

In the Court of Appeal of Alberta

Citation: Frederico v Cabral, 2026 ABCA 251

Date: 20260727

Docket: 2601-0099AC

Registry: Calgary

Between:

Cyril Frederico

Applicant

- and -

Marcenny Da Aguiar Cabral

Respondent

**Reasons for Decision of
The Honourable Justice Kevin Feth**

Application for Permission to Appeal

Application for a Stay Pending Appeal

**Reasons for Decision of
The Honourable Justice Kevin Feth**

[1] The applicant husband applies for permission to appeal a Court of King's Bench appeal decision, including a supplemental order, which overturned most of an Arbitration Award on spousal support and directed a rehearing before a new arbitrator. If permission to appeal is granted, the husband also seeks a stay of the decision pending appeal.

Background

[2] The parties were married in 1995 and divorced in 2022. On May 22, 2024, the parties entered into an Arbitration Agreement appointing Mathew Wirove as Arbitrator to determine spousal support, costs, and updated disclosure.

[3] The Arbitrator found that the respondent wife was not entitled to non-compensatory spousal support, as she had re-partnered, but was entitled to compensatory spousal support based on the roles adopted by the parties during the marriage, the length of the marriage (25 years), and because she was the "secondary earner in the marriage": Award at paras 112-113. Nevertheless, the Arbitrator determined that the wife did not have "a strong compensatory support entitlement" because she "did not provide any evidence to show the damages incurred by the marriage, she worked for a large part of the relationship, and was able to upgrade her education" and her present "employment income without the other benefits is similar to her income throughout the marriage or a bit more": Award at para 116. He also concluded that the husband assumed most of the debts at separation, and the wife "was only left with approximately \$11,000 for her own student loans." He "consider[ed] this factor of unequal distribution, and the fact the parties left the marriage with mainly debts, in [his] decision on quantum": Award at para 118. The Arbitrator further found that the wife "has the means, and financial condition to choose to take a lower-paying job [working for her new partner] that provides her with the flexibility to live a higher standard of living than she did throughout the marriage". He added that the wife does not pay rent or utilities, and has a company vehicle and credit card, all of which would need to be "grossed up and included in her income calculation": Award at paras 120-123.

[4] The Arbitrator held: "As outlined in the *Divorce Act*, I am required to look at the recipients' conditions, means, and needs in determining the quantum of spousal support. . . [and] at this time and for the foreseeable future, the quantum based on [those factors] is \$0.00 per month." As a result, he found that imputing income to the wife and determining the husband's specific income were unnecessary. The Arbitrator added: "In making my determination I did consider his income at his current income levels": Award at paras 122-124.

[5] In short, the Award directed as follows: a) the wife is entitled to spousal support from the husband on a compensatory basis for an indefinite duration; b) as of January 1, 2025, the spousal support payable from the husband to the wife was set at \$0 per month, but reviewable upon a

material change in circumstances; and c) no arrears of spousal support is payable to either party. The Arbitrator subsequently issued a Costs Award by which the wife was to pay the husband's legal fees of \$20,135.86 and arbitration fees of \$4,303.97.

[6] The wife appealed and argued errors of mixed fact and law by the Arbitrator, including that he allegedly failed to determine the parties' specific incomes and did not provide sufficient reasons for deviating from the recommended range of support under the *Guidelines*.

[7] The appeal judge concluded that the *Guidelines* are the "starting point" for determining the quantum of spousal support and the "parties' incomes must be determined as a first step because they are the basis for the range of spousal support under the *Guidelines*". The appeal judge found that "the Arbitrator made a palpable and overriding error in failing to determine the parties' incomes to decide the quantum and duration of ongoing spousal support . . . This failure coloured the remainder of the analysis".

[8] The appeal judge held that while the *Guidelines* are "not a binding authority, the law is clear that they are to be considered and deviation from the *Guidelines* must be justified", citing *Hoffman v De Baene*, 2024 ABCA 57 at para 39 [*Hoffman*]. She concluded:

In light of these principles, the Arbitrator was required to determine [the wife's] income and whether income should be imputed to her, as well as to determine [the husband's] income. It is only after determining incomes and the range according to the [*Guidelines*] that the Arbitrator could determine whether there was a significant departure from the [*Guidelines*] and whether an award outside of the range was justifiable.

[9] The appeal judge found that the wife was left without any understanding about how the Arbitrator arrived at a quantum of \$0.00, as the "Award was not sufficiently tied back to the evidence and criteria of the *Divorce Act*".

[10] The appeal decision confirmed that the wife is entitled to compensatory spousal support but otherwise set aside the Award and the Costs Award and remitted the determination of the quantum and duration of compensatory spousal support, and the parties' incomes, to a substitute arbitrator relying on the evidentiary record and briefs before Mr Wirove.

[11] The parties agree that the effect of the appeal decision was also to set aside the retroactive support decision in the Award, which had directed that neither party receives retroactive support.

[12] A supplemental order followed at the end of May 2026, which appointed the substitute arbitrator, lifted the interim stay of a pre-arbitration Consent Order directing the husband to provide the wife with monthly spousal support of \$1000, and set the costs of the appeal payable forthwith by the husband at \$14,500.

[13] In seeking permission to appeal, the husband argues the appeal judge erred by failing to correctly apply the standard of review for issues of mixed fact and law on an appeal of the Arbitration Award, and by exceeding the jurisdiction granted to her under the *Arbitration Act*, RSA 2000, c A-43 (the *Act*) in directing the appointment of a new arbitrator.

Test for Permission to Appeal

[14] Pursuant to s 48 of the *Act*, the husband can appeal a decision of the Court of King's Bench under section 44 of the *Act*, with permission of the Court of Appeal. The test for permission to appeal considers whether:

- i. the questions raised are reasonably arguable;
- ii. deciding the questions will likely affect the result of the litigation;
- iii. the answer to the questions will likely be of interest to other persons or influence other matters; and
- iv. there are independent reasons not to relitigate the questions, or to limit the scope of the appeal.

None of these considerations, on their own, are determinative: *UCANU Manufacturing Corp v Jardeg Construction Services Ltd*, 2015 ABCA 371 at para 21 [*UCANU*]; *Nilsson v Alberta*, 1999 ABCA 340, 250 AR 85. However, the absence of an arguable appeal is fatal because “only appeals meeting some standard of worthiness should receive permission to proceed”: *Sorenson v Stewart*, 2024 ABCA 336 at para 11; *Kimberley Management Ltd v Klammer*, 2000 ABCA 271 at para 3, 281 AR 158.

Analysis

[15] Having considered the application materials and the arguments of the parties, I find that the applicant has met the test for permission to appeal.

a) A reasonably arguable appeal

[16] Whether an appeal is “reasonably arguable” involves looking at the relative merits of the appeal in the context of the applicable standard of review: *UCANU* at para 21(a). The husband raises three issues for appeal.

[17] First, the husband submits the appeal judge erred in finding that “the Arbitrator made a palpable and overriding error in failing to determine the parties’ incomes to decide the quantum and duration of ongoing spousal support after May 2022”. She concluded that “without a proper

calculation of the parties' incomes, any effort to evaluate or understand the reason behind a potentially significant departure from the [*Guidelines*] ... lacks a sound basis."

[18] The husband says there was no obvious error going to the core of the outcome because the Arbitrator sufficiently addressed the parties' incomes in assessing the "condition, means, needs and other circumstances of each spouse" as required by s 15.2(4) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp). The appeal judge erred in finding that a specific income figure was necessary.

[19] For the wife, the Arbitrator found that her earnings since 2022 were "slightly more than \$30,000 per year". The Arbitrator identified "other benefits" the wife enjoys such as a BMW, a company credit card, gas and insurance, and "other company benefits": Award at paras 71, 123. On this basis, the Arbitrator made some general findings about the wife's income exceeding \$30,000 per year.

[20] As for the husband, the Arbitrator found that his income "increased after separation" and his tax returns showed income of \$35,000 (2020), \$68,951 (2021), \$109,381 (2022) and \$128,745 (2023). The Arbitrator found: "I do not believe I have to determine Cyril's income" but "if I was required to, it is clear that his income increased after separation". He ultimately found in the same paragraph: "In making my determination I did consider his income at his current income levels": Award at para 124. On that basis, the husband's income was arguably found to be approximately \$128,745.

[21] I accept that a reasonable argument is presented that the Arbitrator made general findings about the income levels of both spouses sufficient to engage the analysis under s 15.2(4) of the *Divorce Act* and the *Guidelines*. If so, the appeal judge arguably erred by incorrectly finding palpable and overriding error.

[22] Second, the husband submits that the appeal judge erred in finding that the Arbitrator committed palpable and overriding error by deviating from the *Guidelines* without a "clear and reasoned explanation". The husband acknowledges that where a trial judge (or arbitrator) "is provided with the calculations under the [*Guidelines*] and fails to refer to them or explain why they are not making an award within the range under the [*Guidelines*], that may well inform the scope of appellate review": *Hoffman* at para 31, quoting *Wild v Wild*, 2019 ABCA 159 at paras 9-12. However, he contends that ample reasons were provided by the Arbitrator.

[23] The Arbitrator confirmed that the wife was seeking "mid-range spousal support in the amount of \$4,947 per month" and described the total arrears of spousal support being sought for each year from 2021 to 2024 relying on "a mid-range" of the *Guidelines*: Award at paras 42, 80. He reproduced a passage from *Wolters v Wolters*, 2013 ABQB 172 at para 24 addressing the guidance in the *Guidelines* about the impact of re-partnering on spousal support: Award at para 106. At paragraph 115, he wrote that "Chapter 9 of the [*Guidelines*], provides a non-exhaustive list of how to determine the quantum and duration of support" and set out relevant factors from the *Guidelines* including:

- Strength of any compensatory claim,
- Recipient's needs,
- Needs and ability to pay of payor,
- Work incentives for payor,
- Property division and debts, and
- Self-sufficiency incentives.

[24] In arriving at the quantum award, the Arbitrator noted the husband “assumed the majority of the debts from the family at separation” and said he considered this unequal distribution in his quantum decision. He remarked about the lack of evidence showing the marriage negatively affected the wife’s ability to work and her education. He considered her self-sufficiency, suggested she is intentionally underemployed, expressly considered her means and needs, and observed that she had failed to make full disclosure about her other employment benefits and her living circumstances: Award at paras 116-122.

[25] I find that a reasonable argument is raised about the Arbitrator adequately explaining his reasons for departing from the *Guidelines* and setting the quantum of spousal support at \$0.00, subject to a material change in circumstances.

[26] Third, the husband asserts the appeal judge exceeded her statutory authority by directing the parties to retain a substitute arbitrator when the Arbitrator’s mandate had not ended. Paragraph 14 of the *Act* states that an arbitrator’s mandate terminates when:

- (a) the arbitrator resigns or dies,
- (b) the parties agree to remove the arbitrator,
- (c) 10 days elapse after all parties are notified of the arbitral tribunal’s decision to uphold a challenge to the arbitrator and remove the arbitrator, and no application is made to the court under section 13(6) to decide the issue; or
- (d) the court removes the arbitrator under section 15(1).

See also s 17 of the Arbitration Agreement.

Section 15 of the *Act* deals specifically with removing the arbitrator on a party’s application to the court based on, among other things, the arbitrator being disqualified for being unable to perform the functions of an arbitrator, committing a corrupt or fraudulent act, delaying unduly in

conducting the arbitration, or not conducting the arbitration in accordance with section 19 of the *Act* (which involves treating the parties equally and fairly, and providing an opportunity for each party to present their case and respond to the other party's case).

[27] The husband contends that none of these conditions for terminating the arbitrator's mandate applies, and that in any event, no application was ever brought to the court to remove the Arbitrator in accordance with s 15 of the *Act* or to declare that his mandate is terminated. No evidence to the contrary is presented.

[28] The wife counters that the Arbitrator's mandate terminated when he issued the Award and the Costs Award, and s 16 of the *Act* provides that "a substitute arbitrator shall be appointed" when "an arbitrator's mandate terminates". She points to s 42(1)(a) of the *Act* which states: "An arbitration is terminated when (a) the arbitral tribunal makes a final award or awards in accordance with this Act, disposing of all matters in dispute referred to arbitration...". However, this section says nothing about whether an award is "final" while under appeal.

[29] The enforcement provisions of the *Act* provide some support for the argument that if an appeal is pending, the decision is not final. Specifically, s 49(3) provides that a "court shall give a judgment enforcing an award in Alberta unless (a) the 30-day period for commencing an appeal or an application to set the award aside has not yet elapsed, (b) an appeal, an application to set the award aside or an application for a declaration of invalidity is pending, or (c) the award has been set aside or the arbitration is the subject of a declaration of invalidity".

[30] The wife also argues that this issue was not raised before the appeal judge and this Court therefore should not consider the issue for the first time on a second appeal. She notes that her Originating Application for the appeal in the Court of King's Bench sought the appointment of a new arbitrator, and the husband never objected to that relief.

[31] The husband counters that the appeal judge could not clothe herself with jurisdiction she did not have under the *Act*. Even if he acquiesced at the time, which is denied, the appeal judge could not appoint a substitute arbitrator in these circumstances.

[32] The husband also asserts that the effect of the appeal decision in directing the parties to select a substitute arbitrator, rather than Mr Wirove, is to impose a contract on them to which they did not agree. The Arbitration Agreement contemplated that a specific individual would serve as the arbitrator unless specific conditions were satisfied and a substitute appointed in accordance with the terms of the Agreement. The contractual conditions did not arise. The husband neither agreed to amend the Arbitration Agreement nor to enter into a new agreement.

[33] I conclude that a reasonable argument is raised that the appeal judge exceeded her authority in directing the arbitration hearing to a substitute arbitrator.

[34] Finally, during the oral submissions for this application, a question arose about whether the appeal judge decided a question of law, rather than mixed fact and law, in finding that the Arbitrator was required to determine the parties' specific incomes. The appeal judge characterized the issue as mixed fact and law, rather than an error of law, and noted that a question of law might require permission to appeal under s 44(2) of the *Act*, but that this "process was not carried out in this instance".

[35] On reviewing the appeal decision and the parties' submissions for this application, I am satisfied that the appeal judge approached the issue as a determination of whether the facts satisfied the legal requirements under the *Divorce Act*, and the principles discussed in cases such as *Hoffman*, rather than imposing a distinct legal element. The issue is properly framed as a question of mixed fact and law.

b) The appeal is likely to affect the result of the litigation

[36] The issues raised by the proposed appeal are material to the parties. Deciding those issues will affect the result of the litigation, either by restoring the Award and the Costs Award and ending the litigation, or by referring the issues to a new arbitral hearing.

c) The appeal is likely of interest to other persons or is generally important

[37] The appeal may provide some guidance for family litigants, lawyers, and arbitrators about the extent to which incomes must be determined and reasons given when deviating from the ranges under the *Guidelines*. The appeal may also provide some direction about the authority of an appeal judge to replace an arbitrator appointed under an Arbitration Agreement.

d) There are no independent reasons not to relitigate the questions, or to limit the appeal's scope

[38] I find no independent reasons to decline permission. The issues raised by the proposed appeal do not invite a disproportionate expense when compared to the interests at stake. The delay in resolving spousal support is not prejudicial to either party. The scope of the appeal will be limited to the questions below.

Permission to Appeal is Granted

[39] Permission to appeal is granted on the following questions:

1. Did the appeal judge err by finding that the Arbitrator made a palpable and overriding error in failing to adequately determine the parties' incomes?

2. Did the appeal judge err by finding that the Arbitrator made a palpable and overriding error in failing to provide sufficient reasons for departing from the range under the *Guidelines*?
3. Did the appeal judge err by directing that the determination of quantum and duration of spousal support, and costs of the arbitration, be remitted to a substitute arbitrator?

Stay Pending Appeal

[40] The husband seeks a stay of the appeal decision and the supplemental order, including the payment of appeal costs of \$14,500. He does not ask me to interfere with the Consent Order directing him to pay monthly spousal support to the wife of \$1000.

[41] The application for a stay is brought under Rule 14.48(b) of the *Alberta Rules of Court*, Alta Reg 124/2010. The applicant bears the onus of meeting the tripartite test for a stay, as outlined in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*]. A stay pending appeal may be ordered if the applicant satisfies the court that:

- a) there is a serious question to be determined on appeal;
- b) the applicant will suffer irreparable harm if the stay is not granted; and
- c) the balance of convenience favours granting the stay.

A stay pending appeal is a discretionary remedy and the “fundamental question is whether granting a stay is just and equitable in all the circumstances of the case. This will necessarily be context-specific”: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25, [2017] 1 SCR 824; *Kalmbach v Kalmbach*, 2024 ABCA 281 at para 11.

[42] The test for determining whether the appeal raises a serious question is whether the appeal is arguable, and not frivolous or vexatious. This is a low threshold: *Denis v Sauvageau*, 2022 ABCA 166 at para 17 at para 18. For the reasons already discussed in the context of granting permission to appeal, I find that a serious question is established.

[43] Irreparable harm refers to the nature of the harm rather than its magnitude. Generally, irreparable harm refers to harm that cannot be quantified in monetary terms, or which cannot be cured, normally because one party cannot pay damages or will be unable to repay money: *RJR-MacDonald* at 341; *Scheffelder v Scheffelder*, 2025 ABCA 237 at para 14 [*Scheffelder*]; *Blacklaws v Morrow*, 1998 ABCA 119 (CanLII) at para 8, 216 AR 393 [*Blacklaws*]. An applicant bears the onus of demonstrating irreparable harm with evidence that is clear and not speculative: *Avmax Aircraft Leasing Inc v Air X Charter Limited*, 2022 ABCA 252 at para 79; *Modry v*

Alberta Health Services, 2015 ABCA 265 at para 82. Proof of irreparable harm may be shown where the amount of the judgment exceeds the ability of the ordinary citizen to repay: *Edmonton (City) v Westinghouse Canada Inc*, 1996 ABCA 278 (CanLII) at para 10, 187 AR 153; see also *Re Evans (Bankrupt)* (1992), 135 AR 46, 14 CPC (3d) 106 (AB CA).

[44] The balance of convenience assesses which of the parties would suffer greater harm from granting or refusing the stay pending the outcome of the appeal: *Scheffelmanier* at para 18.

[45] The second and third parts of the test for a stay are linked and may be considered together: *Irwin v Alberta Veterinary Medical Association*, 2015 ABCA 176 at para 21; *Pocklington Financial Corp v Alberta Treasury Branches*, 1998 ABCA 254 (CanLII) at para 8, 228 AR 115.

[46] Where the test is not satisfied, a stay may still be granted if exceptional circumstances exist that make it fit and just to do so: *Blacklaws* at para 6; *O'Kane v Lillqvist-O'Kane*, 2023 ABCA 251 at para 3; *Dow Chemical Canada ULC v NOVA Chemicals Corporation*, 2026 ABCA 50 at para 7.

[47] The husband has not shown that he will suffer irreparable harm if he is required to pay the appeal costs. He does not depose to an inability to pay, hardship or that the wife will be unable to repay if the appeal is successful. His affidavit briefly mentions temporary health issues and working overtime “to pay for ongoing legal fees” but does not clearly demonstrate financial distress.

[48] I decline to interfere with the payment of the appeal costs.

[49] The appeal decision also set aside the Costs Award and directed the substitute arbitrator to determine the cost of the prior arbitration. Again, no irreparable harm is shown by allowing the Costs Award to be set aside pending the appeal. I decline to stay that part of the appeal decision.

[50] The only remaining question is whether I should stay the direction remitting the arbitration issues to a new arbitrator and the provision in the supplemental order appointing the substitute arbitrator.

[51] Conducting a new arbitration process while the appeal is pending will inconvenience the parties, consume their time, heighten conflict, and expose them to significant financial expenses that will be wasted if the appeal is successful. I find that irreparable harm will be the result and that the balance of convenience favours suspending the new arbitration until the appeal is determined.

[52] I exercise my discretion to stay those provisions in the appeal decision, including the supplemental order, that remit the outstanding issues between the parties to a substitute arbitrator and that appoint the substitute arbitrator.

Conclusion

[53] Permission to appeal is granted on the questions described above. The Notice of Appeal shall be filed by August 7, 2026.

[54] A partial stay is granted.

[55] The parties are directed to contact the Case Management Officer to find an early date for the hearing of the appeal.

Application heard on July 22, 2026

Reasons filed at Calgary, Alberta
this 27th day of July, 2026

Feth J.A.

Appearances:

C.M. Thompson
for the Applicant

T. Huizinga, KC
for the Respondent