NOVA SCOTIA COURT OF APPEAL
Citation: *Wolfson v. Wolfson*, 2023 NSCA 57

Date: 20230804
Docket: CA 514322
Registry: Halifax

Between:

Louis Adam Wolfson

Appellant

v.

Jennifer Rebecca Wolfson

Respondent

Judge: The Honourable Justice Elizabeth Van den Eynden

Appeal Heard: February 15, 2023, in Halifax, Nova Scotia

Subject: *Matrimonial Property* Act (MPA); classification; business assets; matrimonial assets; division; unequal division; costs

Summary: The appellant sought to overturn property related provisions of a Corollary Relief Order and the costs award made against him. At trial, he claimed certain assets were business assets and should be excluded from division. The respondent claimed the disputed assets were matrimonial and should be divided equally. In the alternative, she pursued relief under s. 18 (contribution to a business asset by a spouse) and an unequal division of assets under s. 13 of the MPA.
The judge found the disputed assets were held for "two primary but equal purposes"—an income producing vehicle (business asset) and a retirement vehicle (matrimonial asset). The respondent's s. 18 claim was rejected but she succeeded on her s. 13 claim.

The appellant contends the judge erred because (1) the MPA does not permit an asset to have two primary purposes, (2) the evidence was insufficient to ground a finding that the disputed

assets were primarily intended as a retirement vehicle, and (3) the s. 13 analysis is materially flawed.

As to the costs award ($422,567), the appellant contends it is excessive and also marred by judicial error. He made a fresh evidence emotion to support his costs challenge.

Issues:

1. Did the judge err in her classification of the disputed assets?
2. Did the judge err in her s. 13 analysis?
3. Did judge err in her costs award?
4. Should the proposed fresh evidence be admitted?

Result:

Appeal allowed. The judge erred in her classification of assets and her analysis under s. 13 of the MPA. The classification is set aside. The disputed assets are declared to be business assets and excluded from division as between the parties. As a result of errors in the judge's s. 13 analysis, the award is adjusted from $4,447,165 to $1,500,000. The fresh evidence motion is dismissed because it did not meet the admissibility test. Trial costs are reduced from $422,567 to $168,117. The reduction relates to the appellant's success on appeal, not from alleged errors in the judge's costs determination. Each party to bear their own costs on appeal.

NOVA SCOTIA COURT OF APPEAL
Citation: *Wolfson v. Wolfson*, 2023 NSCA 57

Date: 20230804
Docket: CA 514322
Registry: Halifax

Between:

Louis Adam Wolfson

Appellant

v.

Jennifer Rebecca Wolfson

Respondent

Judges:	Van den Eynden, Derrick and Scanlan JJ.A.
Appeal Heard:	February 15, 2023 in Halifax, Nova Scotia
Held:	Appeal allowed, fresh evidence motion is dismissed, per reasons of Van den Eynden, J.A.; Scanlan and Derrick, JJ.A. concurring
Counsel:	Craig M. Garson, K.C. and Diana Musgrave, for the appellant Richard Bureau, for the respondent

Reasons for judgment:

Overview

[1] The appellant (Mr. Wolfson) seeks to overturn provisions of a Corollary Relief Order (CRO) related to the division of property and the costs award made against him at trial.

[2] Justice Theresa Forgeron of the Nova Scotia Supreme Court (Family Division) presided over the parties' divorce trial. One of the contentious issues was the classification and division of corporate shares Mr. Wolfson owned in a group of companies. The various companies owned and operated rental properties.

[3] The net value of the disputed shares was $13,908,662. Mr. Wolfson claimed his shares were business assets and should be excluded from division pursuant s. 4(1)(e) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 (MPA).

[4] The respondent (Ms. Wolfson) sought to have the shares classified as matrimonial assets and their value divided equally. She pursued alternative relief under s. 18 and 13 of the MPA. Section 18 enables a judge to compensate a spouse for their contribution to a business asset either by an amount of money or a share in the business asset. Section 13 permits a judge to divide matrimonial assets unequally or make a division of property that is not a matrimonial asset, provided the judge is satisfied an equal division of matrimonial assets would be unfair or unconscionable.

[5] The judge found the companies were owned, operated and managed for "two primary but equal purposes"—an income producing vehicle (business asset) and a retirement vehicle (matrimonial asset). This hybrid finding led the judge to exclude 50% of the net share value from division as a business asset and include the remaining 50% ($6,954,331) for division as a matrimonial asset, of which, Ms. Wolfson's equal share was $3,477,165.

[6] Neither party argued for a "two primary but equal purposes" approach to the classification of the shares. Nor did the judge alert them to her view that such a novel hybrid classification was an option under the MPA. This construct first arose in the judge's written decision.

[7] Ms. Wolfson's s. 18 claim was rejected but she did succeed on her s.13 claim. The judge awarded her an additional $1,000,000 because she found that an equal division of matrimonial assets would be unfair or unconscionable. However,

the judge said this amount was contingent on her being correct in her hybrid classification of Mr. Wolfson's shares. She held that if she made an error in their classification, she would have reached the same global amount ($4,447,165) under her s. 13 analysis.

[8] Mr. Wolfson contends the judge erred in law because the MPA does not permit an asset to have two primary purposes. He asserts the shares fall squarely within the definition of excluded business assets under the MPA. And further, the judge's factual finding that the other primary purpose of the rental properties was the creation of a retirement vehicle for both parties was a palpable and overriding error.

[9] As to the judge's s. 13 analysis, Mr. Wolfson contends it too is materially flawed and should be set aside. He says the judge erred in her interpretation and application of the s. 13 statutory factors and failed to conduct the required analysis of what amount was required to overcome any unfairness or unconscionability associated with an equal division of matrimonial assets.

[10] I agree with the appellant's complaints of error. Appellate intervention is warranted. In the following analysis, I explain why the judge's classification of the shares and her s. 13 analysis is flawed. I would set aside the judge's classification and declare all the shares to be excluded business assets. Further, I would reduce the amount of Ms. Wolfson's s. 13 award to a total of $1,500,000.

[11] As to the costs award in the amount of $422,567, Mr. Wolfson argues this was excessive and also marred by judicial error. These complaints aside, Mr. Wolfson says that if he is successful on appeal respecting the judge's classification of shares and/or the s. 13 claim, this should result in a significant reduction of trial costs in any event. Mr. Wolfson also made a motion to adduce fresh evidence in support of his challenge to the costs award.

[12] I would dismiss the fresh evidence motion. The proposed evidence did not meet the test for admissibility. I would reduce the costs award from $422,567 to $168,117, being the amount Ms. Wolfson was awarded as reimbursement for expert fees she incurred. This reduction relates to the appellant's success on appeal, not from alleged errors in the judge's original costs determination.

[13] The background, issues to be determined and the standard of review they attract will now be set out, followed by my analysis.

Background

[14] The parties separated after 12 years of marriage. They married in 2006 and separated in 2018. They have two children, aged 10 and 8 at the time of their separation.

[15] The evidentiary portion of the trial spanned 6 days, following which the parties filed detailed written submissions to the judge. The judge rendered three decisions:

- *Wolfson v. Wolfson*, 2021 NSSC 260 – referred to as the "merits decision".
- *Wolfson v. Wolfson*, 2022 NSSC 25 – referred to as the "ancillary decision". In her merits decision the judge asked the parties for further submissions on a variety of issues. After receiving their submissions, she released an ancillary decision.
- *Wolfson v. Wolfson*, 2022 NSSC 263 – decision on costs.

[16] In paras. 8 to 41 of the merits decision the judge set out the parties' circumstances before their marriage, their respective career paths after marriage, Mr. Wolfson's acquisition of rental properties both before and after their marriage, details of other assets owned by the parties as well as other contextual matters. There is no need to recite all the details here.

[17] In addition to the classification and division of assets, the contested issues before the judge included the determination of income for the purposes of child and spousal support and the quantum of support. The parties had earlier agreed upon shared parenting terms for their two children and entered into a consent order, the terms of which were incorporated by reference into the CRO.

[18] For the purposes of determining support, the judge found the parties' annual income to be: $660,000 for Mr. Wolfson and $55,000 for Ms. Wolfson. Mr. Wolfson was ordered to pay the table amount of child support which, after considering the set-off amount payable by Ms. Wolfson, was $7,324 per month. The judge found Ms. Wolfson had a strong compensatory and non-compensatory claim for spousal support. She ordered Mr. Wolfson to pay monthly spousal support in the amount of $13,914 commencing September 1, 2021 to January 1, 2030, at which time support would terminate.

[19] The quantification of income and support was not challenged on appeal but Mr. Wolfson contends the amount of spousal support Ms. Wolfson receives is relevant to her claim for compensation under s. 13 of the MPA.

[20] Central to the financial issues at play in this case was the classification of a group of companies and the division of shares (the "disputed assets") held by Mr. Wolfson. The companies collectively owned 21 buildings, containing 257 rental units in total.

[21] The parties did eventually settle on the value of the disputed assets. They agreed to a gross value of $31,462,700. After taking long term debt into consideration, they agreed the equity was $15,486,419. Their agreement came late in the day—in their closing trial submissions.

[22] The judge was obviously not impressed with how matters unfolded. Although she referred to their agreement as "tenuous", she accepted it. The judge said:

> [55] Mr. Wolfson did not supply proof of the value of his shares in the 12 companies in either of his Statements of Property, despite his obligation to do so. In proceedings brought pursuant to the *Matrimonial Property Act*, R.S.N.S., c. 275, the titled spouse has a positive obligation to both identify their property and to provide credible and meaningful proof of value. …
>
> …
>
> [61] … Although in his Statements of Property, Mr. Wolfson listed his share ownership in his 12 companies, he did not provide credible or meaningful proof of the value of his shares. His failure to do so created a substantive and problematic evidentiary gap.
>
> …
>
> [69] Despite the evidentiary gap, it appears a tenuous agreement about the value of Mr. Wolfson's shares has emerged - the value of his shares roughly equals the equity in the rental properties. Further, the parties appear to agree that the rental properties have equity of at least $15,486,419, without considering deductions for disposition costs and expenses associated with capital and environmental improvements. Mr. Wolfson claims significant deductions for these expenses; Ms. Wolfson strenuously objects to their inclusion.
>
> …
>
> [88] I accept the parties' tenuous agreement in the circumstances of this case. I accept that Mr. Wolfson owns the controlling common shares in the following companies which own the following rental properties with the noted associated values:

• Tobin & Queen Holdings	5230 Tobin Street	$ 5,840,000
• 7145 Quinpool Holdings	7145 Quinpool	$ 2,228,300
• Harvard Properties	2834/40/44 Windsor	$ 1,100,000
• 2966 Windsor Holdings	2966 Windsor	$ 4,140,000
• 2759 Windsor Holdings	2759 Windsor	$ 3,240,000
• Oxford East Holdings	1935/41/45/ 49 Oxford	$ 3,240,000
• Cocowood Holdings	5676 Columbus	$ 850,300
• Lioncore Holdings	1834/36/38 Robie 6008/ 6014 Shirley	$ 3,700,000
• Cabin 5 Holdings	6190 Jubilee 1949 Oxford	$ 2,308,300
• 5900 Holdings	6153/5/7/9 Pepperell 6161/3/5/7 Pepperell	$ 1,275,800
• Windsor & Almon Holdings	6241 Almon	$ 4,080,000
	Total	**$31,462,700**

> [89] Based on the above, the total value of the corporate real property is $31,462,700, from which long term debt of $15,976,281 must be deducted, leaving equity of $15,486,419. Given the lack of other evidence as to value, I accept that Mr. Wolfson's shares in the 11 companies which own the rental properties are worth at least **$15,486,419.**
>
> [emphasis in original]

[23] The judge went on to consider further adjustments for legal fees, real estate commission, capital gains tax, and environmental or capital expenses claimed by Mr. Wolfson. She granted another $1,577, 757 in deductions and, reluctantly, valued the shares at $13,908,662:

Summary of Decision on Disposition Costs and Value of Mr. Wolfson's Shares

[111] In summary, Mr. Wolfson owns all common shares in 11 companies that own rental properties with the following value:

Total Value of Real Property	$31,462,700
Long Term Debt	($15,976,281)
Legal Fees & HST	($35,025)
Marketing, Commission & HST	($542,732)
Capital Gains Tax	($1,000,000)
Equity	**$13,908,662**

[112] Because I have no other credible evidence, I reluctantly assign **$13,908,662** as the value of the shares owned by Mr. Wolfson in the various companies. I recognize that it is more probable than not, that this calculation is a conservative one that favours Mr. Wolfson.

[emphasis in original]

[24] Mr. Wolfson asked the court to classify the disputed assets as "business assets" as defined in s. 2(a) of the MPA. Business assets are exempt from division under s. 4(1)(e) of the MPA.

[25] Ms. Wolfson wanted the assets to be classified as matrimonial property and thus subject to presumptive equal division. In the alternative, she requested relief under s. 18 and 13 of the MPA.

[26] The judge found that the companies were "owned, operated and managed for two primary but equal purposes – as an income producing vehicle, and as a retirement vehicle". Accordingly, she classified 50% of the value of the corporate shares as an exempt business asset and the other 50% as a divisible matrimonial asset:

> [195] I find that the companies were owned, operated and managed for two primary but equal purposes – as an income producing vehicle, and as a retirement vehicle. Neither purpose was more vital, valuable, or significant than the other. The Wolfson rental properties were created, developed, and operated to provide both a consistent cash flow and to increase capital for the parties' retirement. As a result, I find that 50% of the value of the shares owned by Mr. Wolfson are

> properly classified as excluded business assets, while 50% are properly classified as matrimonial assets. …
>
> …
>
> [201] In summary, I find that 50% of Mr. Wolfson's corporate shares are properly classified as matrimonial because they demonstrate two equal, primary purposes. The rental properties both generate income in the entrepreneurial sense, and they serve as a retirement vehicle for the parties. The rental properties are both an income stream and appreciating capital assets being held for retirement.
>
> [202] Half of the value of Mr. Wolfson's corporate shares equal $13,908,662 / 2 = $6,954,331. This is the value of the matrimonial portion for division purposes.

[27] Next, the trial judge conducted her s. 18 analysis. She explained Ms. Wolfson's claim:

> [206] … Ms. Wolfson's based her s. 18 claim on three prongs - her direct work contribution; her contribution of money and money's worth; and her assumption of risk.
>
> …
>
> [213] …From her perspective, given the value of the companies, $1 million is an appropriate payment to satisfy her s. 18 claim.

[28] The judge rejected Ms. Wolfson's s. 18 claim. She held:

> [476] In summary, the following relief is ordered:
>
> …
>
> • A finding that Ms. Wolfson did not prove a s. 18 claim because she was, to an extent, compensated by dividend payments.

The judge had earlier explained (at para. 235) that it was more appropriate to address Ms. Wolfson's contributions to business assets when considering her claim for an unequal division of matrimonial assets under s. 13 of the MPA.

[29] Respecting the s. 13 analysis, the judge determined (at paras. 289 - 290) Ms. Wolfson had proven equal division would be unfair or unconscionable and awarded either: (a) an additional $1 million dollars in the event the 50/50 hybrid classification of the disputed assets was correct; or (b) if the judge erred in her classification of the disputed assets, $4,477,165. In other words, the judge fashioned the s.13 award to preserve the effect of her classification determination.

[30] In her merits decision the judge observed that all financial issues were aggressively litigated. The evidentiary record is extensive. However, the specific evidence related to the parties' retirement intentions was sparse.

[31] There was no evidence related to: at what age the parties might retire and under what circumstances; whether the rental properties would be sold or retained; and what savings or income the parties would need to finance their retirement.

[32] The extent of evidence regarding the retirement intentions of the parties was limited to:

- These statements in Ms. Wolfson's affidavit evidence:

> [218] …I assisted Louis with 6190 Jubilee Road… Louis was very excited about this purchase in particular and regularly stated that the penthouse unit [at 6190 Jubilee Road] would be our retirement home, and would generate income to allow us to retire there and live for free.
>
> [341] Since moving to Halifax Louis and I have talked about the buildings being used for part of our retirement. Louis told me he would look after me and the Properties were our retirement.
>
> [342] Louis wanted us to retire in the Penthouse at 7145 Quinpool Road, where we used to live and where his grandfather intended to retire. He later mentioned that he thought we would live in the larger of two penthouse units at 6190 Jubilee Road.
>
> [351] I never worried about our retirement. I trusted Louis' business acumen and experienced our increase in lifestyle over the years.

- These statements in Mr. Wolfson's reply affidavit:

> [120] I can state with certainty that I never suggested that the Penthouse at either Jubilee or Quinpool Road would be our retirement home. At that time, we were living in an apartment on Quinpool Road and expecting our first child. When we talked about the future we talked about a big house with a yard for our children to grow up in. We talked about someday having our children bring our grandchildren to see us in our family home. A penthouse condo was simply not a vision that either of us ever discussed. My grandfather never intended to retire to the Quinpool penthouse. In fact, he spoke of his mother living there, though she never did. My grandfather intended to live out his life in his home, and he in fact remained there until he was hospitalized.
>
> [173] I believe that Jennifer never worried about retirement, although that had little to do with the business. Our personal assets increased during the marriage as did my income.

- In cross-examination, Mr. Wolfson also denied discussing retirement plans generally with Ms. Wolfson:

> **MR. BUREAU**: Okay. Mr. Wolfson, did you discuss with Ms. Wolfson that you just might—when you were together before you separated—that you might just sell everything and retire? Did you ever have that discussion with her?
> **MR. WOLFSON**: Probably had a lot of discussions. Um….
> **MR. BUREAU**: Did you have that one in particular?
> **MR. WOLFSON**: I don't recall.
> **MR. BUREAU**: Okay. Is it possible you had that discussion? You had a lot of discussions you said.
> **MR. WOLFSON**: Doesn't sound like a discussion that I'd have.
> **MR. BUREAU**: Why not?
> **MR. WOLFSON**: 'Cause my business generates income. That's my business, that's what I, that's what my companies do.
> **MR. BUREAU**: You have talked about leaving a legacy to your children, haven't you?
> **MR. WOLFSON**: I think what you're referring to is a legacy which was begun by my grandfather.
> **MR. BUREAU**: Mm hm.
> **MR. WOLFSON**: I'd love for my kids to be able to work with me within the group of companies. Um, maybe they'd want to be an architect or an engineer, or whatever, get a law degree and continue…
> **MR. BUREAU**: Help defray some of those costs.
> **MR. WOLFSON**: Uh, that's not what I said.
> **MR. BUREAU**: No, no. I'm just trying to lighten the moment. That's fine. Um, so, your testimony is that while you may have— you've discussed lots of things with Jennifer—you never discussed with her the possibility of what I'm going to call cashing out—selling everything you had and retiring.
> **MR. WOLFSON**: No, I do not believe so.
>
> …

[33] In stark contrast, the record contains extensive evidence respecting how Mr. Wolfson owned, operated and managed the rental properties for the primary purpose of generating income or profit in a true entrepreneurial sense.

[34] Turning to costs, the judge awarded Ms. Wolfson a lump sum of $422,567. The judge reasoned:

> [105] To do justice between the parties, I award a lump costs award of $254,450, which represents about 75% of Ms. Wolfson's adjusted legal fees of $339,267.70. To this amount, I add an award of $168,117 for expert fees and HST, for a total lump sum award of $422,567. In reaching this conclusion, I balanced the many factors outlined in this decision, including:

- Costs are payable on a party and party basis and not on a solicitor client basis.
- Settlement positions and offers cannot be considered because of their connection with the parties' settlement conferences.
- HST on legal fees is a valid consideration in this case, either in its own right or as a reasonable, necessary, and just disbursement.
- The amount involved is at least $4.8 million.
- The litigation was complex and involved significant legal, accounting, and valuation issues. These issues were not only addressed by the parties, but also by four experts who provided detailed opinion evidence.
- This case involved a strategic and egregious dereliction in the duty to disclose, which likely resulted in a conservative calculation of the true value of Mr. Wolfson's corporate shares. In addition, the lack of disclosure compromised the integrity of the trial process and limited the parties' ability to meaningfully engage in settlement discussions.

[35] I will supplement any additional background, as needed, in my analysis of the issues.

Issues

[36] Mr. Wolfson raises these grounds of appeal:

1. Did the judge err in her classification of the disputed assets?

2. Did the judge err in her s. 13 analysis?

3. Did judge err in her costs award?[1]

[37] Whether the fresh evidence should be admitted is also in issue. Mr. Wolfson's proposed evidence relates to his third ground of appeal. I will deal with its admissibility in my analysis of that issue.

Standard of Review

[38] The standard of review that guides our assessment of the alleged errors is not controversial.

[1] Grounds 1 and 2 relate to the judge's merits decision. Ground 3 arises from her costs decision.

Classification and division of property

[39] A judge's exercise of discretion in the classification and division of property will not be interfered with by this Court unless the judge has erred at law, applied incorrect principles, made a palpable and overriding error of fact or the result is so clearly wrong as to amount to an injustice. (See *Saunders v. Saunders,* 2011 NSCA 81 at para.18, *Cunningham v. Cunningham*, 2018 NSCA 63 at para. 15 and *Moore v. Darlington*, 2017 NSCA 67 at para 40.)

[40] Issues of fact, including inferences, and issues of mixed fact and law from which no error of law is extractable, are reviewed for palpable and overriding error. Issues of law, including points of law which are extractable from mixed questions of fact and law, are reviewed for correctness. (See *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8 and 27).

Costs

[41] Costs awards are within a judge's discretion. This Court defers to that discretion, absent an error in law or where the award results in an injustice. (See *Ward v. Murphy*, 2022 NSCA 20 at para. 28 and *Donner v. Donner*, 2021 NSCA 30 at para. 60.)

Analysis

Did the judge err in her classification of the disputed assets?

[42] Mr. Wolfson asserts the judge's classification and resulting division of shares must be set aside because (1) the MPA does not permit the hybrid classification she imposed, and (2) she made a palpable and overriding error in finding the other primary and equal purpose of the rental properties was for the creation of a retirement vehicle for both parties. I agree and will address each error in turn.

Error of law – interpretation of MPA provisions

[43] In Nova Scotia all assets are presumed to be matrimonial assets under the MPA unless a party can demonstrate, on a balance of probabilities, the asset fits one of the enumerated exceptions pursuant to s.4(1) of the MPA. Business assets are one such exception (s.4(1)(e)).

[44] Section 4(1) of the MPA provides:

> **"matrimonial assets" defined**
> **4 (1)** In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, **with the exception of**
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
> (b) an award or settlement of damages in court in favour of one spouse;
> (c) money paid or payable to one spouse under an insurance policy;
> (d) reasonable personal effects of one spouse;
> **(e) business assets;**
> (f) property exempted under a marriage contract or separation agreement;
> (g) real and personal property acquired after separation unless the spouses resume cohabitation.
>
> [emphasis added]

[45] Excluded business assets are defined as:

> **Interpretation**
> 2 In this Act,
> (a) **"business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose,** but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;
>
> [emphasis added]

[46] As Mr. Wolfson sought to exclude the disputed property from division, he shouldered the evidentiary burden. He had to establish, on a balance of probabilities, that the primary purpose of the disputed shares was the generation of income or profit in an entrepreneurial sense. (See *Clarke v. Clarke*, [1990] 2 SCR 795; *Tibbetts v. Tibbetts* (1992), 119 N.S.R. (2d) 26 (N.S.C.A.)).

[47] As I have indicated, the judge found the shares had dual primary purposes:

> [195] I find that the companies were owned, operated and managed for two primary but equal purposes – as an income producing vehicle, and as a retirement vehicle. Neither purpose was more vital, valuable, or significant than the other. The Wolfson rental properties were created, developed, and operated to provide both a consistent cash flow and to increase capital for the parties' retirement. As a result, I find that 50% of the value of the shares owned by Mr. Wolfson are properly classified as excluded business assets, while 50% are properly classified as matrimonial assets. …
> …

> [201] In summary, I find that 50% of Mr. Wolfson's corporate shares are properly classified as matrimonial because they demonstrate two equal, primary purposes. The rental properties both generate income in the entrepreneurial sense, and they serve as a retirement vehicle for the parties. The rental properties are both an income stream and appreciating capital assets being held for retirement.
>
> [202] Half of the value of Mr. Wolfson's corporate shares equal $13,908,662 / 2 = $6,954,331. This is the value of the matrimonial portion for division purposes.

[48] The judge instructed herself on the need to classify the disputed assets. She stated:

> [172] Married couples and registered domestic partners in Nova Scotia who are not situate on First Nations Reserves are bound by the provisions of the *MPA.* Nova Scotia is one of only three provinces that exempts business assets from a presumptive equal division of matrimonial property. Despite two Law Reform Commission Reports, one in 1997 and the other in 2017, urging the legislature to remove the business asset exemption, successive provincial governments have chosen not to do so. Thus, the current business asset exemption stated in s. 4(1)(e) of the *Act* and defined in s. 2(a) applies to the Wolfson property division claim.
>
> …
>
> [194] Because the *MPA* is remedial legislation, it must be ascribed a liberal and purposeful interpretation in keeping with its stated objectives. As such, otherwise business assets may be classified as matrimonial depending on the primary purpose of the asset, including whether the asset is generating income in the entrepreneurial sense, whether the asset is a capital asset acting passively, or whether the asset was acquired from funds diverted from the family. Further, the court must examine the parties' intention and treatment of the asset when considering classification issues.

[49] It appears from these passages the judge was aware the task before her was to ascertain the "primary purpose" of the disputed shares. But that is not what she did.

[50] As noted, the concept of "two primary but equal purposes" was never proposed by the parties at trial. Nor was this concept ever identified by the judge prior to release of her decision.

[51] Mr. Wolfson's appeal counsel raised concerns about the absence of any signalling from the judge that she was contemplating such a remedy under the MPA. This is a legitimate complaint. Had she done so, Mr. Wolfson would have been able to make submissions as to whether such an outcome was permissible under the MPA.

[52] I move on to the issue at hand—can an asset have dual "primary" purposes?

[53] The need to classify an asset as either matrimonial or business is supported by the jurisprudence. Many cases have recognized that assets can (and often do) have both matrimonial and business characteristics. However, the task of the judge is to determine which category the asset primarily fits into given the facts of the presenting case. (See *Curren v. Curren* (1987), 81 N.S.R. (2d) 118 (N.S.S.C.), *L.(J.W.) v. M.(C.B.)*, 2008 NSSC 215 at para. 16; *Cunningham v. Cunningham*, 2012 NSSC 91 at para 61; *S.L.K. v. M.M.H*, 2009 NSSC 319 at para. 21; *Buchhofer v. Buchhofer*, 2015 NSSC 358 at para. 33).

[54] The judge did not cite any authority to support her "two primary but equal purposes" finding. Nor did the respondent identify any such authority on appeal. To my knowledge, there is no jurisprudence, either in Nova Scotia or the other two jurisdictions where business asset exceptions still exist (New Brunswick and Newfoundland and Labrador), that allows for an asset to have dual primary and equal purposes. Justice Forgeron created a new category of assets – those which are equally matrimonial and non-matrimonial.

[55] Interpreting the MPA is a question of law. The judge had to be correct in her interpretation of the MPA. While the judge properly instructed herself on the need to classify the disputed assets – she erred in law by classifying them as both matrimonial and business assets. While assets can have multiple purposes that are both matrimonial and business, the trial judge was required to categorize these assets as one or the other. A plain reading of the MPA illustrates the hybrid classification imposed by the judge was not permitted.

[56] Exceptions to matrimonial assets are set out in s. 4(1). Business assets are limited by the definition in s. 2(*a*) and once they are determined to be business assets, there are no further restrictions to their exempted status in 4(1)(e). For convenience I restate those sections:

> **4 (1)** In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, **with the exception of**
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
> (b) an award or settlement of damages in court in favour of one spouse;
> (c) money paid or payable to one spouse under an insurance policy;
> (d) reasonable personal effects of one spouse;
> (e) business assets;

> (f) property exempted under a marriage contract or separation agreement;
> (g) real and personal property acquired after separation unless the spouses resume cohabitation.
>
> 2 In this Act,
>
> (a) **"business assets" means** real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, **but does not include** money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;
>
> [emphasis added]

[57] Counsel for Mr. Wolfson points to the difference between s. 4(1)(e) and other sections of the MPA. For example, s. 4(1)(*a*) provides an exception with a further restriction:

> **4 (1)** In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, **with the exception of**
>
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse **except to the extent** to which they are used for the benefit of both spouses or their children;
>
> [emphasis added]

[58] Further, the exceptions under s. 4(1)(*b*) and (*c*) are also restricted by virtue of s. 4(2):

> **Damages or insurance proceeds**
> **(2)** Notwithstanding clauses (b) and (c) of subsection (1), an award or settlement of damages in court or money being paid or payable under an insurance policy is a matrimonial asset to the extent that it is made, paid or payable in respect of a matrimonial asset.

[59] Mr. Wolfson argues that the standalone nature of s. 4(1)(e) is in contrast to the other noted subsections and this indicates a legislative intention to limit the applicability of exemptions of some assets but not others. He further submits that had the legislature intended to impose further restrictions on the exempted status of business assets this could have been expressed in s. 4 (1) as was the case for s. 4(1)(a), (b) and (c).

[60] Although nothing turns on this, I observe that s. 4(4) and s. 3(3) appear to further restrict what might otherwise be "business assets". These provisions relate to preservation of the matrimonial home:

> **Home owned by corporation**
>
> 3(3) The ownership of a share or an interest in a share of a corporation entitling the owner to the occupation of a dwelling owned by the corporation is deemed to be an interest in the dwelling for the purposes of this Section.[2]
>
> **Shares of corporation**
>
> 4(4) Where property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of that property are matrimonial assets.

[61] Further, and importantly, section 16 of the *MPA* reads as follows:

> **Determination of question between spouses**
> **16 (1)** Either spouse may apply to the court for the determination of any question between the spouses as to
> (a) the ownership or right to possession of any particular property;
> **(b) whether property is a matrimonial asset or a business asset,**
> except where an application has been made and not determined or an order has been made respecting the property under this Act.
> **Powers of court under subsection (1)**
> **(2)** Where an application is made under subsection (1), the court may
> (a) make a declaration as to the ownership or right of possession in the property;
> (b**) make a declaration as to whether the property is a matrimonial asset or a business asset;**
> (c) where the property has been disposed of, order that a spouse pay compensation for the interest of the other spouse;
> (d) order that the property be partitioned or sold;
> (e) order that either or both spouses give such security, including a charge on property, that the court orders, for the performance of any order under this Section, and may make such other orders and directions as are ancillary thereto. R.S., c. 275, s. 16.
>
> [emphasis added]

[62] Section 16 provides a party the right to apply for a judicial declaration that an asset is either a matrimonial or business asset. The wording of s. 16 is clear, a

[2] Section 3 of the MPA defines "matrimonial home" .

judge must determine that an asset is one or the other. "Or" is a disjunctive term. *The Encyclopedic Dictionary of Canadian Law*[3] defines "or" as:

> 1. Used in a disjunctive sense to link mutually exclusive alternatives […].

[63] Had the intention of the legislature been to permit a hybrid classification of an asset, as the judge did in this case, it would not have used "or" in this section.

[64] The classification of assets as either business or matrimonial is also harmonious with other sections of the MPA. For example, s. 13(f):

> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> …
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> [emphasis added]

[65] Section 13(f) permits relief where one spouse – who is not entitled to any portion of the business assets – is granted a division of property to reflect the reality of increased domestic responsibilities which enabled the other spouse to acquire and develop business assets.

[66] And s. 18:

> **Contribution to business asset by spouse**
>
> 18 Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order
>
> (a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or
>
> (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

[3] Kevin P. McGuinness, *The Encyclopedic Dictionary of Canadian Law*, vol. 2 (Toronto, ON: LexisNexis Canada, 2021) at O-100.

> and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.

[67] Section 18 contemplates relief where one spouse owns the business assets, those assets not being divisible matrimonial property, but the non-owning spouse contributed to the assets in some manner. If business assets could be divided as was done in this case—why would a party resort to a claim under s. 18? The judge could simply determine what percentage of the business asset was a joint contribution and then split it accordingly.

[68] As noted, to prove an asset is a "business asset" a party must establish its primary purpose is the generation of income or profit in an entrepreneurial sense. Thus, the meaning of the word "primarily" in s. 2(a) of the MPA also requires examination.

[69] In his appeal submissions Mr. Wolfson contends:

> 46. In remedial statutes, words are to be given their grammatical and ordinary sense in harmony with the statute. The grammatical and ordinary sense of "primarily" is: principally, chiefly, something of the first rank or importance, the largest category of several categories, or for the most part.
>
> 47. The grammatical and ordinary sense of "primarily" is consistent with the statutory scheme's expansive view of matrimonial assets. All assets are matrimonial and available for division, unless they are specifically excluded. The exclusion of business assets focuses on those primarily used or held for income- or profit- producing purposes.
>
> 48. Primarily does not mean equally. … Only one purpose can be the primary purpose. Every other purpose is secondary or less.
>
> 49. By using the word "primarily," the drafters understood that an asset may be used or held for more than one purpose. A different intention would be demonstrated if the drafters had said that a business asset was one used or held *solely* or *exclusively* or *entirely* or *only* for or in connection with a commercial, business, investment, or other income-producing or profit-producing purpose.
>
> 50. Under the *MPA*, an asset is properly classified as a "business asset" where it is proven to be "primarily used or held" for one of the purposes stated in subsection 2(a). That there may be other purposes doesn't disqualify the asset from being a business asset.

[70] *The Encyclopedic Dictionary of Canadian Law* [4] defines "primary" as:

> 1. Of chief importance; principal. Key or central. 2. Paramount or overriding. […].

[71] The word "primary" is used in s. 4(3) of the MPA which deals with cohabitation and reconciliation:

> **4 (3)** For the purposes of clause (g) of subsection (1), spouses are deemed not to have resumed cohabitation where there has been a resumption of cohabitation by the spouses during a period or periods in aggregate not exceeding more than ninety days with reconciliation as its primary purpose.
>
> [emphasis added]

[72] In s. 4(3), the word primary is given a singular qualifier – reconciliation. Without reconciliation as the primary purpose, cohabitation is deemed not to have resumed. Apart from the obvious differences in the purpose of the sections, neither section applies unless the qualifier is present, reconciliation for one, income-producing or profit-producing for the other.

[73] To find, as the judge did, that:

> "the companies were owned, operated and managed for two primary but equal purposes – as an income producing vehicle, and as a retirement vehicle. Neither purpose was more vital, valuable, or significant than the other."

is discordant with the ordinary meaning of primary/primarily.

[74] As directed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the approach to statutory interpretation is as follows:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[4] Kevin P. McGuinness, *The Encyclopedic Dictionary of Canadian Law*, vol. 3 (Toronto, ON: LexisNexis Canada, 2021) at P-322.

[75] The theme of the respondent's appeal submissions[5] respecting the hybrid approach to the division of shares adopted by the judge is that:

> … There is nothing limiting the Court's ability to find two primary purposes and this Honourable Court should otherwise be cautious to disturb the finding….
>
> … It is submitted that this decision is a natural progression of the jurisprudence interpreting the remedial provisions of the *MPA* to date and does not feature the frailties alleged by the Appellant. …

[76] When one examines the entire context of the MPA it is clear the legislature intended for assets to be classified as either matrimonial or business assets. There was no dual primary purpose intention. It was the judge's responsibility to determine which competing purpose (income/profit generation v. retirement) was the primary purpose of the disputed assets.

[77] The remedial nature of the MPA does not displace the core principles of statutory interpretation. Applying the interpretive principles in *Rizzo* to the term "primarily" in s. 2(a) and the term "or" in ss. 16(1)(b) and 16(2)(b) of the MPA leads to only one possible conclusion – assets must be classified as either matrimonial or business, not both as the judge did here. Amendments to the business asset exemption provisions of the MPA is a matter for the legislature, not courts.

Equal primary purpose of retirement vehicle finding was a palpable and overriding error

[78] Having found the judge erred in law by arriving at a classification not permitted under the MPA allows this Court to aside set her classification and determine how the disputed assets should be classified. That said, I will explain the judge's factual error in finding that the other "primary but equal" purpose of the rental properties was for the creation of a retirement vehicle for both parties. This flawed conclusion also materially influenced the judge's reasons for awarding compensation to Ms. Wolfson under s. 13 of the MPA, thus it is important to address the error.

[79] A judge's factual findings, including factual inferences, are owed deference by appellate courts. To overturn findings of fact we must be satisfied the judge made a palpable and overriding error. A palpable error is one that is plain to see.

---

[5] Factum of the respondent at para. 5, 60.

An error is overriding if it has a material impact on the outcome of the case. (See *Laframboise v. Millington*, 2019 NSCA 43 at para. 14).

[80] At trial Ms. Wolfson contended the disputed assets should be classified as matrimonial, not business, based on these factors: the parties' intermingling of finances, the passive nature of the rental properties, and the parties' retirement intention.

[81] The judge anchored her classification on the parties' retirement intentions. For convenience, I restate what the judge concluded:

> [195] I find that the companies were owned, operated and managed for two primary but equal purposes – as an income producing vehicle, and as a retirement vehicle. Neither purpose was more vital, valuable, or significant than the other. The Wolfson rental properties were created, developed, and operated to provide both a consistent cash flow and to increase capital for the parties' retirement….

[82] There is no doubt the judge's finding had a material effect on the outcome—almost 7 million dollars in assets were assigned as presumptively matrimonial. Clearly this would be overriding. I am also satisfied the errors are palpable/plain to see.

[83] In this case, the rental properties were used to generate income and used as the family's primary income source. The properties were held by a variety of companies and kept separate and apart from the finances of the family. Mr. Wolfson was in the business of being a landlord and real estate developer. It is clear from the record that prior to considering the intention of the parties, these properties fell under the business asset exception.

[84] The retirement related evidence in this case was insufficient to establish the importance attributed to it by the judge. The judge accepted Ms. Wolfson's evidence; however, that evidence can not reasonably be said to establish the disputed assets were "primarily" intended as a retirement vehicle.

[85] In addition to the evidence simply being insufficient to ground a "primary" intention attribution, the judge's reasons raise additional concerns:

> 1. The judge misapprehended the evidence of Mr. Wolfson respecting his desire to leave a legacy for his children. He deposed in an affidavit:
>
> > 64. It was always my intention to continue the legacy begun by my grandfather, and grow the business, both to generate more income, and to

> pass a bigger legacy on to our children. I am proud that the company has been able to employ others and contribute to the economy of the city. There is substantial life insurance in place to ensure the company can continue without me.

The judge conflated legacy and retirement as synonymous with one another when they are obviously distinct concepts. This misapprehension clearly impacted her decision on intention. The judge said:

> [170] … The rentals were the parties' retirement funds. This was in part acknowledged by Mr. Wolfson when he spoke about leaving a legacy to the children.

2. The judge's reliance (para. 198) on a general discussion she accepted occurred between the parties respecting the use of 1 unit being the parties "retirement home" seems misplaced. The personal use of 1 out of 257 units cannot be reasonably stretched to mean the parties intended all the assets to be used as a retirement vehicle.

[86] In my view, the record overwhelmingly supports a finding that the companies were owned, operated and managed for the primary purpose of generating income or profit in an entrepreneurial sense. The business assets were operated to produce a consistent cash flow which was reinvested in the company and used by the parties to support them and their children. The judge's conclusion that the assets were owned, operated and managed as a retirement vehicle was a palpable and overriding error. In other words, on this record, the inescapable conclusion is that Mr. Wolfson established, on a balance of probabilities, the disputed assets are business assets and the share value is to be excluded from division. I would allow this ground of appeal.

Did the judge err in her s. 13 analysis?

[87] Ms. Wolfson's claim under s. 13 of the MPA was in the alternative. The judge explained:

> [3] … Ms. Wolfson asks that the shares be classified as matrimonial and divided equally. In the alternative, she seeks compensation for the work she did on behalf of the companies and also seeks an unequal division. Ms. Wolfson states that the exclusion of the corporate assets would produce an unfair or unconscionable result.

[88] Ms. Wolfson was not successful under s. 18 where she claimed a direct contribution to a business asset. As noted earlier, that was in part due to dividends she received and the judge viewing her claim to be better suited to s. 13. [6]

[89] As stated earlier, s. 13 permits a judge to divide matrimonial assets unequally or make a division of property that is not a matrimonial asset, provided the judge is satisfied an equal division of matrimonial assets would be unfair or unconscionable. The section provides:

> **Factors considered on division**
>
> **13** Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:
>
> (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
>
> (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
>
> (c) a marriage contract or separation agreement between the spouses;
>
> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> (g) the contribution by one spouse to the education or career potential of the other spouse;
>
> (h) the needs of a child who has not attained the age of majority;
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (j) whether the value of the assets substantially appreciated during the marriage;
>
> (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
>
> (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;

---

[6] In *Ryan v. Ryan*, 2010 NSCA 2 at para. 15, this Court observed that direct contributions to business assets are properly considered under s. 18, while indirect contributions are considered under s. 13.

> (m) all taxation consequences of the division of matrimonial assets.

[90] Ms. Wolfson based her claim on s. 13(a), (b), (e), (f), (g), (i) and (j). The judge considered each of these factors. She found s.13(b) did not apply, but otherwise concluded Ms. Wolfson had established a claim under s. 13. She held:

> [268] I grant Ms. Wolfson's s. 13 claim. Ms. Wolfson proved by strong and convincing evidence that an equal division would be unfair or unconscionable on a broad view of all relevant factors. This finding is especially pronounced if I erred in my classification of Mr. Wolfson's shares. Ms. Wolfson has met the higher standard discussed in caselaw and reviewed by the Nova Scotia Law Reform Commission.

[91] To compensate Ms. Wolfson, the judge crafted the outcome to capture the amount Ms. Wolfson would have also received as a result of her impugned classification ruling:

> [290] I must now determine the amount of the unequal division. The amount I grant is contingent on the classification of Mr. Wolfson's corporate shares. If I was correct in my classification, I grant Ms. Wolfson a further $1 million based on s. 13 factors. If, however, I erred in classifying Mr. Wolfson's shares, then I would reach the same global result by applying my s. 13 analysis.
>
> [291] In summary, Ms. Wolfson is to receive the cumulative amount of $4,477,165 for her interest in the companies. This roughly equals 32.19% of the equity in the companies. In contrast, Mr. Wolfson will retain $9,431,497 for his interest in the companies. An equal division of the remaining assets is ordered. …

[92] Compensation for a successful s. 13 claim (either an unequal division of matrimonial assets or a division of non-matrimonial assets) must only reflect an amount that alleviates the unfairness or unconscionability. Wealth redistribution is not the purpose of a s. 13 award.

[93] A s. 13 claim must be grounded in the evidence and relate to one or more of the enumerated grounds. This Court has said that a claim for unequal division must be proven by "strong evidence" that demonstrates, on a broad view of all relevant factors, that equal division would be unfair or unconscionable. (See *Donald v. Donald*, (1991) 103 N.S.R. (2d) 322 (C.A.) at para. 20, 81 D.L.R. (4th) 48 and *Volcko v. Volcko*, 2015 NSCA 11 at para. 49). Only when that determination is made will departure from the norm of equal division be permitted. (See *Young v. Young*, 2003 NSCA 63 at para. 15).

[94] I am mindful the judge's analysis under s. 13 was a fact-driven exercise and required the exercise of judicial discretion to weigh a variety of competing factors.

As a result, deference is typically owed on appeal. Our intervention is only warranted where the judge made an error of law, applied incorrect principles, made a palpable or overriding error or the result is clearly so wrong as to amount to an injustice. For example, a review of s. 13 jurisprudence from this Court identifies the following situations where appellate intervention is warranted:

- It is an error of law to consider irrelevant s. 13 grounds or ignore relevant ones (*Young* at para. 7; *Leigh v. Milne*, 2010 NSCA 36 at para. 39; *MacIsaac v. MacIsaac*, 1996 NSCA 128, 150 N.S.R. (2d) 321 at para. 26).
- It is an error in principle to consider factors that are not enumerated in s. 13 of the *MPA* (*Donald* at para. 21).
- Misclassification of assets as matrimonial or non-matrimonial is an error in principle if it affects the s. 13 analysis (*Young* at para. 13; *Best v. Best*, (1991), 32 R.F.L. (3d) 1 (C.A.) at paras. 20, 22).
- It is an error of law to join distinct categories of support that require independent analyses and consideration (*Werner v. Werner*, 2013 NSCA 6 at para. 68).

[95] With the foregoing in mind, I turn to the question of whether the judge's finding under s. 13 is tainted by reversible error. In my view, it is.

[96] The judge's s. 13 analysis is set out in paras. 237-291 of her merits decision. I need only address the statutory factors which demonstrate error, beginning with the judge's analysis of s. 13(a).

Section 13 (a) the unreasonable impoverishment by either spouse of the matrimonial assets - error

[97] The judge found s. 13 (a) applied. She held:

> [271] In the circumstances of this case, I find that s. 13(a) applies because priority was assigned to the accumulation of equity in the companies, which resulted in the impoverishment of the other matrimonial assets.

[98] It was an error of law to consider s. 13(a) because it was an irrelevant ground in the circumstances of this case. The judge considered the impoverishment of matrimonial assets in comparison to non-matrimonial assets.

[99] The judge found (at para. 271) s. 13(a) to apply due to Mr. Wolfson's "priority" of increasing the value in the company assets as compared to matrimonial property. The question is not a comparative one of whether non-

matrimonial assets increased faster than matrimonial ones. Rather, it is an objective question focused solely on the matrimonial assets. That is apparent on a plain reading of the section. The question to be asked and answered under s. 13 is whether matrimonial assets were unreasonably impoverished.

[100] The respondent submits the judge applied s. 13 (a) in a manner consistent with the remedial nature of the legislation which requires a liberal (more expansive) interpretation. I disagree. Instead, I agree with Mr. Wolfson's submissions:

> 114. The trial judge's error is one of statutory interpretation. For subsection 13(a) to apply, the Respondent must prove, on a balance of probabilities, that (i) the matrimonial assets have been impoverished and (ii) the impoverishment of the matrimonial assets was unreasonable.
>
> 115. There was no evidence that the matrimonial assets were either impoverished or unreasonably impoverished.
>
> 116. The trial judge didn't turn her mind to the proper interpretation of subsection 13(a). Instead, she determined, at paragraph 270, that "the words used in s. 13(a) are not restrictive" and then proceeded to consider factors that have no relation to the interpretation given to the clear words of this subsection in over 40 years of jurisprudence. The trial judge cited no authority to support her interpretation of the subsection – because there is none – and no authority for the proposition that the language of subsection 13(a) can be interpreted so expansively, which it can't be.
>
> 117. The trial judge theorized that subsection 13(a) applied "*because **priority** was assigned to the accumulation of equity in the companies, which resulted in the impoverishment of the other matrimonial assets*" … This explanation actually demonstrates the lack of application of subsection 13(a). "Priority" and "impoverishment" are not the same. The impoverishment of matrimonial assets does not follow simply because the equity in the business assets increased. To the contrary, the evidence before the trial judge showed that the value of the matrimonial assets increased substantially during the marriage.
>
> 118. Finally, even if the trial judge's expansive interpretation of subsection 13(a) is correct, the trial judge made no finding that "*the impoverishment of the matrimonial assets*" was unreasonable.
>
> [emphasis in original]

Section 13 (e) the date and manner of acquisition of the assets - error

[101] Section 13(e) (the date and manner of acquisition of the assets) has generally been used to divide matrimonial property that would otherwise be subject to presumptive equal division. For example, in cases of short marriages, where one

party has brought a significantly larger share of assets into the marriage, courts have been reluctant to award equal division. As this Court said in *Shotton v. Roberts*, (1997) 156 N.S.R. (2d) 47 at para. 14:

> The *Act* was not, however, implemented as a tool to arbitrarily redistribute or equalize wealth between married persons. I agree with the comment of Davison, J. in *Zimmer v. Zimmer* (1989), 90 N.S.R. (2d) 243 (N.S.S.C.T.D.) at p.253:
>
> > The legislature did not intend for the Matrimonial Property Act to be used as a vehicle for one party to profit by entering into a short marital relationship and departing with a profit by reason of the contribution made to the marriage by his or her spouse. . .

[102] The division of non-matrimonial assets such as business assets is possible under s. 13. However, as this Court held in *Young*, there is no presumption of equal division:

> [15] There is no presumption that business assets be divided equally, or at all. Under s. 18, the division of a business asset is made solely in accordance with the contribution of the non-owning spouse to the business asset, ignoring the relationship of the parties. In contrast, the division of matrimonial assets is prima facie equal, with unequal division permitted only in limited circumstances. The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the Act is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the Act, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. …

[103] The judge's rationale for finding s. 13(e) to be a compelling reason for unequal division included "the companies and rentals were intended to be… a vehicle for the parties' retirement" (at para. 278). More specifically, as I earlier set out, the judge found the retirement purpose to be a "primary" purpose.

[104] As I explained when addressing the first ground of appeal, the judge's conclusion that the disputed assets were owned, operated and managed for the primary purpose of a retirement vehicle was a palpable and overriding error. The judge's assessment of the "date and manner of acquisition" was impacted by this erroneous conclusion. This reflects an error in principle in the judge's analysis under s. 13(e). Furthermore, given the importance the judge placed on the retirement intentions of the parties, this clearly influenced her quantum assessment.

[105] The judge's reasons reveal further error. Section 13 of the MPA requires the judge to apply a two-step test. As explained by this Court in *Donald* at para. 20:

> In Archibald v. Archibald (1981), 1981 CanLII 4859 (NS SC), 48 N.S.R. (2d) 361 Hallett, J. stated that the court is limited to considering the factors enumerated in s. 13 in determining in the first instance if it would be unfair or unconscionable to simply divide matrimonial assets equally, **and then, applying the same factors determine what division thereof would be fair and conscionable**. I agree.

[emphasis added]

Did the judge complete the required second step in Donald?

[106] Mr. Wolfson contends the judge did not complete the second step in *Donald*. He argues:

> 143. The trial judge erred in law in that, having determined it would be unfair or unconscionable to divide the matrimonial assets equally, she failed to do the analysis required by Justice Hallett (as he then was) in **Archibald v. Archibald,** *supra*, and endorsed by this Honourable Court in **Donald v. Donald**, *supra*, namely, to "*determine what division thereof would be fair and conscionable*." Instead, the trial judge simply used the same quantum she had previously arrived at – under an improper classification of shares – never turning her mind to the crucial point of making an award that would overcome the unfairness or unconscionability.
>
> 144. The Appellant offers the following analysis for consideration. If one looks at "fair" or "conscionable" on a linear continuum, the range of what is fair or conscionable will be quite broad. If one transposes that to a section 13 analysis, when a litigant proves an equal division of the matrimonial assets is unfair or unconscionable, this means that an unequal division is outside the range of what is fair or conscionable. In moving the asset division from unfair or unconscionable, a trial judge only has to bring the division into the range of what is fair or conscionable and no further.
>
> 145. Contrary to the law, and without having turned her mind to the question of what must be done to make the asset division fair or conscionable, the trial judge went through, and far beyond, the zone of what was fair or conscionable, and ordered an unequal division of assets that was unfair and unconscionable to the Appellant.

[107] Ms. Wolfson points to the highly discretionary nature of the judge's task and argues there is no cause for our intervention. She submits:

> It is clear from the case law that while section 13 does not allow for absolute discretion on behalf of the trial judge that it is a highly discretionary decision

> having a view to the assets of the parties to determine what a fair or conscionable division of assets would be. In conclusion, the Appellant has not established that the learned trial judge erred. There is no improper application of legal principles, no palpable and overriding error of fact, and, the result does not amount to an injustice.

[108] I agree with Mr. Wolfson that the judge did not complete the second step as directed in *Donald*. It is clear from her decision that she only performed the first step in *Donald*—she answered the question of whether it would be unfair or unconscionable to divide the matrimonial assets equally.

[109] However, as to quantum the judge said:

> [290] I must now determine the amount of the unequal division. The amount I grant is contingent on the classification of Mr. Wolfson's corporate shares. If I was correct in my classification, I grant Ms. Wolfson a further $1 million based on s. 13 factors. If, however, I erred in classifying Mr. Wolfson's shares, then I would reach the same global result by applying my s. 13 analysis.
>
> [291] In summary, Ms. Wolfson is to receive the cumulative amount of $4,477,165 for her interest in the companies. This roughly equals 32.19% of the equity in the companies. In contrast, Mr. Wolfson will retain $9,431,497 for his interest in the companies. An equal division of the remaining assets is ordered. …

[110] The judge was focused on her classification determination. The s. 13 award was crafted in a manner that preserved it. Apart from the classification of assets not being a permitted statutory consideration under section 13, there is no indication of how the judge determined, in accordance with the *Donald* second step, that $4,477,165 represented the amount required to neutralize the unfairness or unconscionability of an equal division of the matrimonial assets.

[111] Based on the foregoing, I am satisfied the judge erred in several aspects of her s. 13 analysis and the errors had a material impact on her award. Thus, the judge's quantification of $4,477,165 is not subject to deference. I am satisfied a significant decrease is warranted but what should the reduction be?

Reduction of s. 13 award

[112] It is important to restate that the purpose of s. 13 is not to redistribute wealth. However, there is no precise formula. The objective is to arrive at an amount to overcome the unfairness or unconscionability. In other words, bring the division into a range of what would be fair and conscionable and no further.

[113] Mr. Wolfson seeks a substantial reduction in the reward. He asserts the award of $4,477,165 is excessive and far outside the range to rectify the judge's finding that an equal division of matrimonial assets would be unfair or unconscionable. He also references hefty personal income tax consequences that would attach to his access to dividends or a shareholder loan from the companies he controls to finance any award,[7] and, the compensatory aspect of the spousal support award which reflected Ms. Wolfson's disproportionate share of domestic/family responsibilities. He suggests approximately $400,000 on the low end (reflective of the additional matrimonial debt he offered to assume at trial). At the high end, something in the $1,000,000 range.

[114] Ms. Wolfson argues to the effect that any tax consequences are of no import. And as to spousal support:

> [113] The Appellant further suggests spousal support is a consideration on the quantification stage. They have not provided authority and this consideration is not listed under the closed list of factors under subsection 13 of the *MPA*. Ms. Wolfson disagrees with the Appellant's comments and submits that conversely, the unequal division of assets is a consideration for spousal support but not vice versa. The spousal support award is not under appeal. …

[115] Neither party requested that, in the event of reversible error, the matter return to the lower court for reassessment. We have the full record and in the interests of finality and assisting the parties to move on, I am satisfied we can and should determine the adjustment.

[116] To that end, after considering the substance of the judge's analytical errors, the strength of the remaining s. 13 factors not disturbed on appeal, including Ms. Wolfson's disproportionate assumption of child care and other domestic responsibilities (which enabled Mr. Wolfson to better acquire and develop business assets) (s. 13(f)), and, any overlap, as the judge seemed to observe, with statutory factors s. 13(g) and (i), I would award $1,500,000 under s. 13 of the MPA. In my view, this amount represents the appropriate award for the judge's finding of unfairness or unconscionability in the circumstances of this case.

[117] In arriving at the adjusted s. 13 award, I did not consider Mr. Wolfson's concern with tax consequences, nor the compensatory aspect of the spousal support award. As to tax implications, given the amount of the adjusted award, any consequences would not be prohibitive given Mr. Wolfson's remaining asset

[7] Mr. Wolfson submits at his income level, dividends received and/or any shareholder loans not repaid by him to the companies in the same fiscal year, would be taxed to him at 54.7%

portfolio. As to spousal support, even if the compensatory aspect could be considered under s. 13, I would not do so because the parties, and the judge in her ancillary decision, flagged the potential for a variation application due to the timing of the equalization payment made to Ms. Wolfson and how that might impact the determination of the parties' respective incomes for the purpose of spousal support. In other words, the quantum of support may change in the future.

Did the judge err in her costs award?

[118] The judge awarded Ms. Wolfson $422,567 in costs of which $168,117 related to expert fees she incurred respecting valuation of the disputed assets.

[119] Because of Mr. Wolfson's success on appeal, the costs awarded against him at trial must be adjusted. This was explained by this Court in *Doncaster v. Field*, 2016 NSCA 25:

> [74] As explained in *O'Brien v. Clark*, 1995 NSCA 232, because we have allowed the appeal, in part, the costs award on which it was based must be set aside. Accordingly, the usual standard of review in such matters no longer applies. We need not defer to the exercise of the trial judge's discretion and can assess costs anew.
>
> [75] Although we do not owe any deference to Justice Campbell's award of costs, that does not mean we completely ignore what he had to say in his decision.

[120] I will first address the resulting changes in the costs award that arise from Mr. Wolfson's success on appeal and then deal with the remaining amount of $168,117 for expert fees at trial.

Divided success and costs impact

[121] As a general statement, where success is divided, parties generally bear their own costs, both at trial and on appeal. (See *Keddy v. Keddy*, 2009 NSSC 33 at para. 12; *Kennedy-Dowell v. Dowell*, 2002 NSSF 50, 209 N.S.R. (2d) 392 at para. 37; *Doncaster* at para. 87; *Woodford v. MacDonald*, 2014 NSCA 31 at para. 43; *Lu v. Sun*, 2005 NSCA 112 at para. 89 and *Volko v. Volko*, 2020 NSCA 68 at paras. 56-57). In my view, this approach should be adopted in this case.

[122] At trial, Ms. Wolfson was the more successful party:

- Ms. Wolfson sought to have the disputed assets classified as matrimonial property – 50% were included (albeit erroneously).

- Ms. Wolfson sought compensation under s. 18 of the MPA – she was unsuccessful.
- Ms. Wolfson sought unequal division under s. 13 of the MPA – she was successful.
- Mr. Wolfson sought imputed income of Ms. Wolfson of $60,000 and Ms. Wolfson sought $48,000 – divided success as amount was set at $55,000.
- Ms. Wolfson sought imputed income of Mr. Wolfson of $734,000 and Mr. Wolfson sought $345,121 – substantial success for Ms. Wolfson as imputed income was set at $660,000.
- Spousal support was set at $13,914 per month for 12 years – success for Ms. Wolfson on this issue.

[123] The disputed business assets represented a significant portion of the assets divided at trial. And their classification occupied a substantial portion of trial time and of the judge's decision. The outcome on appeal shifts the success from Ms. Wolfson at trial to a divided result:

On appeal

- Two grounds were advanced (classification of business assets and the s. 13 analysis/unequal division award.)
- Mr. Wolfson was fully successful on the classification ground and only partially successful (although to a considerable monetary extent) on the s. 13 ground.

[124] In my view, apart from the issue of expert fees, which I will address next, I would order that the parties bear their own costs at trial and on appeal.

Expert fees and non-disclosure

[125] The judge determined Ms. Wolfson was entitled to recovery of expert fees at trial. The judge correctly set out the test for recovery of such fees at paras. 39-41 of her costs decision. She found Ms. Wolfson satisfied the test for recovery (para. 47). The judge was convinced it was reasonable for Ms. Wolfson to retain experts largely related to Mr. Wolfson's disclosure deficits (paras. 49, 53). The judge also found the amount charged by the experts was just and reasonable in part due to Mr. Wolfson's non-disclosure (para. 60).

[126] Non-disclosure has been described as the "cancer" of family law litigation and courts have regularly awarded costs against the non-disclosing party. (See

Michel v. Graydon, 2020 SCC 24 at para. 33; *Leskun v. Leskun*, 2006 SCC 25 at para. 34, citing *Cunha v. Cunha*, 1994 CanLII 3195 (B.C. S.C.), 99 B.C.L.R. (2d) 93 (S.C.) at para. 9 and *Donner v. Donner*, 2021 NSCA 30 at para. 42).

[127] I would not disturb the award of $168,117 for expert fees at trial. I see no error in the judge's reasons for imposing such an amount. While the parties did agree on valuations at the eleventh hour, that does not negate the concerns the judge aptly noted in her merits decision. I repeat them here:

> [55] Mr. Wolfson did not supply proof of the value of his shares in the 12 companies in either of his Statements of Property, despite his obligation to do so. In proceedings brought pursuant to the *Matrimonial Property Act,* R.S.N.S., c. 275, the titled spouse has a positive obligation to both identify their property and to provide credible and meaningful proof of value. …
>
> …
>
> [61] … Although in his Statements of Property, Mr. Wolfson listed his share ownership in his 12 companies, he did not provide credible or meaningful proof of the value of his shares. His failure to do so created a substantive and problematic evidentiary gap.

[128] Turning to Mr. Wolfson's motion for fresh evidence, I note that *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence where there are "special grounds". As explained in *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal to the S.C.C. denied, 35611 (6 February 2014):

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G*. 2012 NSCA 43, paras 77-79, leave to appeal denied [2012] S.C.C.A. 237, and authorities there cited *McIntyre v. Nova Scotia (Community Services*), 2012 NSCA 106, para 30.

[129] In *Barendregt v. Grebliunas*, 2022 SCC 22 the Supreme Court of Canada re-affirmed the application of the *Palmer* test in the family law context.

[130] The proposed evidence is comprised of communications between trial counsel and transcripts of pre-trial conferences with Justice Forgeron. Mr. Wolfson contends the proposed evidence would "remove any evidentiary basis for the trial

judge's finding regarding non-disclosure which was used to underpin her costs award". I do not agree.

[131] In my view, the proposed fresh evidence fails to meet the test for admissibility. The evidence was not fresh and could have been adduced at trial with due diligence. Further, the evidence would not have affected the result because it was insufficient to undermine the judge's reasons for awarding reimbursement for expert fees. For these reasons I would dismiss the motion.

Conclusion

[132] Based on the above analysis, I conclude:

> 1. The judge erred in her classification of the disputed assets. I would set aside the judge's classification and declare all the disputed assets/corporate shares owned by Mr. Wolfson to be business assets within the meaning of the MPA. Their value is to be excluded from the division of property as between the parties. Consequently, line 24 of the schedule set out at para. 298 of the judge's merits decision is to be disregarded.
>
> 2. The judge erred in her s. 13 analysis under the MPA. I would reassess the amount of Ms. Wolfson's s. 13 award to a total of $1,500,000. Consequently, this revised award must be factored into Mr. Wolfson's equalization payment.
>
> 3. The CRO provisions are accordingly adjusted by these determinations.
>
> 4. As to costs, I would dismiss the fresh evidence motion and reduce the costs awarded to Ms. Wolfson at trial to $168,117, being the amount Ms. Wolfson was awarded as reimbursement for incurred expert fees. This reduction arises from the appellant's success on appeal, not from alleged errors in the judge's original cost decision. Otherwise, on the basis of divided success below and on appeal, I would order that each party bear the balance of their costs in the court below and on appeal.

Van den Eynden, J.A.

Concurred in:

Scanlan, J.A.