta Rules of Court* does not require a party to state the grounds of appeal or constrain the arguments that may be addressed in their factum (***Easy Loan Corporation v Base Mortgage & Investments Ltd***, 2016 ABCA 163 at paras 37 – 41). There are two distinguishing features in the present case. First, the rules under consideration in that case are differently worded than those for Originating Applications which apply in arbitration appeals to this Court and specifically require the applicant state the "basis for the appeal". This requirement is essential to the commencement document for an arbitration appeal in light of the purposes expressed in ***Kwadrans*** and ***Driscoll***. Second, Armstrong J prohibited addition of new grounds without further Court permission, and as mentioned no such application is before me.

[32] I wish to note that if the Appellant had sought to vary Armstrong J's Order to permit him to add questions of law to his appeal, I would have been concerned whether doing so in the circumstances of this case would undermine the foundational principles of Part 1 of the *Alberta Rules of Court*. Arbitration is meant to be a speedy, cost effective and confidential process. Certainty, predictability and speedy resolution underlie the short, non-extendable appeal and set aside periods in s 46(1) of the *Arbitration Act*. Routinely allowing appellants to add significant new questions of law long after the appeal period expired and shortly before the appeal hearing would leave respondents unable to rely on the pleadings to understand the nature of the challenge to the arbitration award, thereby undermining predictability and certainty of arbitral awards, and would create the risk of a late adjournment of the appeal in some cases (though not the present case) thereby undermining speedy resolution.

[33] I note that the Respondent did not argue that no amendment adding questions of law could be made after the limitation period in which to commence an appeal under s 46(1) of the *Arbitration Act*. It is not necessary to further consider that issue.

[34] Consequently, I reject that the Appellant is entitled to pursue alleged errors of law beyond those specified in the Amended Originating Application. Nevertheless, as explained later

in these reasons, I have elected to provide rulings on the additional grounds of appeal in an effort to bring finality to this long standing, expensive, and hotly contested dispute.

[35] Turning to the matter of fresh evidence, arbitration appeals are limited to the record of the arbitration subject to limited exceptions. In this case, the Appellant filed evidence in support of his appeal, but did not apply to submit fresh evidence nor speak to any legally recognized exception. The evidence is largely irrelevant given Armstrong J struck out many of the Appellant's grounds of appeal from his Originating Application. I decline to consider such evidence.

2026 ABKB 558 (CanLII)

## III Standard of review

[36] Both parties agreed that the questions of law are reviewable on the correctness standard. This is consistent with recent case law (***Esfahani v Samimi***, 2022 ABKB 795 at para 85, leave to appeal refused 2023 ABCA 220) and is the standard I will apply.

## IV Errors of law

[37] The Appellant must demonstrate an error of law, such as the application of an incorrect standard, a failure to consider a required element of a legal test or a relevant factor, or similar error in principle (see, for example, ***Teal Cedar Products Ltd v British Columbia***, 2017 SCC 32 at para 44; ***Alberta (Workers' Compensation Board) v Appeals Commission***, 2005 ABCA 276 at para 29).

[38] Much of the Appellant's submissions centre on the Arbitrator's alleged numerous failures to consider relevant evidence or legal tests. If established, the errors amount to errors of law.

[39] The issue in this case is whether the Arbitrator committed such errors. The Appellant's approach to demonstrating such errors was formalistic and did not address the entirety of the Arbitrator's reasons or the record as a whole including the parties' submissions to the Arbitrator.

[40] In contrast, the Respondent provided the Court with substantial parts of the record of the arbitration including much of the testimony and the parties' written submissions following the evidentiary phase of the arbitration hearing and made her submissions in the context of the record.

[41] As an example, the Respondent submitted it can be inferred from the record that the Arbitrator considered the precedent established in ***Corbeil*** linking property judgments to spousal support, and that the mere fact the Arbitrator did not explicitly mention the decision[2] is not an error of law. The Respondent cited the Court of Appeal decision of ***Ekeberg v Swan***, 2022 ABCA 52 dismissing an appeal from a mobility decision where the presiding justice applied the best interests test in s 18 of the *Family Law Act*, SA 2003, c F-4.5 but did not cite the authoritative decision of ***Gordon v Goertz***, 1996 CanLII 191 (SCC), [1996] 2 SCR 27. The Court of Appeal stated *inter alia*:

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[2] Both sides incorrectly stated the Arbitrator did not mention ***Corbeil***. In fact, he did mention both the decision and the overarching principle to avoid double counting earlier in his reasons. I would not compartmentalize his reasons to suggest that in later discussing spousal support he overlooked the principles. I will return to this point later in these reasons.

> [20] The appellant impugns the reasoning of the chambers judge on the basis that the judge did not mention or quote from ***Gordon v Goertz***. In our view, the chambers judge gave sufficient regard to the factors in ***Gordon v Goertz,*** and thus did not misconstrue the legal test. Mere failure to mention the case by name is a complaint about sufficiency of reasons which is not a stand-alone basis for reversal. ...

[42] The fact the Arbitrator did not in some instances set out routine or well known legal principles in detail, cite specific case law or evidence, or set out his reasoning process in minute detail does not necessarily imply that he was ignorant of the legal principles, misconstrued them, overlooked them, or ignored or overlooked elements of applicable legal standards or relevant evidence in his application of such standards.

[43] It would be unreasonable in this case to infer such errors from the lack of detailed reasons alone because the Arbitrator is not necessarily required to provide them under s 38 of the *Arbitration Act*.

[44] It is therefore helpful, in assessing the Appellant's submissions, to briefly review the requirements for reasons which were authoritatively set out in ***R v R.E.M.***, 2008 SCC 51 among other cases. I agree with the summary of ***R.E.M.*** in the context of family arbitration appeals in ***Farmer v Farmer***, 2021 ONSC 5913:

> [111] Reasons serve three main functions: they communicate to the affected parties why the decision was made, they provide accountability, and they permit effective appellate review. They also focus the decision-maker, to help ensure fair and accurate decision-making. See ***R. v. R.E.M***., 2008 SCC 51 ¶ 11, 12; see also ***R. v. Sheppard***, 2002 SCC 26 ¶ 15, 24.
>
> [112] At ¶35, 43, 44 of ***R. v. R.E.M.***, the Supreme Court summarized three principles that guide appellate courts when considering what is required of a trier in terms of reasons. First, appellate courts should take a functional, substantive approach to the sufficiency of reasons. They are to read the reasons as a whole, in the context of the evidence and arguments at trial, and with an appreciation for the purposes or functions for which they are delivered.
>
> [113] Second, the basis for the decision must be "intelligible", meaning capable of being made out, and logically connected to its basis. The trier need not set out his or her process in arriving at the decision in detail, nor must he or she necessarily provide detailed recitations of the evidence or the law. Rather, the reasons must show, when read in context of the record and the submissions, that the trier has "seized the substance of the matter". The degree of detail in any particular case may vary with the circumstances.
>
> [114] Third, to determine whether the logical connection exists, the appellate court should look to the evidence, the submissions and the history of the trial to determine the "live issues" as they emerged during the trial.

[45] Similarly, in ***Custom Metal Installations*** the Alberta Court of Appeal stated:

> [32] Failing to provide reasons that are sufficiently intelligible to permit appellate review is an error of law. Assessing adequacy of reasons is a contextual inquiry having regard to the particular circumstances of the case: whether the

2026 ABKB 558 (CanLII)

> basis of the trial judge's conclusions is apparent from the balance of the record even without articulation, whether the trial judge was called on to address troublesome principles of law, unsettled, confused or contradictory evidence on a key issue, and the time constraints and general press of business in the courts: ***R v Sheppard***, 2002 SCC 26, paras 28-29, 50, 55, [2002] 1 SCR 869; ***R v Walker***, 2008 SCC 34, paras 19-20, [2008] 2 SCR 245; ***R v Lim***, 2019 ABCA 473, para 22.

See also ***Clark v Unterschultz***, 2020 ABQB 338 at paras 99 - 106 and ***Bain v Lazarz***, 2025 ABKB 424 at paras 11 - 14, cited by the Appellant, where such principles were applied in the context of arbitration awards.

[46] As with Courts there are sometimes constraints in which arbitrators operate. In ***Sound Contracting Ltd v Campbell River (City)***, 2024 BCSC 933 the court observed:

> [48] Natural justice requires that an adjudicator give sufficient reasons so that the losing party knows why it lost and so an appellate or reviewing court can meaningfully conduct its review. But arbitration is a private form of dispute resolution. A key benefit to the parties is that it may provide a faster resolution for their disputes than would a court hearing. It is thus extremely important that the courts not impose unrealistic demands for legal analysis that may go beyond what private parties actually want and could undermine this decisive benefit of arbitration.

[47] A failure to deal with live issues might indicate that the decision maker erred in their analysis. A useful analogy can be drawn to judicial review cases. In those cases, "... courts cannot expect administrative decision makers to 'respond to every argument or line of possible analysis' ... or to 'make an explicit finding on each constituent element, however subordinate, leading to its final conclusion'...", because imposing such expectations "would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice" (***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 128). However, "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (***Vavilov*** at para 128). Similar considerations apply in arbitration appeals.

[48] In the case under appeal, the Arbitrator recognized acceptable practical constraints on expressing his reasons:

> 5. I am mindful in drafting this award that the parties' financial resources are limited and that, unlike a court order with reasons, an arbitration award does generally not function as a future precedent. With that in mind, I will not address every fact in evidence, nor every argument advanced.
>
> (Award, at para 5).

[49] Although the Appellant does not assert sufficiency of reasons as a ground of appeal except in relation to alleged departure from the default valuation date, a Court should be mindful of these principles and the Arbitrator's recognition of the financial limitations of the parties before him in assessing whether the Arbitrator actually overlooked or misconstrued the law, failed to consider or apply the law, or failed to consider the evidence before him. I therefore have

2026 ABKB 558 (CanLII)

considered the Appellant's submissions in the context of the entirety of the reasons expressed in the Award, the live issues raised by the parties during the arbitration, and the evidence and party submissions in the arbitration.

## V Ground of Appeal 1: The Arbitrator erred in law with respect to property division because he failed to include contingent personal tax liabilities that are attached to each party's assets

[50] The parties' most significant assets were their holdings of their respective private companies or business assets.

[51] The Appellant was a financial planner who owned and operated a financial planning business through his private company[3]. He personally owned an investment book of business and an insurance book of business. He also had contracted to acquire a book of business from a third party (the "**third party book**") and was in the process of doing so.

[52] The Respondent owned and operated a private company providing service in home renovations and interior design[4]. During its business operations, the company had constructed and owned a spec home (ie, a home constructed for resale without having first secured a buyer) which it intended to sell and use the capital to grow its business. As the Arbitrator found, the plan was thwarted when the Appellant placed a certificate of lis pendens on the home preventing its sale.

[53] The *Matrimonial Property Act* (as it read immediately before January 1, 2020), RSA 2000, c M-8 ("***MPA***") applied to the parties' family property dispute pursuant to the transitional provisions of the *Family Property Act*, RSA 2000, c F-4.7 ("***FPA***"), s 39. Case law interpreted the *MPA* to require that the valuation date be the date of trial. (Amendments to the *FPA* in 2022 mandated the same). The parties are entitled to agree to depart from the default valuation date.

[54] The Arbitrator described the practical difficulties of attempting to value business assets requiring complex expert evidence at the date of hearing (Award, at para 16) and recognized that during the arbitration process the parties agreed that they would use a retrospective value for their corporate and business assets, being December 31, 2021 (Award, at para 17).

[55] At the arbitration, each side presented expert evidence from a qualified business valuator to characterize and value the corporate and business holdings as at December 31, 2021. The parties' respective valuation experts conflicted in their methods of valuation and conclusions. The Arbitrator preferred the evidence of the Respondent's expert generally.

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[3] The Appellant claimed the ownership of this company was split between the Appellant, Respondent and a child. The Arbitrator rejected this assertion (Award, at para 25).

[4] The Respondent's son held a documented 1/3 interest in her company, which the Arbitrator recognized (Award, at paras 37, 79) and accounted for (Award, Schedule A). For simplicity of reference, I refer to the company as the Respondent's company. The Respondent owned two additional companies which have no bearing on the appeal. One did not commence operations and was defunct before the valuation date and was not a serious issue in the arbitration (Award, at paras 55 - 56). The other was not included in the property division because it either had no value after the Appellant solicited its clients to his portfolio or was exempt (Award, at paras 48, 49 and 54).

2026 ABKB 558 (CanLII)

[56] The nature and value (if any) of the of the Appellant’s rights to the third party book of business was a major issue in the arbitration. The Respondent’s expert concluded that the third party book could be treated either as income or an asset in the hands of the Appellant and provided a tentative value based on the limited information available if treated as an asset. The Appellant’s expert concluded that the arrangement between the Appellant and the third party by which the Appellant was acquiring the third party book of business had no net value (it had value but was offset by debt) and generated no income. The Arbitrator rejected the Appellant’s expert opinion on the basis he could not follow it and decided to treat the arrangement as income for support purposes.

[57] A further issue was whether to value some of the Appellant’s books of business in his company rather than in his hands. This in turn impacted the valuation of his equity interest in his private company.

[58] The contested issues pertaining to the Respondent’s company were mainly whether her business had commercial goodwill that should be valued as opposed to personal goodwill associated with Ms Marwood, and whether the spec home should be valued at the agreed valuation date or “cherry picked” (Award, at paras 20, 41) from among the company’s assets and valued at the date of the hearing only because it had increased in value after the agreed valuation date.

[59] The Arbitrator held the parties to their agreement on valuation date. The spec home was a corporate asset (Award, at para 22). It had increased in value after the agreed date and before the hearing (Award, at para 19). The Arbitrator further noted that the Appellant’s business assets had probably also increased in value over the same period (Award, at paras 20, 41, 123), illustrating the danger of focussing only on the spec home and ignoring its place as a corporate asset in applying the parties’ agreement.

[60] The Arbitrator preferred the evidence of the Respondent’s expert that the goodwill was personal to Ms Marwood and therefore excluded from valuation of her company’s goodwill.

[61] The Arbitrator assembled a schedule of assets, exemptions, and debts to reflect his decisions to exclude various assets and debts from divisible property. This became Schedule A to the Award, cited by the Appellant in the first ground of appeal. Each party would retain their assets. The Arbitrator totalled the fair market value of sharable non-retirement assets for each party and equalized the difference between them. He awarded the Respondent a substantial monetary award representing half the difference in fair market value between their sharable non-retirement assets.

[62] The Arbitrator equalized the parties’ retirement assets (RRSPs), finding a small difference in favour of the Respondent and awarded the Appellant an equalization payment of half the difference. This payment was directed at para 99 of the Award to be made by rollover (ie, no tax consequence) therefore the pre-tax retirement assets of each party were equalized and no tax discount was required.

[63] In division of property, the statute requires that the Court consider “a tax liability that may be incurred by a spouse or adult interdependent partner as a result of the transfer or sale of property” (*MPA*, s 8(k), now *FPA*, s 8(k)). The Appellant submits the Arbitrator failed to consider this requirement.

2026 ABKB 558 (CanLII)

[64] It is clear from the Arbitrator's reasons that he made findings of the fair market value of the parties' respective financial assets at the agreed valuation date but did not apply any discount for the eventual disposition of assets in the hands of the spouses at some time after the issuance of the Award.

[65] Each party's valuator considered tax consequences in valuing the parties' respective equity interests in their companies. The Appellant submitted this placed the issue of tax discounts on assets in the hands of the spouses in issue in the arbitration, which the Arbitrator overlooked.

[66] I do not agree.

[67] Section 8(k) is part of the statutory scheme of achieving the just and equitable division of assets between spouses required pursuant to s 7 of the *MPA* (now *FPA*). A just and equitable distribution is not solely based on fair market values. However, the application of the factors of s 8 is dependent on the circumstances of the case and the Court must review the record to ascertain whether such a tax discount was a live issue in the arbitration or whether there is any indication that the Arbitrator overlooked a relevant element of the analysis under sections 7 and 8 of the *MPA*.

[68] The limited tax consequences addressed in the evidence at the arbitration are best illustrated in respect of the experts' respective approaches to the spec home.

[69] The spec home was built for resale. The Appellant thwarted resale by placing a certificate of lis pendens on title and eventually the Respondent moved into the house with the children and paid rent.

[70] The Respondent's expert anticipated the house would be sold upon resolution of the family property claims and therefore deducted expected liquidation costs for this property including taxes that the Respondent's company would be obliged to pay upon disposing of the house (Respondent's expert rebuttal report, September 28, 2023, para 7.20 and Schedule 4, Note 2). Doing so was necessary to value the company on the asset value approach which she employed.

[71] The Respondent's expert testified to the distinction between the tax consequence to the company of disposing of the spec home and any tax associated with getting the net sale proceeds out of the company and into the hands of its shareholder.

[72] The Appellant's expert similarly considered tax consequences associated with disposing of the spec home, though in a different way. She employed primary, secondary and tertiary valuation methods for the Respondent's company, and considered in those approaches a "tax shield" or "tax assets" in coming to a fair market value of the company's shares. These tax factors were potential tax deferrals or savings that a hypothetical purchaser and vendor would consider in deciding the price for an equity interest in a business, all as detailed in her primary valuation report (Appellant's expert valuation and rebuttal report, August 21, 2023 at pp 94 - 95).

[73] The Appellant's expert similarly considered the value of such tax assets in her valuation of the Appellant's business assets (which she valued in his company), though the quantum was either zero or very small.

[74] The arbitration record provided to the Court includes the extensive and voluminous expert reports of the business valuators, the testimony of both experts, the parties' affidavits and

2026 ABKB 558 (CanLII)

testimony, and the voluminous final submissions. I have read all these records. None of these materials addressed any discount under s 8(k) for the non-retirement assets in the hands of the spouses.

[75] This includes the expert reports. Both experts provided opinions of fair market value of the corporate and business assets. As mentioned, both valuators recognized some aspect of inherent tax consequences that would be considered in the purchase and sale of a corporate equity interest. However, neither expert attempted a tax discount recognizing the tax that either spouse would pay in the event they disposed of their respective business or corporate interests.

[76] Neither party's written arguments asked the Arbitrator for any tax discount under s 8(k). To the contrary, both parties asked the Arbitrator to divide the properties based on their fair market values and accept their expert's fair market value opinions (for example, Appellant's submissions dated December 14, 2023, pp 23 - 24 and attached letter from the Appellant's expert at pp 306 - 310 thereof). The Appellant's submissions to the Arbitrator focussed on numerous valuation differences between the experts such as approach to fair market valuation and valuation of goodwill, but did not mention any discount recognizing potential tax consequences under s 8(k).

[77] On the record of this case, the basis of the Arbitrator's decision is apparent from the record of the arbitration and I am satisfied that the Arbitrator did not overlook, misconstrue or misapply the components of s 8 of the *MPA* in making his decisions.

[78] Rather, the Arbitrator adjudicated the live issues between the parties. This was a lengthy arbitration with voluminous expert evidence, expert testimony, submissions, and rebuttal submissions. Each was represented by counsel during the hearing. The Arbitrator was not under an obligation to ask the parties in this case whether they would like to reopen the hearing and address a tax discount under s 8(k) in coming to a just and equitable distribution under s 7 of the *MPA*.

[79] The parties on appeal cited three decisions of the Court of Appeal on the consequences of failing to take s 8(k) into account. The most recent two of these decisions support my conclusion that the Arbitrator's decision should not be overturned given the context of the record and the live issues in the arbitration.

[80] In ***Nykolyshyn v Dalton***, 2023 ABCA 297, the Appellant asserted before the trial judge that that a tax discount should be applied to the value of his book of business as a financial planner because the sale of the book of business is a disposition for tax purposes. The trial judge declined to reduce the value for any future tax consequences, noting the absence of expert evidence on this issue, lack of evidence as to a likely date of disposition, and the resulting inability to calculate the contingent tax liability with some degree of precision.

[81] The Court of Appeal agreed that the evidence was insufficient to determine with any precision the amount of the taxable capital gain, the Appellant's likely marginal tax rate at disposition, and the resulting present day tax deduction. It continued:

> [21] It was nevertheless unreasonable to conclude on the evidence and in the particular circumstances of this case that the likely eventual disposition of the book of business will not attract any tax liability whatsoever. Notwithstanding the lack of expert evidence on this issue, we agree that the trial judge erred in failing to apply a tax discount at least on a conservative estimate. [The Appellant] has

2026 ABKB 558 (CanLII)

> pointed to the fact that the trial judge allowed a 25% deduction for taxes on RRSPs. Given the limited evidence before us, we adopt the same percentage deduction in respect of the book of business value.

[82] In the later decision of ***O'Kane v Lillqvist-O'Kane***, 2024 ABCA 32, the cross-Appellant asked the trial judge to account for tax liabilities on RRSPs withdrawn to pay legal fees, but the trial judge declined to do so because "Evidence concerning the withdrawals and the tax actually paid are necessary to decide the issue and none of that is before the Court".

[83] The Court of Appeal agreed with the trial judge, stating that it was ultimately up to the cross-Appellant to ensure the evidentiary record adequately addressed the issue for the trial judge's consideration and the trial judge cannot be faulted for refusing to take judicial notice of the cross-Appellant's personal tax rate.

[84] Later, in ***McBride v Bacovsky***, 2024 ABCA 61, the trial judge refused to adjust for tax consequences of a disposition when the issue was raised for the first time during final argument in a property division trial.

[85] The Court of Appeal observed that in complex corporate structures, the tax consequences triggered by a disposition are properly the subject of expert evidence. There was no expert evidence. The Court continued:

> [81] The issue of tax implications in this context was not a matter of "common sense" or one suitable for judicial notice. There was no error in the trial judge refusing to consider this issue, given the lack of evidence: *Jans Estate v Jans*, 2020 SKCA 61 at para 109. A trial is an adversarial process. To allow Mr Bacovsky to re-open the trial to lead evidence on the tax implications of the award would be unfair to Ms McBride.

[86] In the ***Jans*** case cited by the Court in the above passage, the Saskatchewan Court of Appeal found that a trial judge did not err in refusing a discount for tax in a complicated matter where there was no evidence:

> [109] The appellants also assert the trial judge erred in his valuation of the assets by failing to take tax consequences into account. They argue any distribution should be an after-tax amount. The trial judge did not err in this regard. There was no evidence tendered by the appellants with regard to tax consequences. <u>Absent such evidence, in a complicated matter such as the one at hand, there was no basis upon which to discount the claim for potential taxes</u> ....
>
> [Underlining added by Eamon J].

[87] As to the proper approach, the Court continued in ***McBride***:

> [82] The issue of tax consequences in matrimonial property cases has come before this Court in recent appeals: see *Nykolyshyn v Dalton*, 2023 ABCA 297 at paras 17-23; *O'Kane v Lillqvist-O'Kane*, 2024 ABCA 32 at paras 13-17. We remind counsel that several options are available to ensure this matter is properly addressed at trial:
>
> 1. Counsel can reach an agreement on the amount of tax to be deducted either as a percentage of the award or as a specified sum, with or without the assistance of an expert;

2026 ABKB 558 (CanLII)

2. Counsel can call expert evidence at trial; and

3. By agreement, counsel can expressly reserve the issue of tax implications, to be determined following judgment. Following judgment, counsel are obliged to use best efforts to then reach an agreement, returning to the trial judge in rare and complex cases.

[88] Returning to the specifics of the case before it in ***McBride***, the Court concluded:

> [83] In conclusion, the existing evidentiary record does not permit an accurate calculation of the tax liability Mr Bacovsky will incur from any deemed disposition necessary to satisfy the award, and it would be unfair to Ms McBride to allow further argument and evidence on this point. Moreover, had the tax implications been properly placed in evidence for the trial judge's consideration, the trial judge may have been persuaded to revisit the percentage of wealth to which Ms McBride was entitled. Parties need certainty and finality. The suggested "mini-hearing" could result in a completely new trial and an unjustified use of judicial resources.

[89] Each case turns on its own facts and ***Nykolyshyn*** is not authority for applying a 25% notional or default rate in any case where there is no evidence. If it were, the Court of Appeal would have done the same in ***O'Kane*** and ***McBride***.

[90] The tax consequences of disposition of the corporate and business interests in the present case were not matters for judicial notice. To assess a discount for a contingent tax liability on assets in the parties' hands as the Appellant suggests, one would need to consider assumptions of time horizons for dispositions, transaction structures for realization of the value of the shares of the private companies particularly for the Respondent and for books of business personally held by the Appellant, and tax treatment of the future dispositions particularly for the books of business personally held by the Appellant. The reasons in ***J.E.S. v J.G.B.***, 2018 SKQB 17 (cited by the Appellant in another context) amply illustrate the complexity of analysing tax consequences of divestment of an investment advisor's book of business, and the Court observed at para 104: "If the evidence cannot move the debate beyond a sale in the abstract, and beyond a bare outline or a partial framework, then speculation about tax consequences is largely futile". In the present case the parties could have entered into this complex analysis, but neither did so.

[91] The outcome of this case is governed by ***McBride***. These were complicated tax issues unaddressed in the evidence and by the parties. The lack of a tax discount was not an error in these circumstances.

[92] Further, unlike the cases cited where the issue was raised before the trial court, the Appellant is raising it for the first time in the present appeal. If the Appellant had raised the issue in a timely way at the arbitration Ms Marwood would have had an opportunity to respond with evidence. As it stands now, the record is not adequate to redo the property equalization on appeal by applying s 8(k). Moreover, attempting to do so, or applying a notional discount as the Appellant suggests in lieu of a reasoned determination on expert evidence, would deprive Ms Marwood of the Arbitrator's experience and the benefits of the streamlined, less formal, and confidential process which she had agreed to.

[93] Remitting the matter to the Arbitrator (who confirmed he is available to resume his role if the Court remitted to him) would also be unfair. It would cause the parties to incur further cost

2026 ABKB 558 (CanLII)

and delay, including hiring experts to ascertain what information is required, dealing with the difficult task of extracting information from the Appellant given his historical reluctance to disclose financial information in the arbitration (Award, at paras 17, 65, 112, 117, 154, 180), and hiring experts to address tax consequences. As in the ***McBride*** case, such outcome would be unfair. As stated in ***McBride***, parties need certainty and finality. The same is true for arbitral proceedings.

[94] I pause to note that counsel for the Appellant submitted alternatively that if the Court was not prepared to apply a notional 25% discount, the matter should not return to arbitration at all. He submitted I should refer the matter to the Court's Family Focussed Protocol because the Arbitrator terminated his mandate. During this appeal, the Arbitrator has confirmed he is available if the Court finds an error of law in the Award. I would not remit to the Court's Family Focussed Protocol. First, it would not be necessary because there is no basis to disqualify the Arbitrator and refer the question to a different decision maker (see Part VII(e) *infra*). Second, it would deprive the Respondent of the benefits of arbitration when the Appellant and his then-counsel (not Mr Tarrabain) had the opportunity to raise the issue of a discount and did not do so.

2026 ABKB 558 (CanLII)

[95] The first ground of appeal alleges failure to consider contingent personal tax liabilities. In his written brief, the Appellant asserts two variants of this ground. First, the Appellant submits that business tax liabilities were not considered. To the extent the businesses were in the Appellant's hands rather than his company then s 8(k) of the *MPA* could theoretically apply had it been in issue, but for the same reasons expressed above there is no merit to this variant of the first ground of appeal. Second, to the extent the Appellant is suggesting the Respondent's expert misconstrued tax considerations in her business valuations, that is not a question of law but rather a question of the Arbitrator's assessing and weighing of evidence of fair market value, which is based on a hypothetical vendor and purchaser. Any extricable question of the application of income tax laws was not raised with the Arbitrator or in the parties' submissions to the Arbitrator. I would not give effect to the Appellant's allegations of error on this further variant of the first ground of appeal.

[96] In conclusion, the Arbitrator did not err in law by declining to consider a complex matter that neither side asked him to consider. This ground of appeal is dismissed.

## VI Ground of Appeal 2: The Arbitrator erred "in failing to consider the Alberta Court of Appeal's decision in *Corbeil*, in deciding to award retroactive spousal support, and should have been considered in the property decision"

[97] This ground of appeal contemplates the need to avoid double counting when dividing family property and making a retroactive spousal support award as discussed in the well known ***Corbeil*** case and many others. Where both matters are before the Court, it is usual to address property division first followed by spousal support. The family property division is relevant to spousal support issues such as the claimant's need. If an award of spousal support is made, the property division must be again considered and, if necessary, adjusted to ensure there is no double counting unless permissible in limited circumstances such as those described in ***Boston v Boston***, 2001 SCC 43 at para 65 and ***Bone v Bone***, 2020 ABCA 323 at para 31.

[98] The Appellant submits that the Arbitrator awarded significant amounts of retroactive support without analysing its impact on property distribution. He did not consider whether the amounts if they had been paid when due would have reduced the property pool, whether the

Respondent's receipt of significant property already compensated the alleged disadvantage for which spousal support was ordered, or whether the award resulted in double recovery.

[99] The Respondent submits that the Arbitrator did consider the interconnection between property and support. The Arbitrator considered the amount of property equalization the Respondent would receive in assessing spousal support. The Respondent further submits that the Appellant did not make arguments to the Arbitrator of how the award would have affected the assets in the property pool.

[100] Before considering the alleged errors, I will set out the background to the spousal support and property division findings.

[101] Both parties asserted claims to retroactive and ongoing spousal support.

[102] The Arbitrator recognized that spousal support may be granted on a need or compensatory basis (the third potential ground of entitlement, the contractual basis, was not in issue). He observed that on the facts of the case, spousal support beyond "something transitional and need based would be unusual absent a clear compensatory component" (Award, at para 163).

[103] The Arbitrator found that the Appellant had not made out a case on the evidence for entitlement and the Respondent did make out entitlement, primarily on a need basis (Award, at paras 166 - 167). The need was found to arise from the Respondent's full time parenting after separation, especially given her lower income. The Arbitrator found as facts that the Respondent could not meet her own reasonable needs and those of her family and that the Appellant had the means to pay (Award, at paras 168 - 170).

[104] The Arbitrator considered counsel's submissions in determining quantum, including SSAG calculations. He correctly recognized he was not bound by the SSAG. He found that support on the low end of the SSAG was appropriate for the retroactive period from January 1, 2020 to December 31, 2023. The low end recognized the lack of a strong compensatory claim, the Respondent's relatively high income, and the unusual feature of a significant amount of the Appellant's income being unavailable to him as cash during the retroactive period (while the Appellant operated under the arrangement to acquire the third party book of business) (Award, at para 171).

[105] The Arbitrator applied a tax discount to the monthly retroactive payments suggested by the low end of the SSAG and fixed a lump sum, because he was unsure whether CRA would allow the usual tax consequences to gross spousal support owed retroactively over several years (Award, at para 173).

[106] The Arbitrator recognized that awarding forward or future spousal support was more speculative and difficult. He recognized that s 15.2 of the *Divorce Act* governs spousal support liability and payments and identified the existence of factors and objectives of spousal support in the following passage of the Award:

> 176. ... The guidance specifically provided by the Divorce Act with respect to spousal support liability and payments is found in section 15.2. The objectives of spousal support allow for a broad consideration of factors and objectives, such as the financial consequences of care of children, economic advantages and disadvantages arising from the marriage or its breakdown, and the promotion of economic self-sufficiency. The application of all these factors and objectives will vary greatly from one couple to the next, defying any attempt to determine

2026 ABKB 558 (CanLII)

> monthly amounts mathematically form income alone. A slavish adherence to a pure income-based formula would, in my view, mark a departure from the plain wording of the statute and would, therefore, be an error.
>
> (Underlining in original).

[107] The Arbitrator said he considered the monthly range of support under the SSAG, as well as the parties' incomes, duration of the marriage, financial impact of post-separation parenting on the Respondent, the relatively high monthly child support she should have been receiving, and the economic consequences from the breakdown of the marriage (Award, at para 177). The Arbitrator awarded an additional lump sum for future support, on the assumption the Appellant's income would be relatively stable over the next two or three years and the Respondent's income would not decline significantly but may increase (Award, at para 177).

[108] The Arbitrator stated this total lump sum award implied a duration of about 5 years for spousal support from the date of separation (Award, at para 177). The Arbitrator noted (Award, at para 178) that the lump sum might be too low in a case where there was a strong compensatory claim or the Respondent's ongoing need was clearer. However, the Respondent would "shortly be entitled to some large amounts of property and support payments from [the Appellant] from which to ramp up her business and future income". The ongoing child support though far from determinative, was another factor going to the Respondent's ongoing need for spousal support (Award, at para 178).

[109] The Arbitrator awarded both retroactive and future spousal support in the form of a lump sum (Award, at para 179) and further explained his choice to award lump sums as follows:

> 180. A fixed and final lump sum amount in lieu of open-ended future monthly support is justified in this case for several reasons identified earlier, but is especially appropriate in circumstances in which the cost of calculating future annual incomes is so great due to both the inherent complexities of the party's businesses, and, as importantly, the demonstrated unwillingness of [the Appellant] to facilitate financial disclosure.

[110] I am not persuaded that the Arbitrator ignored the impact of property equalization or the prospect of double counting in the retroactive spousal support award.

[111] The Arbitrator considered the bases for entitlement to spousal support and found that the Respondent had a strong claim to need based spousal support following separation, primarily given her "unusually great parenting obligation" following separation and its negative impact on her income (Award, at paras 168 – 169).

[112] Elsewhere the Arbitrator had noted that the Respondent's income was negatively impacted after separation partly because the Appellant had placed a certificate of lis pendens on her company's first spec home project, precluding the company from disposing of the home and replenishing working capital to grow the business (Award, at paras 128 - 134). He recognized that upon finalization of support and property division the Appellant would owe her a substantial sum that would address her working capital needs in her business (Award, at paras 133 - 135). Later, he considered the property division in concluding that a relatively small amount of future support was warranted in addition to retroactive support (Award, at para 178).

[113] When read as a whole, the Award reflects the Arbitrator's chain of reasoning that the Respondent was in need of assistance arising from the consequences of the marital breakdown

2026 ABKB 558 (CanLII)

and the substantially increased parenting obligations on the Respondent, the Appellant was able to pay, the retroactive award would partially but not fully address the disadvantages upon the Respondent arising from the marital breakdown, and that having taken into account the property division the Respondent remained entitled to a small future looking award on the needs test. I note this would in turn promote economic self-sufficiency when considered with the other awards. The Arbitrator explicitly recognized the existence of the factors and objectives concerning spousal support in s 15.2 of the *Divorce Act* at para 176 of the Award and his findings are consistent with them, so the record does not suggest the Arbitrator overlooked them. Moreover, the Arbitrator stated he considered the wide range of factual circumstances expressed in para 177 of his Award and the Appellant has not demonstrated that the Arbitrator failed to do what he said he did do.

[114] Therefore, I reject the Appellant's submission that the Arbitrator failed to consider the property division in assessing the Respondent's disadvantages underlying her need for support.

[115] Did the Arbitrator overlook the impact of the retroactive support award on property division?

[116] In deciding spousal support, a Court or arbitrator must consider the impact of a retroactive spousal support order on the property division, because a payment of lump sum retroactive support impacts the property that would or should have been available for division (***Corbeil*** at para 60). It is clear from ***Corbeil*** that generally the Court or an arbitrator in determining property division and spousal support must be alert to double counting.

[117] The Appellant submits that the Arbitrator erred in failing to recognize the following principles in ***Corbeil***:

> [60] Moreover, retroactive spousal support orders made after or contemporaneously with an order dividing matrimonial property can be problematic. It is very important for a court to consider the impact of a retroactive spousal support order on the property division. That is because a payment of lump sum retroactive support impacts the property that would or should have been available for division.
>
> [61] For example, suppose an order for retroactive support of $30,000 was made and paid prior to trial. The payor spouse would obviously have not been able to save that money and he would have $30,000 less property in his or her hands to divide as at the date of trial. Thus, the total property for division would be reduced by $30,000, meaning that each party would receive $15,000 less assuming an equal division. Complicating the matter further, the payee may have been able to save $30,000 which would be available to divide. In such a case, the total property would be the same, and each party would end up with equal amounts. The net effect of the maintenance order would be zero. The total assets would be the same, the maintenance would be paid and each party would share equally in the remaining assets. The parties would end up in exactly the same position as they did here but the maintenance would have been paid.
>
> [62] Since that would be the result if the payment were made the day before the property division, the result should not change simply because the order is made at the same time as the division. In other words, any obligation for

2026 ABKB 558 (CanLII)

> retroactive support would be an obligation of the husband and an asset of the wife that should be included in the calculation of property and its division.
>
> [63] In simple terms, had the payor been ordered to pay and had paid support prior to trial, he would not have been able to save that money so it would not be available for distribution at trial. Thus, if there is to be a retroactive order, the payor's assets must be reduced by the amount of that order.

2026 ABKB 558 (CanLII)

[118] The Appellant did not demonstrate what double counting may have resulted from the Arbitrator's alleged failure to recognize the ***Corbeil*** or double counting issues generally. He simply says the Arbitrator did not address potential double counting and therefore he committed an error of law.

[119] In view of the considerations set out in Part IV *supra*, it is not sufficient for the Appellant to assert that the Arbitrator overlooked potential double counting between divisible assets and spousal support merely because he did not explicitly cite ***Corbeil*** at paras 60 – 63 or discuss this specific point.

[120] The Appellant has not explained the factual, evidentiary or other circumstances that should cause me to conclude, having regard to the Arbitrator's reasons and the record of evidence and submissions in the arbitration, that the Arbitrator overlooked double counting. To the contrary, in reading the Award as a whole and the record, I am confident the Arbitrator was alive to double counting issues. I am satisfied that he did not explicitly address the question whether to deduct the retroactive spousal support from the Appellant's divisible property or to add it to the Respondent's divisible property because there was no serious risk of double counting and it was not a live issue between the parties, and not because he overlooked or refused to consider the issue.

[121] My conclusion is based on the following considerations.

[122] First, the Arbitrator's lengthy reasons evince a thorough knowledge of the laws governing property division, guideline income determination, child support, and spousal support.

[123] It is crystal clear from the Arbitrator's Award that he was aware of the dangers of double counting or double dipping and the legal principles on the subject (Award, at paras 15, 60, 61, 118, 126). As to the principles in ***Corbeil***, the Arbitrator stated at para 60 of the Award:

> 60. The bank account balances provided by the parties were from several years after they separated. They appeared to be mostly "operating accounts". The danger of treating funds in bank accounts years after separation as "property" is that they often are a simple reflection of income deposited before it was spent. If those same funds are income for support purposes (shared through child and spousal support) then counting them as property as well results in double counting which was considered undesirable by the Alberta Court of Appeal in at least these two cases. Corbeil v Corbeil (2001) ABCA 220 and Corrigan v Ewal (2017) ABQB 179, not to mention the Supreme Court of Canada in Boston v Boston.
>
> (Underlining in original).

[124] Contrary to both sides' submissions on the appeal, the Arbitrator cited ***Corbeil*** in the quoted passage. Also appearing in the quoted passage is the leading case of ***Boston*** which deals

with double counting of a pension asset both in the property determination and as a source of income in spousal support.

[125] The Arbitrator could not possibly have been unaware of ***Corbeil***'s requirements. He cited the general principle throughout his award. He excluded bank account balances from the parties' divisible property to avoid double counting (Award, at para 61). He excluded both parties' consumer debt accumulated after separation, citing case law to the effect that consumer debt accumulated after separation should be excluded from property division calculations absent exceptional circumstances (Award, at para 62). He recognized links between property division and spousal support and the need to avoid double counting and double dipping when assessing these awards (Award, at para 15) and in assessing guideline income (Award, at paras 118, 126). He cited ***Corbeil*** and ***Boston***, both commonly cited cases addressing double counting issues pertaining to property division and spousal support.

[126] It is implausible that this Arbitrator, citing case law and showing sensitivity to the nature of assets and income and how they should be accounted for, would then overlook and fail to apply the principles pertaining to double counting between divisible assets and retroactive spousal support later in his reasons. I refuse to compartmentalize his reasons and thereby assume he somehow overlooked double counting issues when addressing spousal support.

[127] Second, the spousal support award was retroactive and unpaid. None of it could have grown the Respondent's assets because she did not receive it. The lack of support may have driven up her post-separation debt, but the Arbitrator did not include that debt in his property division. There was no basis to account for possible recoupment of the debt in searching for double counting.

[128] Third, the Appellant's remaining non-retirement divisible property (after removing bank accounts and post-separation debt) consisted of illiquid assets – his insurance and investment books of business and vehicles. To find potential double counting, one must look to the evidence of the nature of those assets and any additions thereto or withdrawals therefrom.

[129] In looking to those divisible assets, the vast majority on the Appellant's side consisted of the books of business for the insurance products and the investment products whose value depended (according to the expert evidence accepted by the Arbitrator) on a revenue multiple. The parties chose to value all the business assets at December 31, 2021. If the property division were made at December 31, 2021 perhaps one might be concerned for double counting if awarding spousal support on all of the Appellant's income because some of his income was derived from the Appellant's businesses for the period after December 31, 2021[5]. However, the valuation date was chosen for convenience only to permit the parties to obtain the necessary expert reports for the arbitration hearing. The property division was effective in early 2024. There could not be any double counting on the retroactive spousal support award which covered the period to December 31, 2023. I see no reasonable prospect of the necessity to make a deduction from the income generated by his books of business on the basis the Appellant was ordered to pay retroactive spousal support in the same Arbitration Award.

[130] The rest of the Appellant's non-retirement assets were vehicles. The Arbitrator excluded from divisible assets both parties' motor vehicles known or alleged to have been acquired after

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[5] However, double counting principles probably apply differently to a book of business of an investment advisor as opposed to a pension, as discussed at para 163 *infra*.

2026 ABKB 558 (CanLII)

separation and assigned a value of $50,000 to the Appellant's two vehicles which he owned before separation and sold after separation (Award, at para 96). I see no reasonable prospect of a deduction from the value of these assets on the basis the Appellant was ordered to pay spousal support in the same Arbitration Award. These assets were either acquired before separation or were not included in divisible assets.

[131] Fourth, there was no evidence the Appellant increased savings in his retirement property (RRSP accounts) during the period when he ought to have been paying spousal support. To the contrary, he withdrew amounts to pay expenses and failed to provide a complete set of his RRSP statements in the arbitration (Award, at paras 64 - 65). I see no reasonable prospect of the necessity to make a deduction from the value of these assets on the basis the Appellant was ordered to pay spousal support in the same Arbitration Award.

[132] Fifth, the Appellant's lawyer in the arbitration (who is not the Appellant's lawyer on this appeal) did not ask the Arbitrator for any adjustment for alleged double counting arising from the imposition of the retroactive spousal support award or any spousal support award. This is apparent from the Appellant's voluminous closing submissions, both primary and rebuttal.

[133] Sixth, the Respondent also sought retroactive and future spousal support and had significant equity interests valued in the property division, also using a valuation date of December 31, 2021. Yet, like the Appellant, her counsel did not ask for any credits or other consideration of potential double counting.

[134] In summary, it is not reasonable to imply, and the record does not support, that the Arbitrator overlooked potential links between the retroactive spousal support award and property division. I reject as implausible the suggestions that the Arbitrator was unfamiliar with the principles in ***Corbeil***, that he was not aware of potential intersection of spousal support and property division or potential double counting, or that he simply failed or refused to consider the principles on the evidence and submissions of this case.

[135] Similar to the first ground of appeal, the absence of an adjustment arising from retroactive spousal support is not necessarily an error when none was asked for or apparent from the evidence or the parties' submissions. Allowing the Appellant to raise the issue for the first time on appeal would be grossly unfair to the Respondent by depriving her of certainty and finality and imposing additional costs on her to redo pieces of the arbitration when the Appellant and his arbitration lawyer already had the opportunity to raise the matter with the Arbitrator.

[136] The Arbitrator did not err in law as alleged and this ground of appeal is dismissed.

## VII The merits of the other asserted grounds of appeal

[137] The foregoing deals with the two grounds of appeal before the Court. The Respondent alternatively addressed the merit of the other grounds asserted by the Appellant in his written brief. In the interests of finality to this long running, hotly contested and expensive family property and support dispute, I will address them.

### (a) Erred in selecting valuation date for spec home

[138] The valuation date of the spec home is one of the alleged errors in the Appellant's appeal submissions but not included in his Amended Originating Notice.

2026 ABKB 558 (CanLII)

[139] The facts and circumstances pertaining to this ground are reviewed in relation to the first ground of appeal and include the specific background to the choice of valuation date at paras 53 - 54, 59, *supra*.

[140] The Appellant submitted that the record does not disclose a clear, mutual and enforceable agreement to value the properties in 2021. The Appellant did not provide the entirety of the record so that I could assess this submission. The Arbitrator specifically found that during the arbitration process the parties agreed to value the businesses at December 31, 2021 (Award, at para 17). The Appellant has not provided any record or evidence that would impugn this finding.

[141] However, the Appellant further invokes the principle that the Arbitrator's reasons must be sufficient. I have set out several applicable authorities on this requirement in Part IV *supra* and will not repeat them here. The Appellant cites ***Bain*** and submits the Arbitrator failed to give sufficient reasons to depart from the hearing date valuation rule.

[142] Did the Arbitrator give intelligible reasons for departure from the default valuation date?

[143] The valuation date issue was addressed in mid-2023 among counsel and the Arbitrator. According to the Appellant's reply brief in the arbitration, it was also addressed at some earlier time, when the Appellant was self-represented.

[144] The Appellant submitted in his reply brief in the arbitration that while the parties may have agreed to a different valuation date for the Respondent's companies, this was only done in regard to "the business portion of the companies, not the real estate portion". He did not provide any particulars of the claimed limitation or refer to records, directions or discussions purporting to impose such limitation on the agreement, nor were such records or information provided on the appeal. The brief also says the agreement was made when the Appellant was self-represented but does not ascribe any consequences to that circumstance. For example, counsel did not submit the Arbitrator should find the agreement void or otherwise infirm.

[145] The Appellant's reply affidavit in the arbitration (at para 85) asserted the Arbitrator issued an interim award to have the spec home re-evaluated at current market price. The Appellant did not provide such award on appeal, however the record contains an email dated June 30, 2023 where the Arbitrator, in summarizing a process call held June 29, 2023, stated that the Appellant may submit a rebuttal report using the same valuation dates as the Appellant's expert (i.e., December 31, 2021) and further, despite using the same valuation date for the companies, the Arbitrator had made one exception – the fair market value of the spec home in the Respondent's company. The Appellant "may have it appraised based in its current value as the value used in [the Respondent's expert] report is from 2021 and is stale".

[146] On the current record, the issue before the Arbitrator was whether there was an exception to the agreement on business asset valuation date. I conclude the Arbitrator's reasons were sufficient, as set out in the following paragraphs.

[147] The Arbitrator found the parties agreed during the process to value corporate assets at December 31, 2021 and that the house was a spec home held as a business asset. His reasons as to the existence of an agreement are sufficient. The Appellant did not refer in his rebuttal submission in the arbitration to any record, discussion or consideration calling the existence of the agreement into question, nor were any provided on the appeal.

[148] Rather, the live issue requiring explanation in the Arbitrator's reasons was the content of the agreement: Did it contain an exception as the Appellant asserted? The only thing in the

2026 ABKB 558 (CanLII)

record on the appeal suggesting an exception is the June 30, 2023 email summarizing the process call. The Arbitrator explained the matter of a pre-hearing ruling in para 19 of the Award:

> ... In agreeing to allow [the Appellant] to enter an updated valuation I was not expressing a conclusion about the proper valuation date for it. Rather, I was leaving it open for him to make submissions at the hearing regarding the possibility of having [the Respondent's] company valued at December 31, 2021 with its main asset valued in 2023.

2026 ABKB 558 (CanLII)

[149] In other words, there was no agreement or direction to make exceptions to the agreed valuation date, contrary to the Appellant's assertion in his affidavit. The Arbitrator then rejected that the spec home should be valued at a later date than the other corporate assets only because it had increased in value to the benefit of the person asking to depart from the agreement (or as the Arbitrator said, to cherry pick).

[150] These explanations are intelligible, meaningfully respond to the Appellant's submission to the Arbitrator, and are sufficient. While the Appellant might not agree with the Arbitrator's conclusion, the reasons are sufficient to communicate to the affected parties why the decision was made, to provide accountability, and to permit effective appellate review.

[151] In summary, there was no error of law in respect of valuation date of the spec home. An agreement to use a different valuation date is a legally recognized exception to the required date of valuation. The spec home was a corporate asset. It was correct to value it as of the agreed date. The reasons for doing so were sufficient. I would have dismissed this ground of appeal.

**(b) Erred in treating third party book of business as income**

[152] The Appellant asserted that the Arbitrator's decision to account for the third party book of business as income for support purposes was an error of law.

[153] Under the arrangement with the third party, the Appellant was serving the third party's clients and the commissions generated from that activity were paid to the third party presumably until the purchase price was paid in full (Award, at para 115). The Appellant was asked in the arbitration what the price was, but never answered (Award, at para 117), which was another instance of vague and incomplete evidence from the Appellant (Award, at para 117).

[154] The Arbitrator observed the Appellant's expert accepted the third party arrangement generated significant revenue (Award, at para 118) but disagreed with that expert's testimony that it gave rise to a liability in the same amount and thus had no value. The Arbitrator said he could not follow the expert's proposition and rejected her evidence in favour of the Respondent's expert evidence.

[155] The Respondent's expert concluded that if the Arbitrator found the Appellant was doing work for the clients as part of a purchase arrangement it should be classified as income (Award, at para 116) and it might be possible to value the book of business as an asset (Award, at para 118).

[156] The Arbitrator was faced with the problem that the Appellant's records disclosure was unreliable and incomplete including in relation to the arrangements the Appellant had made with the third party to acquire the third party book of business (Award, at para 112) and his evidence of the arrangement was vague and incomplete including failing to answer on cross-examination the purchase price of the third party book of business (Award, at paras 117). The Appellant was

not a credible witness (Award, at para 11). He therefore could not be relied on to disclose the evidence concerning the third party arrangement. The difficulties obtaining financial information from the Appellant is a common theme in the Award. Other instances are with respect to child support where the Arbitrator noted "the history of the couple is high conflict and regular resistance from [the Appellant] to the necessary financial disclosure to facilitate his income determination" (Award, at para 154) and with respect to spousal support where the Arbitrator fixed a lump sum (Award, at para 180 described in para 109 *supra*). The Respondent submitted the Arbitrator should impute the commission income to the Appellant for various reasons including that the income was diverted into an unknown arrangement without full disclosure (Respondent's rebuttal submissions, December 21, 2023, para 65).

[157] In view of the inadequate record of the third party arrangement the Arbitrator decided to consider the Appellant's process of acquiring ownership in the context of income. The Arbitrator recognized this addition to the Appellant's income as an imputation of income (Award, at paras 123, 124, 126, 136, 147, 171).

[158] The Arbitrator added, at para 126 of the Award, that the Appellant had taken on extra work in the third party arrangement and was being compensated by receiving a credit on his purchase of the book of business, rather than in cash. He concluded: "The fact that his new income is in the nature of a credit, not available cash, is irrelevant in [the Respondent's expert's] mind to calculating his income and I believe she is correct about that."

[159] I agree that income can be earned in forms other than cash. It is also trite law that the decision maker has wide authority to impute income in the variety of circumstances described in s 19 of the *Federal Child Support Guidelines*, SOR/97-175 as am., including where income has been diverted or failing to provide income information where legally required to do so. To the extent recognizing non-cash income or imputing income gives rise to liquidity issues, it can be addressed by other means such as allowing time to pay (which the Arbitrator considered – Award, at para 181), assessing ability to pay in a spousal support context (which the Arbitrator considered – Award, at para 171), or considering liquidity issues if a hardship application is brought under the *Federal Child Support Guidelines* (if one was formally made in the present case, the Arbitrator rejected it for lack of explanation and evidence: Award, at para 147).

[160] The Appellant submits that a book of business is family property, citing ***Nykolyshyn*** at para 9 and other authorities. The Appellant then submits it was error to include the third party book as income.

[161] Cases such as ***Nykolyshyn*** are distinguishable. They pertain to books of business owned by a spouse. In the present case, the Arbitrator found the Appellant had a contract to acquire the book, served the third party's clients, and transferred the commissions to the third party as a credit to the purchase price, the amount of which he refused to disclose. The Arbitrator found the evidence of the arrangement to be incomplete, vague and unreliable. In substance the Appellant appeared to be earning and diverting non-cash benefits from the third party as a result of the Appellant's ongoing work for the third party's clients.

[162] I see no extricable error of law in the Arbitrator's decision to recognize the consideration received in the third party arrangement as income given the lack of disclosure or credible evidence of the arrangement.

2026 ABKB 558 (CanLII)

[163] Further, I do not agree with the Appellant's submission at para 51 of his brief that if the third party book of business were an asset in the hands of the Appellant, then it would have been a legal error to include commissions as income. The trial judge in ***Nykolyshyn***, whose reasons are reported at 2022 ABKB 860, reviewed the double dipping cases and concluded that all income earned from a book of business in future be included in the owner's income for spousal and child support purposes notwithstanding the value of the book was included in the property division (see 2022 ABKB 860 at paras 212 - 225). That is because income from a business, in contrast to a pension asset, can be spent without affecting the value of the asset or in other words, the value of the asset is not depleted by earning an income therefrom (***Koch v Koch***, 2020 ABQB 65 at para 19, followed by the trial judge in ***Nykolyshyn*** at paras 216 - 217).

[164] I therefore would have dismissed this ground of appeal.

**(c) Failed to consider all elements in s 15.2(4) of the *Divorce Act* relative to both parties or all objectives as set out in 15.2(6) of the *Divorce Act***

[165] As described in my reasons with respect to the second ground of appeal (alleged failure to apply the principles in ***Corbeil***), it is clear from the evidence and submissions in the arbitration and the content of the Award that the Arbitrator was familiar with the governing legal principles and live issues in the arbitration. Contrary to the Appellant's submissions, he recognized and considered the legal elements and objectives of spousal support set out in section 15.2 (see paras 106, 107, and 113 *supra*).

[166] The Appellant submits that the Arbitrator discussed the Respondent's situation in greater detail than the Appellant's situation.

[167] I reject that the Arbitrator gave unequal consideration of the elements and objectives expressed in s 15.2 of the *Divorce Act*. Considering the Award as a whole, it is apparent that the Arbitrator discussed both parties' circumstances in detail as he methodically worked through the valuation and income issues. He did not believe many of the Appellant's factual assertions and rejected them. His views of the Appellant's lack of credibility as a witness are apparent from the Award and adequately explained. Deciding what weight to apply to each element and objective expressed in s 15.2 of the *Divorce Act* was a matter for the Arbitrator and there is no error of law in his analysis.

[168] I therefore would have dismissed this ground of appeal.

**(d) Failed to consider the test for determining retroactive spousal support.**

[169] The Appellant has not explained the evidentiary or other considerations that should lead me to conclude that the Arbitrator failed to consider the applicable legal test. As mentioned in Part IV, I cannot necessarily infer from the lack of a reference to legal principles for awarding retroactive spousal support that the Arbitrator overlooked them.

[170] The principles for making retroactive spousal support awards have been authoritatively established since at least 2011 when ***Kerr v Baranow***, 2011 SCC 10 was pronounced. There, the Court found that considerations similar to those applicable to retroactive child support awards (as set out in the well known case ***D.B.S. v. S.R.G.***, 2006 SCC 37, [2006] 2 SCR 231) applied, however, they must be considered and weighed having regard to the different legal principles and objectives that underpin spousal support (***Kerr*** at para 207). A list of non-exhaustive factors include (1) the needs of the recipient spouse (2) the conduct of the payor; (3) the reason for the

2026 ABKB 558 (CanLII)

delay in seeking support; (4) any hardship a retroactive award may cause; and (5) certainty of a payor's or recipient's obligations (***Kerr*** at paras 207-212).

[171] The parties separated December 2019. The arbitration was commenced in October 2020 with the signing of an agreement to arbitrate. The parties agreed to submit a variety of claims to mediation/arbitration including "spousal support (retroactive and ongoing)". The Appellant did not provide the date of effective notice seeking spousal support in his appeal submissions, nor was I provided a copy of the Respondent's statement of claim for divorce and division of matrimonial property referenced in her arbitration affidavit sworn September 19, 2023 at para 25 which might have shed light on the date the Appellant was first put on notice of a claim for spousal support.

[172] Both parties claimed spousal support retroactive to January 2020 in their written post-hearing briefs submitted to the Arbitrator. As an example, the Appellant claimed (in his brief submitted December 14, 2023 at p 25, para 12), 48 months of retroactive spousal support commencing January 2020. The fact that both parties claimed retroactive spousal support back before the date their applications were commenced is relevant (***Kerr*** at para 211).

[173] It is apparent from the arbitration record that the parties focussed on income issues (quantum) and post-separation need in their respective spousal support submissions.

[174] In contrast, I do not see any arguments in the submissions to the Arbitrator that either party delayed in seeking spousal support, that a party did not put the other on notice of a claim to spousal support in a timely way, or that lack of notice created a hardship or detracted from certainty or predictability.

[175] The Respondent addressed post-separation conduct of the payor in her affidavit in the arbitration sworn September 19, 2023 at paras 96 - 107. The Arbitrator accepted that the Appellant was not credible and his disclosure of records concerning his income arising from the third party arrangement was not reliable but found that the Appellant's litigation conduct was more appropriately addressed in claims for costs awards (Award, at para 169).

[176] Requests for retroactive spousal support are routine and adjudicated on well established principles. In the context of the parties' submissions in this case, and the Arbitrator's demonstrated knowledge of family law principles, the fact the Arbitrator did not set out the applicable legal elements for awarding retroactive support does not suggest that he misunderstood the applicable legal principles or failed to consider them. Both parties claimed retroactive support back to their separation and neither asserted concerns about notice, delay or misconduct that should be considered in whether to make a retroactive award.

[177] Again, based on my observations in Part IV *supra*, the Arbitrator was responding to the matters the parties placed in issue in respect of their competing retroactive spousal support claims and the fact he did not refer to other factors that neither side relied on does not imply that he failed to consider the law or overlooked elements of the test or evidence. As with the first and second grounds of appeal, to allow the Appellant to recast his position on spousal support for the first time on appeal having had a full opportunity to raise it with the Arbitrator, would be grossly unfair to the Respondent by undermining certainty and predictability, and extending and driving up the cost of this hotly contested and long running dispute for no good reason.

[178] I therefore would have dismissed this ground of appeal.

2026 ABKB 558 (CanLII)

### (e) Claim for relief

[179] The Appellant requested, in the event parts of the Award were set aside, to direct the parties to the Court's Family Focussed Protocol. In supplemental submissions of March 20, 2026, Respondent's counsel provided an email from the Arbitrator advising that if the Court returned the matter to him, he would resume his role as Arbitrator. In the circumstances I would have refused to direct that any remits be directed to a substitute arbitrator (if I had the power to do so in this case) or to the Court. The alleged errors of law in this case could not give rise to reasonable apprehension of bias or support a decision to remit to someone else, having regard to the factors set out in ***Edmonton (Police Service) v Furlong***, 2013 ABCA 177 (CanLII) at para 3 and ***Walton v Alberta Securities Commission***, 2014 ABCA 446 (CanLII) at para 9.

## VIII Conclusion

[180] The appeal is dismissed.

[181] The parties may speak to costs by written submissions not exceeding 5 pages with pinpoint references to any records or evidence relied on. Any costs claimant shall file and serve their submission, and provide a courtesy copy in electronic form to my office, within two weeks. A party opposing the costs claim may respond on the same basis within two weeks, and the claimant may provide a brief rebuttal submission within one week thereafter.

Heard on the 13th day of March, 2026 with supplemental written submissions March 20, 2026.
**Dated** at the City of Calgary, Alberta this 7th day of August, 2026.

**J.T. Eamon**
**J.C.K.B.A.**

**Appearances:**

Ahmed Tarrabain
for the Appellant

Sasha Joshi and David Taylor
for the Respondent

2026 ABKB 558 (CanLII)