SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Wolfson v Wolfson*, 2021 NSSC 260

Date: 2021/09/03
Docket: *SFH* No. 1201-071176
Registry: Halifax

Between:

Louis Wolfson

Petitioner

v.

Jennifer Wolfson

Respondent

Library Cover Sheet

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	March 9, 10, and 11, 2020; January 20, 21, and 25, 2021 in Halifax, Nova Scotia
Submissions	February 10 and 12; March 1 and 3, 2021
Decision:	September 3, 2021
Counsel:	Kim Johnson and Ashley Donald for the Petitioner, Louis Wolfson Richard Bureau and Ryan Christen for the Respondent, Jennifer Wolfson
Law:	Family Law
Issues:	Value of shares; Disposition costs; Classification of corporate shares; Section 18 claim; Unequal Division; Imputation of income; Jurisdiction to adjust for CCA claimed by companies; Pre-tax corporate income; Child support in shared parenting arrangement; and Spousal support.

Result: **Duty to Provide Evidence of Value**

Inherent in the duty to disclose is the duty to fairly value assets. The onus is on the party who owns the asset to provide credible and meaningful evidence of value. The onus is not on the non-owning party seeking disclosure.

Deductions for Disposition Costs

Law surrounding the calculation of disposition costs reviewed.

Husband's request, to have over $1.8 million in notional disposition costs related to real estate commission, was reduced by 70% given evidentiary burden, absence of credible evidence, available options, and other contingencies.

Husband's request to have $7.4 million reduction for capital gains tax rejected and replaced with a reduction of $1 million. Husband did not provide expert evidence on the calculation of the capital gain or on the projected amount of capital gains tax.

Adverse inference drawn where husband not an unsophisticated or impecunious litigant and the issue of capital gains was neither an unexpected nor novel legal or factual issue. Husband strategized that he would be in a better legal and financial position by omitting the expert evidence than he would be by producing it.

Husband's request to reduce the appraised value of the rental properties rejected in the absence of credible evidence.

The value of the husband's shares in the companies that own the rental properties is $13,908,662.

Classification of Corporate Shares

Review of legal principles and law surrounding classification of business assets. 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.

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 rental properties were created, developed, and operated to provide both a consistent cash flow and to increase capital for the parties' retirement. 50% of the value of the shares owned by the husband were classified as excluded business assets, while 50% were classified as matrimonial assets.

The parties' retirement intention was not a fleeting, future, or inconsequential plan, casually or inadvertently spoken, rather it was an intention specifically planned and orchestrated. $6,954,331 classified as a matrimonial asset.

Section 18 Claim

Law surrounding s. 18 claims reviewed. Wife denied s. 18 claim despite proof of direct and indirect contributions because she received dividends from companies. Given classification decision, it was appropriate to address the wife's contributions as part of her unequal division claim

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Unequal Division Claim

Law surrounding unequal division reviewed. Wife proved by strong and convincing evidence that an equal division would be unfair or unconscionable on a broad view of all relevant factors: the acquisition of the assets; the wife's disproportionate assumption of childcare and domestic responsibilities and its impact on the husband's ability to focus on the business; and the substantial increase in the value of the assets over the 12 years of marriage.

In these circumstances, an equal division would produce a result that would offend the concepts of fairness and conscionability. An

equal division of all matrimonial assets ordered, plus another $1 million to the wife. Cumulatively, the wife received 32.19% of the value of the corporate shares because of the classification and unequal division rulings.

In many jurisdictions business assets are divided and support paid without the collapse of either the "goose" or its "golden egg."

Details surrounding the timing, security, and applicable interest rate to be applied to the equalization transfer to be submitted by September 21.

Wife's Income

Wife's income was deemed to be $55,000 per annum which took into consideration income the wife will earn from her investment, which had an unpredictable and inconsistent payout.

Jurisdiction to Adjust for CCA Claimed by Companies

Law unsettled and no Nova Scotia appellate direction.

Given the remedial nature of the Guidelines, their stated objectives, and case authorities, court has jurisdiction to adjust for the CCA claimed by the husband's companies either pursuant to ss. 18 or 19 of the CSG or through s. 11 of Schedule III. Preference is for calculation to occur under s. 18 or s. 11 because s. 19 would place the evidentiary burden on the spouse who lacks control of the asset and the associated evidence. In this case, the burden is of no consequence, because even if it rests on the wife, she overwhelmingly satisfied it.

Husband's Income

Husband's annual income set at $660,000 in recognition that significant capital expenses will be incurred as the companies proceed with their development plans. This figure excludes the benefits provided to the husband by the companies because of limited evidence about their value. Some of these benefits, however, are considered as part of the parties' circumstances in the calculation of child and spousal support.

Child Support in Shared Parenting Arrangement

Law surrounding child support in shared parenting arrangement reviewed. After conducting Contino analysis, the set-off approach correctly captures the spirit and intent of s. 9 and was in keeping with the parties' submissions. Set-off amount of $7,324 per month is the appropriate child support figure, together with s. 7 expenses, which are to be prorated between the parties after spousal support is calculated, including expenses related to private school, faith, activities, and health.

If the parties are unable to agree on process to manage the payment of special expenses, then submissions to be provided by September 21.

Spousal Support

Court must follow binding direction of NSCA - SSAGs are a tool to be used for comparative purposes but do not replace the analysis required under the Divorce Act.

Wife has strong compensatory and non-compensatory spousal support claim. Parties enjoyed an affluent lifestyle. Given shared parenting arrangement, parties should share a similar standard of living.

Spousal support payable until January 2030.

As requested, parties are to recalculate spousal support figures based on parties' deemed incomes, sharing of special expenses, and debt payment. Further, benefits husband receives from companies reduce his need. Submissions due September 21.

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By the Court:

Introduction

[1] Louis and Jennifer Wolfson are separated spouses with two children. They seek a divorce, a division of their property, and the resolution of maintenance issues. All financial issues were aggressively litigated. In addition to the testimony of the parties and other lay witnesses, four experts offered opinion evidence about the contested property and support issues.

[2] The most significant property issue concerns the classification and division of the shares which Mr. Wolfson owns in a group of 12 companies. The group of companies owns, operates, and manages 21 rental properties under the name of Peppermint Properties. Nineteen of the rental properties were acquired after the marriage. Mr. Wolfson seeks to classify his shares as business assets and exclude them from division.

[3] In contrast, 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.

[4] In addition, Ms. Wolfson seeks support. Settlement of the maintenance issues was hindered because the parties disagreed on the quantification of their incomes. Mr. Wolfson wants to impute income to Ms. Wolfson because he states that she is underemployed. In contrast, Ms. Wolfson seeks to pierce the corporate veil so that Mr. Wolfson's income includes some of the corporate income.

[5] Ms. Wolfson seeks both child support and spousal support. Child support is linked to household standards of living given the shared parenting arrangement. Further, although the parties agree that Ms. Wolfson is entitled to spousal support, they do not agree on quantum or duration.

[6] This divorce hearing was complex and protracted. Despite direct evidence being adduced through affidavits and extensive expert reports, the trial nevertheless took six days to complete. The trial was held in March 2020 and January 2021. In February and March 2021, the parties provided lengthy written submissions to thoroughly review the evidence and to articulate their clients' respective positions.

Issues

[7] The following 11 issues will be determined in this decision:

- What is the value of Mr. Wolfson's shares in the corporate holdings once disposition costs are considered? *[paras 52 to 112]*
- What are the other assets and debts of the parties? *[paras 113 to 145]*
- Did Mr. Wolfson prove that the shares he owns in the group of companies that own and operate rental properties are exempt business assets? *[paras 146 to 202]*
- Did Ms. Wolfson prove entitlement to a s.18 claim? *[paras203 to 235]*
- Did Ms. Wolfson prove that an equal division is unfair or unconscionable? *[paras 236 to 291]*
- What is the appropriate division of the assets and debts? *[paras 292 to 301]*
- What is the income of Ms. Wolfson? *[paras 302 to 316]*
- Is CCA a permitted adjustment in determining Mr. Wolfson's income?*[paras 317 to 363]*
- What is the income of Mr. Wolfson? *[paras 364 to 414]*
- What is the appropriate child support award? *[paras 415 to 449]*
- What is the appropriate spousal support award? *[paras 450 to 475]*

Background

Before the Marriage

[8] When the parties started to date in 2004, they were living and working in different provinces. Ms. Wolfson was educated, employed, and living in Ontario. She was a teacher with an honours certification in special education. She owned a condo, a pension, and a significant investment that her father acquired on her behalf through savings which were invested when she was a young girl.

[9] For his part, Mr. Wolfson was educated, employed, and living in Nova Scotia. He was a lawyer having graduated in 2002 and called to the bar in 2004. Further, in 2003, Mr. Wolfson created a management company, LSC Leasing Inc, to provide management services for some of his grandfather's rental properties.

[10] In 2004, Mr. Wolfson acquired his first rental property which he purchased from family members. The Pepperell Street property was placed in the ownership of 5900 Holdings Limited. The property was acquired with the financial assistance of Mr. Wolfson's father and a CIBC mortgage. Mr. Wolfson said he had no personal resources. At his father's request, Mr. Wolfson's two sisters were given non-voting discretionary shares. They are not involved in the operation or

management of the company and have no decision-making authority. They have not received any benefit from the company. Mr. Wolfson has sole control of the company.

[11] The Pepperell Street property is composed of two large, four-unit buildings which required extensive renovations. The renovations were completed by September 2005. The renovations were financed by loans from Mr. Wolfson's father and a LOC. After the property was fully rented in September 2005, the company refinanced with RBC to repay Mr. Wolfson's father and the LOC.

Ms. Wolfson's Career Path After Marriage

[12] The parties married five months later in February 2006. Ms. Wolfson agreed to move to Halifax. She found employment as a substitute teacher and then secured a term position as a resource teacher from October 2006 until June 2007. She stopped working as a teacher because the parties' first child was born in October 2007. Their second child was born in July 2009. Ms. Wolfson remained out of the work force to care for both children.

[13] In addition to caring for their young children, the home, and helping with the companies, Ms. Wolfson completed her master's degree in Education on a part-time basis between 2007 and 2010.

[14] Given the extent of her responsibilities, in 2012, Ms. Wolfson opted for part-time employment with the Nova Scotia College of Early Childhood Education. Once this employment ended, Ms. Wolfson began working for Peppermint Properties for several months in 2014 and 2015. Afterwards, she started working at MSVU as a practicum supervisor in the Department of Child and Youth Studies. In 2016, Ms. Wolfson secured other employment at MSVU as a course lecturer. She is now currently employed, on a part-time basis, as faculty at MSVU. She also takes on other part-time contract work when available with MSVU and other entities, such as Debate Camp. Further, throughout the marriage, her investment produced considerable dividend payments which Ms. Wolfson consistently used for the benefit of the family.

[15] Ms. Wolfson has not been employed on a permanent, full-time basis since the marriage.

Mr. Wolfson's Career Path After Marriage

[16] Mr. Wolfson became the primary wage earner in 2007 when Ms. Wolfson took maternity leave. His income was generated from his employment as a lawyer, and from his work managing and renting properties.

[17] In 2008, LSC Leasing Inc assumed the management of all the rental properties owned by Mr. Wolfson's grandfather. In addition, in 2008, Mr. Wolfson stopped practicing law. He was not satisfied working as a lawyer. The parties therefore agreed that Mr. Wolfson should concentrate his efforts on developing and managing rental properties. Mr. Wolfson remains working in this field.

Acquisitions of Rental Properties After Marriage

[18] Mr. Wolfson acquired a large portfolio of rental properties after the parties married. In 2007, Mr. Wolfson's companies, Cabin 5 Holdings Limited, Lioncore Holdings Limited, and Cocowood Holdings Limited purchased six properties from the Ivany Apartment Company Inc. These properties were situate at 6190 Jubilee Road, 1840 Robie Street, 2586 Sherwood Street, 6008 Shirley Street, 6014 Shirley Street, and 5676 Columbus Street.

[19] 6190 Jubilee Road is a 23 unit apartment building. After purchase, the apartments were updated resulting in an significant increase in rents within a few years – from $17,775 to about $30,000 per month: exhibit 11, para 125.

[20] 1840 Robie Street is used for student housing and caters to medical students because it is close to the hospital. Bedrooms were added to the units to increase revenue. In addition, the property contains a large parking lot close to the hospital which is rented out to tenants and hospital staff.

[21] 2586 Sherwood Street was rented out until it was sold in 2011 for a "good profit": para 158, exhibit 11.

[22] 6008 and 6014 Shirley Street are each six-unit apartment buildings that were subject to minor renovations. The limited work that was done "significantly increased the value of the property:" para 139, ex 11. Lioncore arranged for the subdivision of the two properties. These properties are across the street from the former QE High School which soon will be the site of a major hospital expansion: para 141, exhibit 11.

[23] 5676 Columbus Street is an eight-unit apartment building which was modestly renovated since purchased by Cocowood Holdings Limited. It is the only property currently owned by Cocowood. It is in the north end of the city. The income from this property as well as the property's value increased since its acquisition: para 154, exhibit 11.

[24] In 2008, more properties were acquired. Cabin 5 Holdings Limited purchased 1949 Oxford Street and Oxford East Holdings Limited was incorporated to purchase three adjacent Oxford Street properties – 1935, 1941, and 1945. These

properties were renovated after purchase. 1949 Oxford Street is an eight unit apartment building which was modestly renovated, resulting in significant rent increases. An extra bedroom was added to 1941 Oxford Street while extensive renovations were effected on 1935 Oxford. These properties focus on the student market. They are profitable and rents increased considerably since acquisition: para 172.

[25] 1945 Oxford Street is the only property that is currently not rented because it is in a state of disrepair. It is located directly between 1949 and 1941 Oxford, thus offering significant developmental opportunities.

[26] More properties were purchased in 2009. Mr. Wolfson incorporated Windsor & Almon Holdings Limited to purchase and renovate property situate on 2810 Windsor Street which was acquired from Mr. Wolfson's grandfather. It was extensively redeveloped. Tenants were evicted and the building gutted. Renovations took about a year to complete. When completed, commercial tenants were located and the upper loft style apartments were successfully rented. The basement is used for residential and commercial storage.

[27] In 2010, Lioncore Holdings Limited bought 1834 Robie Street. It is adjacent to the 1840 Robie Street property which Lioncore also owns. It is a 13-bedroom triplex arranged over three separate flats. It too has a large parking lot which is rented out to tenants and hospital staff. Cosmetic renovations resulted in increased rent for each of the bedrooms. The units cater to students.

[28] Further in 2010, another company was incorporated, Tobin & Queen Holdings Limited, to purchase and renovate an apartment building on 5320 Tobin Street which was sold by Mr. Wolfson's grandfather. The 34-unit apartment building was extensively renovated after tenants moved out. It too continues to be profitable, although damage from a 2019 hurricane caused issues for which there is insurance coverage.

[29] In 2011, 6252-56 Shirley Street was bought for $850,000 and placed in Mr. Wolfson's name personally. It was extensively renovated and then sold in 2012 for $1,805,000. Scant details were provided about the renovation costs, tax consequences, or the treatment of profits.

[30] In 2011, 6275 Liverpool Street was purchased by Mr. Wolfson in trust and a conventional mortgage, personally held, of about $178,000, was secured. In 2015, the property was placed in the name of Harvard Properties Limited. In 2016, Harvard Properties transferred 6275 Liverpool Street to 2966 Windsor Holdings.

This home was rented until it was torn down to create a parking lot for 2966 Windsor Street.

[31] Similarly in 2011, Mr. Wolfson purchased 2840 Windsor Street in trust and secured a mortgage of about $337,000 in his name. In 2015, the property was transferred to Harvard Properties Limited. This property provides stable rental income and has development potential.

[32] In 2012, Mr. Wolfson purchased 2844 Windsor Street in trust by personal mortgage financing of $400,000 and, in 2015, transferred the property to Harvard Properties Limited. This property provides stable rental income and has development potential.

[33] In 2012, buildings were purchased from the estate of Mr. Wolfson's grandfather by three companies - 7145 Quinpool Holdings Limited, 2759 Windsor Holdings Limited, 2966 Windsor Holdings Limited. 7145 Quinpool Road is a 64-unit apartment building. This property may be redeveloped now that the HRM Centre Plan is finalized for this location. 2759 Windsor Street required extensive renovations of about $1 million that were completed in 2013. 2966 Windsor Street is a 24-unit residential apartment building that also underwent extensive renovations. In addition, 2966 Windsor Holdings Limited purchased 6275 Liverpool Street. Renovations and the Liverpool acquisition cost about $1 million. The renovations were completed by 2015. All properties are successfully rented.

[34] In 2013, 2834 Windsor Street was purchased in Mr. Wolfson's name in trust and then transferred in 2015 to Harvard Properties Limited. This property also provides stable rental income and development potential.

[35] All rental properties are operated through Peppermint Properties while LSC Leasing Inc provides management services to the entire group of companies. The individual companies pay management fees to LSC which in turn pays Mr. Wolfson. LSC Leasing Inc issued non-voting discretionary shares to Ms. Wolfson after the marriage so that dividends could be distributed to her.

[36] At the time of trial, the rental properties consisted of 21 different buildings, most with multiple units. The companies own 257 separate rental units which house 338 tenants. The companies also receive rent from parking tenants.

Other Assets of the Parties

[37] In addition to the rental properties, the parties have two homes. Their principal residence is on Inglis Street, Halifax while their summer home is in Chester. Both properties are held in Ms. Wolfson's name. Further, the parties

acquired retirement savings, savings, investments, and vehicles, as well as investments for their children.

Separation

[38] Mr. and Ms. Wolfson separated in January 2018. They both continued to live in the matrimonial home until July 2018 when Mr. Wolfson moved into a nearby house that Mr. Wolfson states was bought by his father for him. He says that he pays rent to his father.

[39] Initially, the children lived with Ms. Wolfson slightly more than with Mr. Wolfson. The parties then implemented a shared parenting arrangement where the children spend equal time with both parents. In January 2020, the parties reached a final settlement on the parenting issues. The arrangement continues to be one of shared parenting.

[40] Unfortunately, the parties did not reach agreement as to the interim payment of support. Ms. Wolfson continued to deposit her income and additional funds into the joint chequing account to pay for her expenses and those of the children. Similarly, Mr. Wolfson continued to put money into the joint account to pay for the household expenses and those of the children. He also paid Ms. Wolfson's monthly Visa bill and paid for some of the children's expenses. The children's expenses include private school tuition and Camp Kadimah expenses. At this stage, it is difficult to disentangle the intermingling of funds, except for one expense. The parties agree that Ms. Wolfson will reimburse Mr. Wolfson $26,862 for legal fees that he paid on her behalf.

[41] Despite participating in a settlement conference, the parties were unable to resolve any of the financial issues. A trial was therefore necessary.

The Trial

[42] The trial was scheduled to be heard over three days on March 9,10, and 11, 2020. Regrettably, the evidence was not completed within that time. I hoped to reschedule quickly but the court closed because of Covid. The trial did not resume until January 20, 21, and 25, 2021.

[43] Mr. Wolfson's evidence proceeded first. In addition to Mr. Wolfson, three lay witnesses and one expert witness testified. Lorne Timmons, who is Mr. Wolfson's personal and corporate accountant testified in a non-expert capacity, as did two people who worked for Mr. Wolfson's companies - Andrew Raftus and David Green.

[44] Mr. Wolfson's expert witness, Paul Bradley CPA, CA, CBV, CFE, a partner with Deloitte LLP, provided testimony of his analysis of Mr. Wolfson's income. Mr. Bradley was qualified as an expert in the field of quantifying *Guideline* income, including corporate attribution for the purposes of assessing the quantum of child and spousal support, as well as business valuations of tangible and intangible assets based on corporate financial statements.

[45] Ms. Wolfson retained three experts to provide opinion evidence. First, Nikki Robar, CPA, CA, CBV, a partner with Pricewaterhouse Coopers LLP, provided expert evidence about Mr. Wolfson's income. Ms. Robar was qualified as an expert witness in the field of quantifying *Guideline* income, including corporate attribution for the purposes of assessing the quantum of child and spousal support, business valuations of tangible and intangible assets, and general accounting and taxation matters.

[46] Ms. Wolfson's second expert witness was Chrystal Fuller, LPP, MCIP of Brighter Planning. Ms. Fuller was qualified to provide expert opinion in the field of planning and development potential of real estate properties. Ms. Fuller provided an expert report relating to the best use and planning of the corporate rental properties.

[47] The third expert witness was Jeff McLean, AACA, P.App of Altus Group. He was qualified as an expert in the field of commercial real estate valuation and appraisal. Mr. McLean provided expert evidence as to the value of some of the corporate real properties.

[48] In addition to the expert evidence, Ms. Wolfson and her father, Peter Miller, testified. Mr. Miller appeared remotely by way of video link with the Newmarket Courthouse in Markham, Ontario.

[49] Given the volume of evidence and the significant delay between the two sets of trial dates, counsel confirmed that written submissions were preferred. These submissions were received by the court on February 10 and 12; and March 1 and 3, 2021.

Credibility and Reliability Issues

[50] Both parties argued that the evidence of the other was not trustworthy and that credibility and reliability assessments should be resolved in their respective favour. Extensive examples were proffered in support of their positions. The parties relied on credibility and reliability factors such as those stated in ***Gouthro v Gouthro***, 2017 NSSC 246.

[51] I considered the law, the parties' arguments, and the evidence in my analysis of the case. I acknowledge issues surrounding the reliability and credibility of the evidence of both parties and their respective lay witnesses which I considered when drawing the conclusions that I have. I find that some of the reliability and credibility issues arise because of faded memories and the passage of time; and some because of the tendency to remember and recall details based on one's own perspective. Further, I find that Mr. Wolfson did not always tell Ms. Wolfson the truth during the marriage which ultimately impacted on the accuracy of some of her recall. Finally, I find that Mr. Wolfson at times intentionally coloured the truth when he testified to advance his own position.

Analysis

[52] **What is the value of Mr. Wolfson's shares in the corporate holdings once disposition costs are considered?**

Owner's Obligation to Provide Meaningful and Credible Evidence of Value

[53] Mr. Wolfson is the controlling shareholder of 11 private companies which own and operate 21 rental properties. Mr. Wolfson owns all shares in the 11 companies, except for 5900 Holdings Limited. Mr. Wolfson's two sisters were issued preferred shares in 5900 Holdings Limited. The sisters neither play a role in the company's operations nor do they receive financial benefits from the company.

[54] Further, Mr. Wolfson owns the controlling shares in the management company, LSC Leasing Inc. LSC Leasing Inc does not own real property but rather offers management services to the rental properties. Ms. Wolfson has preferred shares in LSC Leasing Inc.

[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. In *Canadian Family Law* 6th ed., (Toronto, Irwin Law, 2015), authors Julien and Marilyn Payne state as follows at p. 2-8:

> … The Ontario Court of Appeal made it clear in *Homsi v. Zaya* that the party asserting the value of an asset must provide credible evidence as to its value. This requirement obliges the party to provide not just a guess but a realistic value based on credible evidence. At times, documentary evidence or expert valuations may be required and it may be necessary to obtain information in the possession of a third party. …. However, it is not always necessary to call

> expert evidence to prove values for minor assets and a court is entitled to ascribe a global value to ordinary household contents.

[56] Similarly, in *Evidence in Family Law* (Loose leaf ed., 2021), author Harold Niman states as follows about the obligation to provide meaningful financial disclosure in family law proceedings at p 2-8:

> The requirement for parties to make full and complete financial disclosure is fundamental to family law proceedings. Financial statements must be filed wherever financial disclosure is relevant to the issues in a case. As Galligan J. opined in *Silverstein v. Silverstein*, financial statements "must not be perfunctory pro forma documents but they must be real, complete, up-to-date and meaningful". ….

[57] And at p 2-10:

> In addition, the onus of establishing the value of all property is on the owner – not the party seeking disclosure – and this obligation may require the party to obtain an expert valuation report. It is not acceptable to simply insert "unknown" in a financial statement, even if property values will ultimately be potentially deducted or excluded from a party's net family property.

[58] In ***Virc v. Blair***, 2017 ONCA 394, the Ontario Court of Appeal confirmed the obligation of the titled spouse to provide credible evidence of value:

> [56] The husband submits the trial judge misapprehended the evidence and misunderstood the disclosure he made to the wife. He submits he did disclose the existence of his assets as required by the Family Law Act. His wife, he argues, had the ability to value the assets, but did not do so.
>
> [57] The trial judge found, at para. 94 of his reasons:
>
> > [T]he husband never alerted the wife to the fact that the book value of Renegade's investments significantly exceeded their market value. At best, the husband's evidence is that he did nothing to prevent the wife from testing the veracity of his representation of the company's value.
>
> The trial judge concluded this was not a sufficient discharge of the duty to make full disclosure, especially given the husband's valuation expertise and the wife's deference to that expertise.
>
> [58] In my view, the husband's submission is improperly characterized as an alleged misapprehension of fact on the part of the trial judge. In reality, the husband asserts an error of law, in that the husband submits he fulfilled his disclosure obligations because the wife could have sought to independently verify his valuations.
>
> [59] The trial judge did not err. Inherent in the duty to disclose is the duty of the titled spouse to fairly value the asset. This is a basic principle of disclosure. The onus is on the party asserting the value of an asset that he or she controls to provide credible evidence as to its value: *Menage v. Hedges* (1987), 8 R.F.L. (3d) 225 (Ont. U.F.C.), at para. 44;

> *Homsi v. Zaya*, 2009 ONCA 322, 65 R.F.L. (6th) 17 (Ont. C.A.), at para. 38. The husband's submission to the contrary is wrong in law.

[59] In ***Leskun v Leskun,*** 2006 SCC 25, the Supreme Court of Canada approved the comments of Fraser, J which underscored the critical nature of disclosure, while further noting that the non-disclosing husband had a poor platform from which to launch an appeal:

> 34 In all of these circumstances, the appellant has a poor platform from which to launch an attack against the trial judge's conclusion regarding his assets and liabilities. As Fraser J. commented in **Cunha v. Cunha** 1994 CanLII 3195 (BC SC), (1994), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9:
>
>> Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done.
>>
>> If problems of calculation exist the appellant is largely the author of his own difficulties. I would not interfere on that basis.

[60] Moreover, Beaton, JA in ***Donner v Donner,*** 2021 NSCA 30 discussed the frustrations associated with decision-making in the absence of adequate evidence and the potential consequences for the non-disclosing party:

> [42] As noted by Ms. Donner, in family litigation trial judges are unfortunately often faced with making decisions without the benefit of adequate information. While this can undoubtedly be frustrating for the opposing party, insufficient disclosure leaves trial judges to do justice as best they can with the limited information provided. There comes a point in a case where both the opposing party and the judge should end efforts to secure more or better disclosure, and instead forge a way to a hearing and decision. If not, already burdened trial dockets would risk becoming even more congested, and the resolution opposing parties seek further delayed. The consequences to the party who falls short of meeting disclosure obligations can be addressed by such "tools" as, for example, adverse inferences the judge might draw, credibility findings and evidentiary conclusions the judge might reach, and potential cost consequences that might be imposed on a non-disclosing party.

[61] I now return to the case before me. 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.

[62] To address the gap, appraisals of the real property owned by the companies were entered into evidence. Some of the appraisals were acquired by Ms. Wolfson for litigation purposes; others are dated and were created for non-litigation purposes. Thus, the best evidence of the value of Mr. Wolfson's shares, are the property appraisals of the rental properties owned by the companies. From these appraisals and other evidence, each party put forth their position on the value of Mr. Wolfson's shares, which I now review.

Position of Mr. Wolfson

[63] In his post-trial submissions, Mr. Wolfson appears to adopt the position that the value of his shares equals the value of the rental properties owned by his companies, less debt, disposition costs, and environmental and capital expenses. Mr. Wolfson appears to state that his shares have a net value of less than $6 million. He extrapolated this number based on the following reasoning:

- He accepted the schedule created by Ms. Wolfson's expert, Nikki Robar. This schedule lists and values the corporate real property based on the greater of their assessed, appraised, or net book values. This schedule also deducted the balance of the corporate long term debt.
- He accepted the increase in the values of the real properties that were appraised after the Robar schedule was created. His calculations reflect this increase.
- He deducted legal fees of $1,500 per property, together with HST.
- He deducted 5% real estate commission, together with HST.
- He deducted 54% of the net value of the properties for the payment of capital gains tax based on his personal tax rate. He relied on ***Gomez-Morales v Gomez-Morales*** (1990), 100 NSR (2d) 137 (SCAD) and ***Simmons v Simmons***, 2001 NSSF 35. Mr. Wolfson stated that all tax consequences must be considered even if there is no evidence of imminent sale because assets must be valued at their realizable value. He noted that taxes are an obvious disposition expense which cannot be ignored - just as they are not ignored in the valuation of RRSPs and pensions. Mr. Wolfson opined that a significant injustice would be created if the inevitable tax consequences were ignored.
- He said further deductions, which were unquantified, were appropriate because the Altus appraisals assumed no environmental issues and no

significant capital expenses when Mr. Wolfson testified otherwise including in exhibit 11, tabs D, L, and Q.

[64] Mr. Wolfson's calculation, without reference to the unquantified environmental or capital expense deductions, is as follows:

Real Estate Value	***$31,462,700***
5% Commission	($1,573,135)
HST	($235,970)
Legal Fees	($28,500)
HST	($6,525)
Long Term Debt	($15,976,281)
Taxes (54%)	($7,366,836)
Equity	***$6,275,453***

Position of Ms. Wolfson

[65] Ms. Wolfson stated that valuation is a non-issue because the only evidence about the value of Mr. Wolfson's shares came from her experts, Ms. Robar and Mr. MacLean. Ms. Wolfson stated that the properties owned by the companies are valued at $31,462,700. This ultimately was the same conclusion reached by Mr. Wolfson. Ms. Wolfson agreed that the long term debt should be deducted which results in equity of $15,486,419 in the corporate real property.

[66] Ms. Wolfson, however, clarified that this value is limited because it relates to the real property only. It does not include the value of the good will, cash balances, shareholders loans, trade receivables and payables, or other property and equipment owned by the companies in which Mr. Wolfson has shares. In addition, the figure of $15,486,419 does not account for increases in equity through the payment of debt or the increases in the fair market value of the real property since the appraisals were conducted.

[67] Ms. Wolfson also disputed Mr. Wolfson's attempt to artificially reduce the value of the property holdings for reasons which include the following:

- There is no evidence that the companies would ever pay the speculative 5% real estate commission fees to dispose of the entire portfolio of properties. There is no evidence that companies generally pay this amount for the disposition of commercial properties.

- There is no evidence to suggest that $7,400,000 in capital gains tax is accurate. Lorne Timmons, the corporate accountant, did not provide expert evidence. He commented on Mr. Wolfson's personal tax rate only, and without any reference to the corporate properties. Mr. Timmons stated that he did not calculate the amount of capital gains or capital gains tax that might be incurred.
- If there is a realizable capital gain, income tax is payable on only 50% of the gain, making the effective rate 27%: *Income Tax Act*, RSC 1985, c. 1(5Th Supp), s. 38.
- It is nonetheless inaccurate to suggest that the equity should be discounted by even 27%. Before such a discount is employed, evidence about the proceeds of disposition, adjusted cost base, and outlays and capital expenses must be considered. In short, expert opinion is necessary.
- Mr. Wolfson's calculation assumes no eligible small business capital gains exemption.
- Mr. Wolfson's calculation does not distinguish depreciable property.
- In the Altus Report, Mr. MacLean appraised the Oxford Street Site; the Robie Shirley Street Site; and the Windsor Edinburgh Site. Tabs D, L, and Q of exhibit 11 do not relate to these properties. They relate to 6190 Jubilee Road and 7145 Quinpool Road. Further, these reports were never posed to Mr. MacLean; he was not cross-examined on these reports.
- The Altus Report does provide for a demolition allowance for 1945 Oxford Street which was vacant since 2016 as noted in exhibit 7, page 53, tab A.
- Mr. MacLean indicated that no structural survey was completed on 1935-37 Oxford Street. Further, both units at 1935-37 Oxford are currently rented, corroborating that the property is structurally sound.
- Over $400,000 was paid on the principal of the long term debt since the March 2020 court appearance.

[68] In summary, Ms. Wolfson stated that Mr. Wolfson's shares are worth no less than $10 million, and likely substantially more. She noted that no value was placed on good will, cash balances, shareholders loans, trade receivables and payables, or other property and equipment owned by the companies. Further, she strongly opposes Mr. Wolfson's other claimed disposition, environmental and capital deductions.

Tenuous Agreement on Value

[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.

Law on Deductions for Disposition Costs

[70] ***Gomez-Morales v Gomez-Morales***, *supra*, is often cited for the proposition that disposition costs should be deducted when calculating the fair market value of capital property. This statement is an oversimplification of the *ratio* of the case. I will explain by reviewing three key components of the decision, as follows:

- Why tax consequences should be considered.
- How counsel and courts should approach the issue.
- The importance of evidence.

Why Tax Consequences Should Be Considered

[71] In ***Gomez-Morales***, Hallett, JA stated that tax consequences should be considered for two reasons - legislative intent and inevitability of payment. First, he noted that although not engaged in the case before him, s. 13(m) nonetheless did "evidence a concern by the Legislature that taxation impacts on many property transfers and, in my opinion, it is a factor that warrants consideration on a division of assets in this case, even though the division relates to a business asset:" para 27.

[72] Second, Hallett, JA confirmed that although it may be difficult to determine the "exact tax cost", income tax consequences "are not speculative and cannot safely be ignored simply because a disposition may be "well down the road:" para 35. He then noted that "[e]ven on death, capital property attracts capital gains tax unless there is an exemption or postponement; inherent in the ownership of most capital property is a contingent liability for income tax:" para 35. He later held that "[n]o one has yet been able to take their property to the grave or to avoid the long and omnipresent arm of the tax collector": para 38.

Approach To Be Taken

[73] Hallett, JA discussed the approach that counsel and courts should undertake when confronted with the issue. The suggested approach involves three aspects. First, the court must, of necessity, value the assets of the parties:

> [36] …. In determining what amounts should be paid to a spouse under Section 12 or Section 13 of the Matrimonial Property Act, the Court must, of necessity, value the assets of the spouses.

[74] Second, counsel should determine if detailed financial information relevant to income tax consequences should be adduced. Hallett, JA stated that where there is a real possibility of a s. 13 order being made, such evidence is relevant and should be presented:

> [36] … Counsel for the parties will have to assess whether detailed financial information relevant to income tax consequences of a division need be adduced in a given case. In many cases, such evidence would not be necessary and the expense of adducing the same can be avoided. In cases such as this, where the only asset of any real value is a business asset and there is a real possibility of a Section 13 Order being made that would affect the asset, such evidence is relevant and should be adduced.

[75] Hallett, JA noted that where capital property is likely to be included in the court's division order and there is credible evidence that it will be sold, fairness requires that disposition costs be deducted from the value of the asset:

> [37] If an award is likely to be made that cannot be satisfied out of matrimonial assets but will involve a division of business assets as in this case, then in determining the value of assets of the payor spouse, each asset and the circumstances of the payor spouse should be looked at to determine if the appraised or market value of the asset should be reduced to recognize the reality of disposition costs (legal fees and real estate agent's commission for example on a sale of real property) and any tax costs associated with disposition of the asset.
>
> [38] If there is credible evidence that the capital property will be sold, in the event of a substantial award the tax and disposition costs can be calculated with accuracy and should be deducted from the value of the asset. If there is not any credible evidence on the issue, the Court will have to consider the personal and financial circumstances of the payor spouse and the nature and history of the asset to determine if fairness demands there be a reduction in the value of the asset to recognize the contingent liabilities or expenses that relate to capital property such as disposition costs, capital gains tax and recapture of depreciation that would likely become a reality on the disposition now or in the future….

[76] Hallett, JA declined to establish one specific principle of general application, emphasizing that each case must be assessed on its own facts and merits:

> [38] … In short, each case must be looked at on its own facts, recognizing the inherent contingent liabilities that usually float around the ownership of capital property. I do not think one can establish any more specific principle for determining this issue of valuation although Courts have tried (see annotation by James G. MacLeod to Heon v. Heon (1989), 1989 CanLII 4302 (ON SC), 22 R.F.L. (3d) 273). I am not in favour of deducting the full notional tax costs in every case as proposed in the Heon case as fairness may be sacrificed merely for the sake of consistency nor am I in favour of a regime that is founded on the cop-out theory that there should be no reduction of the value of the payor spouse's assets because, as disposition is "well down the road", the tax cost is too speculative to consider, particularly if the Court has not analyzed the facts of the case. One cannot say as a general rule that the income tax consequences of disposition of capital property are so speculative that they can be safely ignored. It may be that in some cases the potential tax is so insignificant in relation to the value of the assets that it would be safe to ignore the issue.

The Importance of Evidence

[77] Finally, Hallett, JA discussed the importance of evidence from the party seeking a deduction:

> [39] **Provided it is relevant** in a particular case and **there is evidence from which a finding can be made**, an attempt should be made to assess the tax consequences associated with the eventual disposition of an asset and an adjustment of value made if fairness dictates. As stated by Lambert, J.A., in Murchie v. Murchie (1984), 1984 CanLII 754 (BC CA), 39 R.F.L. (2d) 385 (B.C.C.A.) at p. 390:
>
> > "There is...no absolute rule as to whether tax consequences should or should not be taken into account. The circumstances of each case will dictate what seems to be the best course in valuation."
>
> and by Finlayson, J.A., in McPherson v. McPherson, the cases "turn on their own facts."
>
> **This leads me to the question whether or not the appellant has adduced sufficient evidence to prove that the amount to be paid to the respondent should be reduced to take into account that a sale of the Laval Street property will likely result in disposition costs and attract capital gains tax or require the appellant to use his exemption to avoid the tax and thus diminish his capital gains exemption which I suggest is in the nature of a deferred cost**. The evidence of Mr. Mahar proves that a sale would attract capital gains tax of $24,000.00 unless the appellant's exemption was used, in which event there would be no tax payable: Mr. Mahar's evidence also proves that in the normal course of events the disposition of an apartment building would entail payment of legal fees and likely a real estate agent's commission. On the other hand, there is no evidence from the appellant's mouth that he

> intended to sell the Laval Street property if a substantial award was made in his wife's favour nor what his intention was respecting the use of his capital gains exemption. [*Emphasis mine*]

[78] In ***Gomez-Morales***, an expert, Keith Mahar, CA, testified at trial that the sale of the rental property would attract legal fees and real estate commission of $14,000 and $24,000 in capital gains tax if the capital gains exemption was not used. Despite the expert evidence, Hallett, JA underscored the lack of trial evidence concerning either the husband's intention to sell or his intention to use his capital gains exemption.

[79] In reaching his decision, Hallett, JA held that although ½ of the disposition costs payable by the wife would notionally be $19,000, her share should nonetheless be reduced to $8,760 to reflect contingencies:

> [46] Considering that disposition of the Laval Street property will take place at death if not sooner, it is therefore fair that the amount of $68,760.00 be reduced to recognize the reality that in this case there will likely be disposition costs at some time. There is also the tax costs that hovers over this property. Recognizing these facts, I would reduce the award to the respondent respecting the Laval Street property to $60,000.00. The reduction in the award is not a precise calculation; that is not possible, but an effort must be made to recognize the inherent liabilities that are associated with ownership of most capital property. In this case, half of the full tax costs on a disposition if the exemption were not claimed would be $12,000.00 and half of the disposition costs $7,000.00, for a total of $19,000.00. These costs may not be incurred in full, depending on whether or not the exemption is used and the possibility it will not be necessary to engage a real estate agent. The sum of $19,000.00 has been reduced to $8,760.00 to reflect these and other contingencies. ….
>
> [47] The award of $60,000.00 in connection with the Laval Street property shall finalize the division of property between the spouses and the award shall bear interest in accordance with Civil Procedure Rule 62.26(3) and the Interest on Judgments Act, R.S.N.S. 1989, c. 233, at the rate of five per centum per annum from August 23, 1989, the date of the trial judge's Order.

Caselaw from other Jurisdictions

[80] Unsurprisingly, other courts have discussed the impact of evidentiary gaps when deciding whether to deduct disposition costs. For example, in ***Rick v. Brandsema***, 2009 SCC 10, the Supreme Court of Canada considered whether, when valuing a dairy farm, the trial judge erred in declining to make a deduction for notional disposition costs. Citing authorities from Ontario and British Columbia, Abella J, for the unanimous court, held at paras 54 to 57 that the trial judge's decision not to make a deduction was "completely supportable" because of

the absence of evidence regarding an imminent or eventual sale. The authorities relied upon included the ***MacPherson*** decision which was not entirely endorsed by Hallett, JA in ***Gomez-Morales***.

[81] More recently, in ***Berta v Berta***, 2015 ONCA 918, at paras 77 to 82, the trial judge's decision to assign a nil value to proposed disposition costs was upheld on appeal.

Decision

[82] I will now assess the facts and merits of the claimed disposition costs based on the approach suggested by Hallett, JA. Then I will assess the unquantified claim related to capital and environmental improvements.

Why Disposition Costs and Income Tax Consequences Are Relevant

[83] The issue of disposition costs is relevant because the Wolfson divorce involves the division of capital property either under s. 12 or s. 13 of the *MPA*. Disposition costs will be triggered in one of two ways - if Mr. Wolfson disposes of his shares in any of the companies, or if any of the companies sell the real property that they own. If Mr. Wolfson transfers his shares, he will incur disposition costs. If any of the companies sell real property, it is the company, and not Mr. Wolfson, that will incur disposition costs.

[84] Disposition costs at some point will include legal fees, potential real estate commission if the corporate real property is sold, and capital gains tax. Mr. Wolfson can neither take his "property to the grave" nor "avoid the long and omnipresent arm of the tax collector": para 38 of ***Gomez-Morales v Gomez-Morales***.

Value of Mr. Wolfson's Shares in the Corporate Holdings

[85] The approach suggested by Hallet, JA is not easily applied because of the deficiencies in the evidence. As stated previously, I have no direct evidence of the value of Mr. Wolfson's shares in the various companies. Instead, the parties relied on the report of Ms. Wolfson's expert, Nikki Robar, to provide a baseline of the value of the corporate real property.

[86] At the request of Ms. Wolfson, Ms. Robar produced a report detailing the income of Mr. Wolfson. In that report, Ms. Robar specifically notes that she did *not* prepare a valuation of the companies. She states as follows in exhibit 5, tab E:

> E.16 We have not prepared a valuation of the Wolfson companies; however, the attached ***Schedule E.1*** reflects the greater of the municipality assessed value, appraised value (for 5 properties only) and net book value of the properties, totaling $30,241,977. This is $15 million greater than the net book

> value of real property reported in the Companies' financial statements. As at May 31, 2019 the companies reported total debt of 16 million borrowed against the properties. This suggests there is approximately $14.2 million of equity in the properties available to the Companies and/or its owners for future business or other investment.

[87] Despite Ms. Robar's caveat, both parties agreed in their post-trial submissions that the Robar Schedule should be adopted as proof of value, subject to upward adjustment because of the subsequent appraisals on some of the corporate rental properties.

[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:

Company	Property	Value
• 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	$3,700,000
	6008/ 6014 Shirley	
• Cabin 5 Holdings	6190 Jubilee	$2,308,300
	1949 Oxford[i]	
• 5900 Holdings	6153/5/7/9 Pepperell	$1,275,800
	6161/3/5/7 Pepperell	
• 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**.

[90] I must now determine if this figure should be further reduced based on Mr. Wolfson's proposed four deductions – legal fees, real estate commission, capital gains tax, and environmental or capital expenses. Ms. Wolfson did not strenuously object to proposed legal fees of $28,500, together with HST of $6,525, which I therefore adopt as an appropriate disposition expense.

Burden of Proof

[91] In determining the appropriateness of the remaining three claims, I note that Mr. Wolfson bears the civil burden of proof because he seeks the deductions. To be clear, Mr. Wolfson seeks to reduce the value of the real property by significant amounts - $1,809,105 for real estate commission and $7,366,836 for capital gains tax. Mr. Wolfson did not quantify the amount he claims for environmental or capital expenses.

Proposed Disposition Costs – Real Estate Commission

[92] I will now address the real estate commission claim.

[93] Although some evidence was led about real estate commission being incurred on the sale of real property, such evidence was not presented in the manner described in ***Gomez-Morales***. Mr. Wolfson did not produce an expert report detailing the amount of commission payable in the commercial context. Further, Mr. Wolfson confirmed that he did not intend to sell the corporate real properties.

[94] I must therefore decide if it is more probable than not that Mr. Wolfson's companies would expend $1,809,105 in real estate commission to dispose of their portfolios of properties. To assist with my determination, I reviewed Mr. Wolfson's affidavit for details about his acquisitions of the corporate rental properties. From the following review, it appears that real estate commission was not likely paid on many of the properties acquired by these companies:

- In 2004, 5900 Holdings Limited purchased properties on Pepperell Street from Mr. Wolfson's mother and aunts.
- In 2006, Mr. Wolfson answered an ad in the newspaper seeking tenders on a package of six properties. Mr. Wolfson was successful; he created Lioncore Holdings Limited, Cocowood Holdings Limited, and Cabin 5 Holdings Limited for the purchase of these properties.

- In 2007, a Mr. Leventhal asked Mr. Wolfson if he was interested in buying another package of rental properties. As a result, Cabin 5 Holdings Limited bought 1949 Oxford Street while another company, Oxford East Holdings Limited, was incorporated and purchased the three other adjacent Oxford Street properties.
- In 2009, Windsor & Almon Holdings Limited was incorporated to purchase the Windsor Street property owned by Mr. Wolfson's grandfather.
- In 2010, Mr. Wolfson incorporated Tobin & Queen Holdings Limited to purchase properties on Tobin Street owned by his grandfather.
- In 2012, two other holding companies were created to purchase properties from the estate of Mr. Wolfson's grandfather.

[95] I infer that Mr. Wolfson was able to purchase many rental properties without the use of a real estate agent. Given this background, would Mr. Wolfson's companies expend $1,809,105 in real estate commission fees? I find that Mr. Wolfson's companies would likely not incur the amount claimed given other available options. Other available options include the following:

- The companies do not sell their properties. Instead, Mr. Wolfson, on retirement or death, may arrange for the transfer of his corporate shares to his children so they can continue operating the rental properties. This appears to be Mr. Wolfson's current stated intention as noted at para 63 of exhibit 11.
- Mr. Wolfson's companies may sell a portion or all their real properties to family members, friends, or business acquaintances without the use of an agent.
- Mr. Wolfson may connect with other property developers to seek their interest. Given current market conditions, Mr. Wolfson's companies would likely be successful in selling at least some of the properties in this manner.
- Mr. Wolfson may use other media tools or sales alternatives to market and sell the corporate properties.
- Mr. Wolfson may make a business arrangement for a significantly reduced commission for the properties that are to be sold. Mr. Wolfson has exhibited an uncanny ability to manage, save, and stretch the value of a dollar. I find that he would not pay anything near 5% in real estate commission for the sale of the corporate properties.

[96] Given Mr. Wolfson's evidentiary burden, the absence of credible evidence, my findings, available options, and other contingencies, I reduce the claimed $1,809,105 in fees and HST by 70% to produce a probable, but generous, figure of $542,732 for expenses and HST related to the marketing and sale of the rental properties.

Proposed Disposition Costs – Capital Gains Tax

[97] I will now address Mr. Wolfson's claim for a deduction of $7,366,836 for notional capital gains tax. Did he prove this claim on a balance of probabilities?

[98] The calculation of notional taxable capital gains is complicated and is based on several considerations. First, I must identify who will incur the gain. Will Mr. Wolfson sell or dispose of his shares in the companies; or will the companies sell the real property that they own; or will some combination of both options occur? If Mr. Wolfson sells his shares, he will likely incur a capital gain. If the companies sell the real property that they own, then the companies will likely incur a capital gain.

[99] The calculation of taxable capital gains in either situation is a multi-step process. Starting with a sale of the shares, the first step is to calculate the gain. In general, the gain is the amount by which the "proceeds of disposition" exceed the total of the "adjusted cost base" and the "outlays and expenses" incurred to sell the property: *ITA*, s. 40(1). To determine this amount, I require credible evidence of the following:

- The proceeds of disposition – normally the sale price of the property: *ITA*, s. 54.
- The adjusted cost base - the cost of a property plus any expenses to acquire it, such as commissions and legal fees. The cost of a capital property includes capital expenditures such as the cost of additions and improvements to the property: *ITA*, ss. 53(1), (2), 54.
- Outlays and expenses – any amounts incurred to sell a capital property, including fixing-up expenses, finders' fees, commissions, brokers' fees, surveyors' fees, legal fees, transfer taxes, and advertising costs: Canada Revenue Agency, "*Capital Gains 2020*", T4037(E) Rev. 20, pp. 5, 7, 8.

[100] The calculation of the tax consequences of a disposition of Mr. Wolfson's shares is further complicated by the potential availability of the capital gains exemption for dispositions of "qualified small business corporation shares": *ITA*, s. 110.6. The exemption is only available to individuals and, as of 2020, is limited to

$883,384 as a lifetime total. In "*Capital Gains 2020*", T4037(E) Rev. 20, the CRA states at p. 13:

> For 2020, if you disposed of qualified small business corporation shares (QSBCS), you may be eligible for the $883,384 LCGE. Because you only include one-half of the capital gains from these properties in your taxable income, your cumulative capital gains deduction is $441,692 (1/2 of $883,384).

[101] On the other hand, if the rental properties are sold, rather than the shares, both the value of the buildings and the land must be determined as separate properties: *Income Tax Regulations*, C.R.C., c. 945, s. 1102(2). For the buildings, which are depreciable assets, the gain (and thus the capital gain) is again the amount by which the proceeds of disposition exceed the total of the adjusted cost base and the outlays and expenses. Before calculating the capital gain, however, any capital cost allowance (CCA) claimed to date must be "recaptured". Any gain on the sale, up to the original cost, is a recapture of CCA, which is brought into business income and fully taxable. Any gain above the original cost is a capital gain that is ½ taxed: *ITA*, ss. 13(1), 40(1)(a), 38(a); David Sherman, *The Lawyer's Guide to Income Tax and GST/HST* (Toronto: Thomson Reuters, 2017), at pp. 121, 265-66.

[102] It is obvious from even a cursory review of the provisions of the *ITA* and *Income Tax Regulations* cited above that the calculation of taxable capital gains in the circumstances of this case is a highly technical exercise that requires special knowledge of accounting principles and income tax law. An expert should have analyzed the financial data to produce an evidence-based calculation.

[103] The detailed financial information suggested by Hallett, JA, and relevant to the calculation of the gain, income tax consequences, and potential exemptions, should have been adduced by Mr. Wolfson. It was not. His failure to do so is troubling. As a result, I draw an adverse inference against Mr. Wolfson for the following reasons:

- Mr. Wolfson is not an unsophisticated or impecunious litigant. Rather, he is an astute and strategic businessman with knowledge of the law.
- The issue of capital gains was not a novel *factual* issue which unexpectedly arose during the hearing. It was a known and live issue from the outset. For example, at para 64 of exhibit 11, Mr. Wolfson stated in part: "… Sale of real estate generates massive tax implications from the recapture of capital cost allowance and capital gains taxes." Mr. Timmons also said that he spoke about the issue with Mr. Wolfson.

- The issue of capital gains was not a novel *legal* issue which unexpectedly arose during the hearing. The decision of ***Gomez-Morales***, and its recommended approach has been a staple since 1990.

[104] In drawing an adverse inference, I find that Mr. Wolfson strategized that he would be in a better legal and financial position by omitting the expert evidence than he would be by producing it. This is not an appropriate outcome, especially in the family law context.

[105] Further, I make the following additional findings relevant to the claimed deduction for capital gains tax:

- The property division that I order will involve capital property.
- Mr. Wolfson provided no evidence that he intended to sell some or all of his corporate shares.
- Mr. Wolfson provided no evidence that the companies intended to sell some or all of their real property. In fact, Mr. Wolfson said that he did not intend to sell the corporate real property.
- Mr. Wolfson will face tax consequences when there is a disposition of his shares.
- The companies will face tax consequences when there is a sale of their real property.
- I have no expert evidence quantifying the capital gain or capital gains tax that would attract if Mr. Wolfson disposed of some or all of his shares.
- I have no evidence about whether the capital gains exemption for the disposition of qualified small business corporation shares will be available to Mr. Wolfson if he sells or otherwise disposes of his shares. See ***O'Neill v. O'Neill***, [2007] OJ No 1706 (Ont Sup Ct J) for an example of a case where the parties' respective experts disagreed on whether the disposition of the husband's shares would trigger an entitlement to the capital gains exemption. If the capital gains exemption is available to Mr. Wolfson, I find it would be prudent for him to make use of it in the event a capital gain was incurred on the disposition of any of his shares.
- I have no expert evidence quantifying the capital gain, capital gains tax, or the taxes associated with the recapture of CCA that would attract if the companies sold some or all of their real property.

[106] Given my analysis and findings, I conclude as follows:

- Mr. Wolfson did not prove that a discount of $7,366,836 should be granted for notional capital gains tax that would attract to him if he sold his shares or if the companies sold the rental properties.
- I cannot use his proposed $7,366,836 as a reference point or guide because it is based on an erroneous calculation. It is a number devoid of meaning.

[107] Further, I recognize that in ***Gomez-Morales***, where credible expert evidence was adduced, Hallett, JA nonetheless reduced the claimed disposition expenses by more than 50%.

[108] What is the fair, just, and appropriate outcome in this case? Given the absence of credible evidence on the amount of the gain or on the amount of the capital gains tax, and given my negative inference, my findings, and the various contingencies, I assign a discount of $1 million to represent the notional discount for capital gains tax while repeating the words of Hallett, JA at para 46 ***Gomez-Morales***:

> This valuation of half the equity is therefore somewhat arbitrary and for those who will criticize this approach, all I can say is that there is often little accounting precision on the division of assets between spouses. While one attempts to make the calculations with as much accuracy as possible, the basis of such calculations are generally estimates of value by experts. As a consequence, even as a general rule, a Court's division of property is, at best, an estimate of what is fair in the circumstances applying the criteria of the matrimonial property legislation. Furthermore, the Courts are regularly called upon in assessing damages arising out of personal injuries or death to fix amounts involving numerous contingencies and there is no reason why the Court should not do so in determining fair values in matrimonial property cases.

Proposed Disposition Costs - Environmental or Capital Expenses

[109] Further, I find that Mr. Wolfson did not prove that the value of the rental properties should be further reduced because of unquantified environmental or capital expenses for the following reasons:

- Mr. Wolfson strategically chose not to produce expert evidence of the fair market value of the corporate real property.
- If there were credible environmental or capital expenses that would actually reduce the fair market value of the rental properties to less than stated in the appraisals that were exhibited, Mr. Wolfson would have generated an expert report confirming that the appraisals were wrong. He did not.[ii]

- Mr. Wolfson neither proffered other expert evidence, nor provided credible non-expert evidence, to negatively impact on the appraised values. I do not accept Mr. Wolfson's evidence on this point.
- Mr. Wolfson would have produced expert opinion evidence on the fair market value of the rental properties if it were advantageous to him. I infer that he did not do so because he believed that the exhibited appraisals were either accurate or produced an outcome that was less than the fair market value of the properties.
- I accept the evidence of Mr. MacLean. He provided professional, balanced, and evidenced-based expert opinion on the value of some of the corporate real property.
- Mr. MacLean did not appraise all the rental properties. Dated property appraisals were entered as proof of value for some of the rental properties. These appraisals do not reflect current market increases, and, I infer, as a result, undervalue the rental properties.

[110] No further reduction to the value of the rental properties owned by the 11 companies is granted. To do otherwise~~,~~ would produce a result that would be unjust, unfair, and without credible foundation.

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.

[113] **What are the other assets and debts of the parties?**

[114] The following are the assets and debts of the parties:

6137 Inglis Street, Halifax

[115] This property is the family home; it is held in Ms. Wolfson's name. The home was appraised in October 2019 for $915,000 from which agreed upon disposition costs of $53,613 are deducted. In addition, there was a mortgage balance of $283,839 and a LOC balance of $122,034. The total equity in the family home is **$455,514**.

88 Shaw Island Road, Marriott's Cove, Chester

[116] This property is the parties' summer home, with desirable ocean frontage and an inground pool. This property is held in the name of Ms. Wolfson. The home was appraised in October 2019 for $1,010,000. Disposition costs of $59,075 are deducted. Further, the LOC with a balance of $8,571 and the shareholder's loan of $444,000 must likewise be deducted. The total equity in the summer home is **$498,354**.

[117] In addition, Mr. Wolfson claims a further deduction of $2,700 because of what he perceives will be the negative tax consequences associated with the sale of the summer home. Ms. Wolfson does not agree. She states that the gain on the property would be negligible because of the money spent on capital improvements and, in any event, Mr. Wolfson does not own the property – she has legal title.

[118] I decline to grant a further reduction for capital gains tax. No calculation of the gain or tax was provided. There was credible evidence of capital improvements. Any amount incurred can be offset by the exemption.

Household Contents

[119] Mr. Wolfson states that the Inglis Street household contents are valued at $75,000 while the Shaw Island household contents are valued at $50,000. Ms. Wolfson strongly disagrees that the value of the Inglis Street contents is anything near $75,000. She states that, for the most part, the furniture in the family home was second-hand furniture from her parents. She states that the Inglis Street contents are worth no more than $15,000.

[120] I am not able to ascertain the value of the household contents. Both parties had a positive obligation to provide credible evidence of value. Both chose not to proffer such evidence. For example, neither party obtained an appraisal. Further, detailed evidence as to value was scant and inadequate.

[121] I therefore order the parties to equally divide the household contents in both homes by a process of alternating selection as will be detailed under the asset division section of this decision.

[122] *Vehicles*

[123] There is agreement on the value of the following vehicles:

- 2014 Acura MDX $28,000
- 1997 Porsche 911 Turbo S $175,000
- 1997 Porsche 911 Carrera S $110,000
- Boston Whaler $32,000[iii]

[124] A car loan of $35,235 used to acquire one of the Porsches must likewise be deducted from the equity of the vehicles. The equity in the vehicles equals **$309,765**.

Pensions and RRSPS

[125] Before the marriage, Ms. Wolfson acquired pension benefits with the Ontario Teacher's Pension Plan with a commuted value of $102,839. The parties agree that the commuted value should be used for its value and then discounted for income tax. The parties used a 30% discount which equates to a value of $71,897**.**

[126] In addition, Ms. Wolfson acquired pension benefits with Nova Scotia Pension Services with an agreed upon value, including a discount for income tax, of $3,412.

[127] Further, both parties acquired RRSPs during the marriage, which they have discounted for income tax, and which they both agree have the following values:

- RRSPs of Mr. Wolfson $62,122
- RRSPs of Ms. Wolfson $10,860

[128] The four retirement vehicles have a combined value of **$148,291,** about 48% of which have their genesis in Ms. Wolfson's pre-marriage employment.

Accounts, Investments, and Securities

[129] Occasionally, counsel used different balances for the parties' accounts and investments in their Equalization Tables. I reviewed the Statements of Property and evidence and find that the following listing represents the balances of the parties' accounts, investments, and securities for division purposes:

- RBC **13 (Joint) $13,079
- RBC **50 (Joint) $3,833
- CIBC **32 (LW) $4,982

- RBC US Accounts (LW) $613 [converted to Cndn funds]
- CIBC **75 $320,426
- CIBC **65 $12,732
- RBC TFSA (LW) $12,073
- RBC TFSA (JW) $12,095
- CIBC **52 (JW) $133,458
- RBC GIC **99 (Joint) $1,119
- RBC **819 (JW) $14,626
- RBC ** 232 (JW & KM) $24,390
- Manulife CSV (LW) $36,445
- State of Israel Bond (JW) $347
- South Point Properties (JW) $321,658

[130] The total value of the parties' accounts and investments is **$911,876**.

Disputed Property – Inglewood Drive

[131] Ms. Wolfson seeks to include the 5927 Inglewood Drive lot as a matrimonial asset. Ms. Wolfson stated that the parties were gifted the lot by Mr. Wolfson's grandfather as an engagement gift. Mr. Wolfson transferred the lot to his grandfather's estate in 2012 to resolve a family rift and to have the estate's remaining properties transferred to him.

[132] In contrast, Mr. Wolfson stated that the lot is not matrimonial property for five reasons. First, it did not exist at separation, having been transferred out of his name in 2012. He did not receive any money for the disposition. Second, the property was a gift to him and not to both parties. Third, the property was seldom used by the parties, other than to occasionally walk on it when they were visiting the grandfather. Fourth, the property was not worth $400,600 because of restrictive covenants and contamination. Fifth, even if the property is included, it would be exempt as a business or inheritance asset.

[133] I find that the Inglewood property will not form part of the asset division because it did not exist at separation. This does not mean, however, that the property plays no role in the resolution of some of the other legal issues. For this reason, I make the following findings:

- The Inglewood property was not an advance of inheritance or a business asset. The Inglewood property is no different than Ms. Wolfson's share in the South Point Investment, which was acquired by Ms. Wolfson's father on her behalf when she was young. None of the parties' money was expended to acquire Ms. Wolfson's interest in South Point, yet the parties characterized it as matrimonial. The same rationale applies to the Inglewood property.
- The Inglewood property was a matrimonial asset as it was an engagement gift to both parties. I accept the evidence of Ms. Wolfson. She was credible. I reject the evidence of Mr. Wolfson.
- Mr. Wolfson's grandfather gifted the lot as an engagement gift to both parties, with the hope that they would build their home next to him. This finding is not inconsistent with the property being placed in Mr. Wolfson's sole name. The parties were only engaged at the time of the transfer. In addition, this finding is not inconsistent with the grandfather seeking to have the lot subdivided before the parties were dating. The grandfather always wanted Mr. Wolfson to live near him. The property, however, was not transferred until after the parties were engaged. It was an engagement gift.
- The property had considerable value. Mr. Wolfson was unsuccessful in his appeal of the assessed value. In 2012, the assessed value was $400,600.
- The property tax on the Inglewood lot was paid with family income.
- Although no moneys changed hands in 2012, the transfer facilitated the timing of Mr. Wolfson' ownership of the Quinpool Road property.

Disputed Property – Trust Property

[134] Mr. Wolfson thought that Ms. Wolfson may own an interest in a trust established by her father that may be worth substantially more than stated in the South Point investment. Mr. Wolfson said that he witnessed documents signed by Ms. Wolfson in about 2016 or 2017 related to her father, but was unable to recall details. Mr. Wolfson also raised issues about the lack of disclosure surrounding the South Point investment.

[135] In response, Ms. Wolfson said that she was not aware of a trust being established by her father other than her receipt of the South Point investment. Ms. Wolfson said that Mr. Wolfson was always aware of her investment in South Point for four reasons. First, she informed him of the investment. Second, dividends from this investment were consistently used to pay for family expenses throughout

the marriage. Third, the Wolfsons' tax returns were completed jointly by Mr. Wolfson's accountant, in consultation with Mr. Wolfson. Ms. Wolfson's South Point dividends were reported on her returns. Fourth, Mr. Wolfson's father was also involved with South Point and had complete knowledge about the investment and dividend payments.

[136] Mr. Miller said that he invested in South Point when Ms. Wolfson was a child of about 12 years. He used baby bonus money and monetary gifts to fund her portion of the investment. He said that there were no documents about her ownership interest because he bought the investment many years prior. He, personally or through his companies, bought the investment, which he then divided to include his children and brother. He said that there was nothing in writing. He produced a copy of the ledger showing his share ownership. Mr. Miller said the purchase may have been eventually funnelled through a corporate entity but he is the owner of the company. Mr. Miller also said that in about 2014, when his brother was diagnosed with cancer, he bought out his brother's interest in South Point.

[137] I make the following findings in respect of the trust:

- Ms. Wolfson owns 1.855% of the South Point investment, or 26.5% of Mr. Miller's 7% interest.
- Mr. and Ms. Wolfson were both aware that Mr. Miller, either personally or through a company, provided Ms. Wolfson with an interest in the South Point investment well before the marriage.
- Mr. Miller purchased the South Point investment when Ms. Wolfson was young - when she had no real appreciation of the acquisition. Ms. Wolfson's share was financed from baby bonus cheques and money gifts. Mr. Miller, either personally or through a company, holds Ms. Wolfson's interest in trust. The South Point shares are not held in Ms. Wolfson's name.
- Ms. Wolfson's percentage interest in South Point did not increase after Mr. Miller acquired his brother's interest, or at any other time.
- When describing the South Point acquisition, Mr. Miller referenced himself even when referring to companies which he controlled. He did so because Mr. Miller understands that he is ultimately the owner of the companies. Mr. Miller was honest and did not intend to mislead the court by so doing. Mr. Miller was credible.

- Mr. Wolfson was aware of Ms. Wolfson's interest in South Point, as noted in his affidavit, exhibit 12, paras 29 and 76.
- Ms. Wolfson used all dividend payments which she received during the marriage for family expenses. Mr. Wolfson was aware of this.
- Since the marriage, neither Mr. Wolfson nor Ms. Wolfson contributed to the acquisition or maintenance of the South Point investment.
- Ms. Wolfson was not aware of any other trust being established on her behalf.
- Mr. Miller may have established a discretionary trust as a means to eventually transfer property to Ms. Wolfson because she is his child, but if he did, Ms. Wolfson was never aware of its existence.
- The only trust with a monetary value which was established, on a balance of probabilities, related to Ms. Wolfson's interest in the South Point investment.

[138] It appears that the parties have generous fathers with accumulated wealth. For example, Ms. Wolfson's father generously provided her with the South Point investment. Further, the evidence confirms that Mr. Wolfson's father assisted him financially by loaning his companies monies which were all subsequently repaid. Further, Mr. Wolfson said that after separation, his father purchased a home in south end Halifax so that Mr. Wolfson could live near the matrimonial home.[iv] It thus appears that Mr. Wolfson's father also has accumulated wealth. The wealth, however, accumulated by Mr. Wolfson's father has no bearing on the parties' property division. Similarly, the wealth accumulated by Ms. Wolfson's father has no bearing on the parties' property division.

[139] It is likely that both parties will continue to benefit from the financial generosity of their fathers. The property owned by the parties' fathers is not, however, matrimonial property. Likewise, eventual inheritance is not matrimonial property.

Disputed Property – Donald Holdings Limited

[140] Ms. Wolfson discovered that Mr. Wolfson also owned a company, Donald Holdings Limited, which he did not disclose. Mr. Wolfson said that it is a non-operating company without assets.

[141] There is no evidence to suggest that this company has any value. As such, it is not included in the parties' asset division.

Unsecured Debts

[142] Unsecured debts existing at separation are as follows:

- Joint Visa $5,576
- CIBC Visa (JW) $220

[143] The total balance of the non-secured debt was **$5,796.**

Children's Savings and Investments

[144] The parties made provision for their children through the acquisition of the following accounts:

- RESPs ***29 $55,744
- RBC (SW) $23,079
- RBC (CW) $16,343
- State of Israel Bonds (CW) $11,928
- State of Israel Bonds (SW) $10,560
- Trust Account for Children $20,000

[145] These accounts total **$137,654**; they are the property of the parties' children. They are not matrimonial property and are not subject to division. These accounts and investments will continue to be managed by Ms. Wolfson, who will keep Mr. Wolfson advised of their status on annual basis. Ms. Wolfson will not withdraw any of the funds, except for investment or reinvestment purposes, without Mr. Wolfson's consent, which consent will not be unreasonably withheld.

[146] **Did Mr. Wolfson prove that the shares he owns in the group of companies that own and operate rental properties are exempt business assets?**

[147] Matrimonial assets are defined in s. 4(1) of the *MPA* as including all property acquired before or during the marriage with enumerated exceptions, including the business asset exception:

> **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
>
> …
>
> (e) business assets;
>
> ...

[148] Business assets are defined in s. 2(1)(a) of the Act as follows:

> (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;

Position of Mr. Wolfson

[149] Mr. Wolfson stated that the shares he owns in a group of companies which own and operate rental properties are business assets. He notes that the companies are assets that generate income in an entrepreneurial sense: ***SLK v MMH,*** 2009 NSSC 319, with income production as their primary purpose: ***Lawrence v Lawrence***, (1981), 47 NSR (2d) 100 (SCAD). Although Mr. Wolfson acknowledged that intention is an important element in determining classification based on ***Hebb v Hebb,*** 1991CarswellNS 49 (SCAD), he stated that relying exclusively on intention has its dangers: ***L (JW) v M (CB)***, 2008 NSSC 215.

[150] Mr. Wolfson relied on the trial decision of ***Volcko v Volcko***, 2013 NSSC 342, in which the trial judge found that the husband's shares possessed "the requisite entrepreneurial sense that makes them business assets": para 41. Mr. Wolfson argued that like the Volckos, the Wolfsons acquired substantial family assets and were not relying on the business assets for anything other than the generation of income. He further states that he alone bore the financial risk associated with these businesses, and the decision of whether and when to purchase, renovate and rent was entirely related to Mr. Wolfson's own management expertise.

[151] Mr. Wolfson stated that his group of companies is similar to the factual scenario discussed in ***Pothier v Pothier***, 2017 NSSC 230, wherein the court treated the separate corporate entities as an interdependent group and classified the group as business assets. Mr. Wolfson stated that the evidence is uncontroverted that he treats his business as a singular entity, even though the business is based on separate corporate ownership of various groups of rental properties which are all serviced by one management company.

[152] Mr. Wolfson disagreed with the suggestion that the companies are passive assets. He stated that the evidence proves that all corporate assets are being actively managed in the entrepreneurial sense. Every property but one is rented and each property contributes to the overall revenue of the business. The one property not rented still contributes, but its development was placed on hold pending

finalization of the HRM Centre Plan, which is consistent with the recommendations of Ms. Wolfson's expert, Ms. Fuller. Mr. Wolfson stated that the timing of the development of a business asset is exactly the kind of entrepreneurial decision that distinguishes business assets from personal ones.

[153] Mr. Wolfson disagreed with the suggestion that the companies were being held for retirement purposes. He stated that if the mere future possibility of retirement income being generated by a company is sufficient to classify a business asset as matrimonial, then no asset would ever be a business asset, thus rendering s.4(1)(e) of the *MPA* meaningless.

[154] Mr. Wolfson further distinguished the retirement cases put forth by Ms. Wolfson. For example, the primary intention found to exist in ***Hargraft v Hargraft***, [1989] NSJ No 187 (SCTD), is lacking in the Wolfson case. Mr. Wolfson did not purchase the rental properties for any purpose other than the generation of income. Further, in ***Robacewski v Larson***, 2019 NSSC 78, the court reasonably considered the retirement intention because Mr. Larson was 65 and purchased the apartment building immediately prior to retiring from his lifelong career.

[155] Mr. Wolfson distinguished other cases put forth by Ms. Wolfson, examples of which include the following:

- Unlike ***Fisher v Fisher***, 2001 NSCA 18, in the Wolfson case, the business assets were kept entirely separate from the matrimonial assets; there was neither family use of the business assets, nor contribution of family resources to maintain or enhance the business assets.
- Unlike ***RWB v DCB***, 2015 NSSC 254, the Wolfsons did not use joint accounts for both business and personal expenses; their home was not used as security to finance business assets.
- Unlike ***Robacewski v Larson***, *supra*, the Wolfson case does not involve a professional service corporation where a business structure is created by a professional solely to permit the accumulation of savings within the structure. Mr. Wolfson's business is a true working company using its assets to generate income as its primary purpose.
- Unlike ***Young v Young***, 2002 NSSC 115, the Wolfsons are neither retired nor the businesses sold.
- Unlike ***SLK v MMH***, *supra*, Mr. Wolfson did not purchase rental properties to house his children while they attended university.

- Unlike ***Cowan v Cowan,*** 2019 NLSC 144, Mr. Wolfson did not incorporate a professional service corporation which had cash savings and investments. Rather, Mr. Wolfson's companies contain property that is rented and actively being managed and developed.

[156] Mr. Wolfson took umbrage with the facts as presented by Ms. Wolfson, some examples of which are noted as follows:

- The Wolfson brand name obviously refers to Mr. Wolfson's surname.
- Ms. Wolfson conflates benefits received from the company with intermingling of resources. They are not the same. Funds did not go back and forth in such a way as to make the company and personal finances indistinguishable.
- The parties borrowed money from the company in a manner consistent with CRA protocols. They took advantage of a legal and available accounting tool. This action does not convert a business asset into a matrimonial one.
- The Shirley Street property was purchased, financed, and sold personally by Mr. Wolfson years before separation. There is no evidence that the sale proceeds were invested in the companies.
- The Windsor Street and Liverpool Street properties were purchased by Mr. Wolfson in trust for the companies. There is no evidence that personal money was used to finance the purchase or transfer of the properties. Electing to purchase the properties in a different way, but without use of family money, does not change the nature of the business asset into a matrimonial asset.
- The business provides minimal personal financial benefits to the parties and these minimal benefits are insufficient to convert an otherwise business asset into a matrimonial one.
- Other than an accidental inclusion, there is no evidence that personal bank accounts were used for business purposes or that business bank accounts were used for personal purposes.
- There is no evidence that the laundry money was not duly accounted for as business income.
- The parties do not have modest personal assets and there is no evidence that the corporate debt was paid off to the detriment of the family. The parties

accumulated over $3 million is personal savings over 10 years. The companies were not the parties' retirement fund.

- It is an error to suggest that LSC Leasing has cash investments because on May 30, 2018, it held cash of $100,000. LSC Leasing collects income from the other companies and then pays income to Mr. Wolfson. The amount of money held by LSC Leasing fluctuates. There is no evidence of cash reserves.

[157] In summary, Mr. Wolfson urged the court to find that his shares are business assets and exempt from division.

Position of Ms. Wolfson

[158] Ms. Wolfson underscored the remedial nature of the *MPA* and various cases which confirm that approach: ***Clarke v Clarke,*** [1990] SCJ No 97**;** ***Johnson v Johnson,*** 1998 CarswellNS 93 (SC) as aff'd at 1999 NSCA 25; and ***McKearney-Morgan v Morgan***, 2016 NSSC 79. Ms. Wolfson also relied on the *obiter* comments of Hallett, JA in ***Gomez-Morales v Gomez-Morales***, *supra,* in which he confirmed that rental properties may contain attributes which characterize matrimonial assets.

[159] In addition, Ms. Wolfson argued that the presence of the following three factors confirm that the corporate holdings are properly classified as matrimonial assets – the parties' intermingling of finances; the passive nature of the rental properties; and the parties' retirement intention.

Intermingling of Finances

[160] Ms. Wolfson relied on ***Fisher v Fisher***, *supra*; ***RWB v DCB***, *supra*; ***Robaczewski v Larson****, supra*; and ***Young v Young,*** *supra,* as appealed on other grounds at 2003 NSCA 63, to support her position on intermingling. Factually, she made a several arguments, including the following:

- The parties did not differentiate between private and corporate holdings.
- The companies loaned money to the parties for non-business purposes and without interest, including for the closing of the Shaw Island cottage property which was later repaid by moneys from Ms. Wolfson's investment with South Point Properties. Then Cocowood Holdings Limited and Windsor and Almon Holdings Limited further loaned the parties $444,000 to pay off the cottage mortgage. After separation, the parties' joint line of credit was then used to pay the corporate loan.

- Mr. Wolfson equates the companies to himself to the extent that he willingly purchased and signed financing documents in his personal capacity. For example, the Shirley Street property located at 6252/54/56 was purchased in 2011 in Mr. Wolfson's name and financed by a personal mortgage. The rental units were renovated and sold in 2012. Similar arrangements were made in respect of other properties on Liverpool Street, Shirley Street and Windsor Street. Further, Mr. Wolfson did not tender trust agreements to bolster his claim that they were purchased in trust. In contrast, there are, however, deeds and mortgages in Mr. Wolfson's personal name before the court. These properties were later transferred to 2966 Windsor Holdings and Harvard Properties.
- 2759 Windsor Holdings Limited paid for the construction of a climate controlled garage at 2759 Windsor Street for the sole purpose of housing Mr. Wolfson's two Porsche vehicles. No personal funds were expended for the garage's construction. Mr. Wolfson does not pay storage fees for the use of the garage.
- Mr. Wolfson drives the GMC Sierra truck for his daily use, including transporting the children. The company pays for this vehicle and its gas.
- LSC Leasing Incorporated pays Mr. Wolfson's Sunlife Life Insurance Policy in the amount of $20,400 per year.
- The parties often relied on the companies for different aspect of their personal lives.
- The coins from the laundry machines were rolled and then used to pay babysitters, housekeepers and household expenses. According to both the Deloitte Report and the PWC Report, the laundry money could be worth thousand of dollars each year.

[161] In summary, Ms. Wolfson argued that throughout the marriage there was an expectancy and dependency by both the couple and the companies that the other would be available to provide financial assistance and support should it be required. The above listed examples confirm that the personal and corporate assets were intermingled.

Passive Investments

[162] Ms. Wolfson also argued that the rental properties are passive investments, as noted in ***Hebb v Hebb,*** *supra*; ***Herritt v King***, *supra*; and ***Roberts v Shotton***,

1997 NSCA 197. In this case, as in ***SLK v MMH,*** *supra,* while the rental properties may involve a business purpose, their primary purpose is a passive one.

[163] To augment her argument, Ms. Wolfson stated that Mr. Wolfson purchased a number of properties in "plots", including those he owns on Oxford Street, Windsor Street, and three of the four properties located on the corner of Shirley and Robie Street. Ms. Wolfson stated that Mr. Wolfson did not effect significant renovations, development, or investment into the properties situate at 2834/2840/ and 2844 Windsor; 6008-14 Shirley; 1834/1840 Robie; or 1935/1941/1945 and 1949 Oxford. In fact, 1945 Oxford Street has been vacant since December 2016.

[164] Ms. Wolfson argued that if the court is not satisfied that the buildings as a whole are matrimonial based on their passive nature, these properties in particular are examples of passive properties within the portfolio, which are not being used in the entrepreneurial sense.

[165] Ms. Wolfson stated that Ms. Fuller's testimony confirmed her position. Ms. Fuller testified that the HRM Center Plan would not apply to an individual like Mr. Wolfson, who completes renovations to alter the interior and exterior of the apartment without changing the dimensions of the property.

[166] Ms. Wolfson stated that Mr. Wolfson is treating these properties like an investment – hoping for a future, distant gain when by-law changes permit more substantial projects. The Brighter Report discussed the current "best-use" for the properties as follows:

- Oxford Site – Eight stacked townhouses.
- Robie/Shirley Site – Six-storey building.
- Windsor Site – Four-storey building.

[167] Ms. Wolfson also relied on Mr. Wolfson's affidavit evidence of August 14, 2018. At para 8, Mr. Wolfson stated that after the capital projects were completed, "the buildings pretty much run themselves." Mr. Wolfson further confirmed at para 14, that all he does is "oversee a smoothly running organization" and that he now has "very little work to do myself." Ms. Wolfson stated that this testimony confirms the passive nature of the rental investments.

Parties' Retirement Intention

[168] Ms. Wolfson stated that the parties intended that the rental properties and companies would fund their retirement. She relied on ***Hargraft v Hargraft***, *supra;* ***Young v Young,*** *supra*; ***Herritt v King***, *supra;* ***Hebb v Hebb,*** *supra****; Baggs v Baggs*****,** [1997] NSJ No 87 (SCTD); ***Faddoul v Faddoul,***2005 NSSF 21*;**MN v AN,***

2019 NSSC 134*; **Robaczewski v Larson**, supra; and* **Eyking v Eyking**, 2012 NSSC 409, in support of her position that intention determines classification.

[169] Ms. Wolfson stated that the parties did not expend significant resources on the acquisition of retirement assets, such as RRSPs and TFSAs, because their retirement plan was focused on the rental properties.

[170] Ms. Wolfson further stated that the corporate debt was being paid at an accelerated pace to the detriment of the family assets. Ms. Wolfson stated that the corporate assets are worth 10 times more than the family assets. This concentration was to ensure the parties' healthy retirement. 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.

[171] In summary, Ms. Wolfson urged the court to adopt a liberal interpretation of the *MPA* in the factual context of this case. From her perspective, Mr. Wolfson was unsuccessful in proving that his shares are exempt business assets because of the parties' intermingling of finances, the passive nature of the corporate holdings, and the parties' intention to use the rental properties for their retirement.

Law

[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*[v]. Nova Scotia is one of only three provinces that exempts business assets from a presumptive equal division of matrimonial property.[vi] 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.[vii] 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.

[173] Since the passage of the *MPA* over 40 years ago, courts have grappled with the characterization of business assets. Although many similar fact patterns may appear to have disparate judicial outcomes, such outcomes underscore the fact-based nature of the analysis. For example, Jollimore, J held in ***Murphy v Murphy***, 2015 NSSC 41:

> [47] My characterization of these assets may appear to be at odds with the Court of Appeal's recent decision in *Volcko*, 2015 NSCA 11 where Ms. Volcko appealed from a decision on the basis that the trial judge erred in characterizing her husband's shares as a business asset. At paragraphs 20-40 in *Volcko*, 2015 NSCA 11, Justice Hamilton, with whom Justices Scanlan and Bourgeois concurred, addressed this ground of appeal. As I

> read the Court's decision, this ground of appeal was dismissed because it did not fall within the proper scope of appellate review: there was "no error of law" or misapprehension of the evidence, the decision was not "clearly wrong". Having concluded that the decision was beyond the scope of proper appellate review, the Court of Appeal did not consider the issue on its merits, though it left readers with the unsettling suggestion that the characterization was questionable, writing, at paragraph 39, "We are not entitled to interfere simply because we may have viewed the evidence differently."

[174] Despite the fact-based approach to the classification of business assets, several themes have nevertheless emerged. These themes developed from the interpretative principles articulated by the Supreme Court of Canada.

Interpretative Principles

[175] In ***Clarke v Clarke,*** *supra*, the Supreme Court of Canada confirmed the remedial nature of the *MPA,* and the broad and liberal interpretation which the *Act* must therefore be afforded. Wilson, J, for the court, stated as follows:

> **20** The objective of the Act found in the preamble supports the appellant's position. The preamble reads:
>
>> WHEREAS it is desirable to encourage and strengthen the role of the family in society;
>>
>> AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;
>>
>> AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;
>>
>> AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;
>>
>> AND WHEREAS it is desirable to recognize that child care, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets;
>
> **21 Thus the Act supports the equality of both parties to a marriage and recognizes the joint contribution of the spouses, be it financial or otherwise, to that enterprise. The Act goes further and asserts that, due to this joint contribution, both parties are entitled to share equally in the benefits that flow from the union -- the assets of the marriage. The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized. In interpreting the provisions of the Act the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose.** [Emphasis added]

[176] The importance of this pivotal decision was emphasized by Hallett, JA in ***Tibbetts v Tibbetts***, 1992 CarswellNS 85 (CA), wherein he stated that "[c]onsidering that the definition of matrimonial assets includes all property of the spouses, unless exempted from the definition, the term 'business assets' has been fairly confined by the Supreme Court of Canada to assets that are truly of a business character": para 18.

[177] Further, in ***Tibbetts***, Hallett JA also confirmed that earlier restrictive decisions on the classification of business assets must be re-examined:

> 18 The earlier decisions in this Province, such as **Lawrence v. Lawrence**, supra, must be read in light of this binding statement of the Supreme Court of Canada in **Clarke v. Clarke**, supra, with respect to the interpretation of the term "business assets" as defined in the **Act**. **Considering that the definition of matrimonial assets includes all property of the spouses, unless exempted from the definition, the term "business assets" has been fairly confined by the Supreme Court of Canada to assets that are truly of a business character. An investment portfolio is not a business asset in the true sense of that word as interpreted by the Supreme Court of Canada notwithstanding its purpose is to earn income**. The husband's investment portfolio was accumulated from earnings surplus to his family's needs and **although one of the purposes of investing was to earn money, the primary purpose was to secure a reasonable level of retirement income for the family therefore these funds were properly classified as matrimonial assets by the trial judge**; he applied the decision of the Supreme Court of Canada in Clarke v. Clarke, supra. [Emphasis added]

[178] In ***Johnson v Johnson***, *supra,* Davison, J discussed the significance of the rules of statutory interpretation in the classification of business assets**:**

> 62 With respect to the scheme and object of the **Matrimonial Property Act** and the intention of the legislature, we get great assistance from the recitals set forth at the beginning of the legislation. The **Act** was intended to strengthen the role of family in society and recognize the contribution of each spouse to the marriage and the **Act** recognized that joint contribution in dividing assets. Under the **Act**, all property was matrimonial unless there was proof an exception in s. 4(1) applied. I have not changed from the view I expressed in **Curren v. Curren (supra)** at p. 123:
>
> ….
>
> To find assets are business assets simply because they are connected with a business is contrary to the intention of the legislation and contrary to rules of statutory interpretation as most recently expressed in **Re Rizzo & Rizzo Shoes Ltd. (supra).**

[179] In ***McNulty v McNulty***, 1989 CarswellNS 68 (SCTD), Davison, J stated that s. 4(4) of the *MPA* revealed the legislature's intention to "prohibit assets being retained by a corporation for the purpose of thwarting the objectives of the *Act*: para. 20.

[180] In the context of these interpretative guidelines, courts have identified the following factors as relevant when classifying business assets:

- Generation of income in the entrepreneurial sense;
- Capital gain and passive nature of asset;
- Diversion of family income or property; and
- The parties' intention and treatment of asset.

Generation of Income in Entrepreneurial Sense

[181] In ***Clarke***, Wilson, J held that "business assets are assets which have as their purpose the generation of income in an entrepreneurial sense": para 39.

[182] In ***Tibbetts***, Hallett, JA confirmed that to be classified as an exempt business asset, the asset must involve "the employment of capital for the purpose of generating income in an 'entrepreneurial sense'": para 17. He then adopted the dictionary meaning of entrepreneur as "a 'person in effective control of commercial undertaking', one who 'undertakes a business or enterprise, with chance of profit or loss'": para. 17.

[183] In ***L (JW) v M (CB)***, *supra*, B MacDonald, J proposed that the level of risk and management activity could assist in the determination of entrepreneurial activity, such that entrepreneurial activity would be proven where there was greater risk and increased management activity: para 17.

[184] Examples of cases where the court found sufficient evidence of income being generated in the entrepreneurial sense include ***Volcko v Volcko***, *supra*; and ***Pothier v Pothier***, *supra.*

Capital Gain and Passive Nature of Asset

[185] In contrast to an asset generating income in the entrepreneurial sense, assets which are held passively or for a gain on capital have been classified as matrimonial. For example, in ***Best v Best***, (1991), 120 NSR (2d) 61 (CA), the Court of Appeal overturned the trial judge's finding that a woodlot was a business asset because the woodlot was not being operated for income or profit, but rather was being operated for a capital gain. Freeman, JA held:

> [20] A woodlot may be a working asset. Judicial notice may be taken of the fact that timber is a growing crop to be harvested only at intervals of decades. But there is insufficient evidence before the Court to take the woodlot in question out of the example in Lawrence of "a piece of land held in hope of gain (which) would be a matrimonial asset." It might have been relevant if Mr. Best was a farmer or woodlot operator, but he was not; or if the lot was being managed for the purpose of occasional harvesting, but it

> was not. The land was purchased and held for some 50 years, an asset to be sure, but not a business asset within the meaning of the Matrimonial Property Act. **For the woodlot to fall within that classification, it would have to have been "working in a commercial, business or investment way for the production of income or profit." The increase in value was in the nature of a capital gain, which may be readily distinguished from income or profit. I would find, with respect, that the respondent has not met his burden of proving that the woodlot was a business asset and not a matrimonial asset.** [Emphasis added]

Diversion of Family Income/Property

[186] As part of the classification analysis, courts must examine how the contested asset was acquired. In ***Tibbetts***, Hallett, JA, found that the contested investment portfolio was properly classified as matrimonial because it was comprised of funds that were diverted from family use:

> [16] It would appear that the legal distinction between capital property (commonly referred to as assets in accounting terminology) and income has been discarded by the Supreme Court of Canada in classifying pension income as a matrimonial asset following marriage breakdown. **Madam Justice Wilson agreed with Mr. Justice Hart that pensions are "funds comprising income diverted from the date on which it was earned**". In **Lawrence v. Lawrence**, (1981), 47 N.S.R. (2d) 100 (A.D.) Mr. Justice Hart had stated that money invested in savings certificates, stocks or bonds would be business assets. **The evidence in this case would indicate that the stocks and mutual funds held by the husband were acquired from earnings from his employment and thus were, in a sense, funds comprising income diverted from other family uses.** [Emphasis added]

Parties' Intention and Treatment of Asset

[187] Nova Scotia caselaw confirms that intention is a key component when classifying assets. In ***Hebb v Hebb**, supra*, Hart JA held that intention controlled asset classification. In so doing, a holding company operating the Bridgewater Professional Building on a rental basis was classified as matrimonial, consistent with the court's earlier decision of ***Herritt v King***, *supra*:

> [17] It is quite obvious that this holding company which operated the Bridgewater Professional Building on a rental basis would normally fall into the classification of a business in the ordinary sense of the meaning of that word. **Whether it should be classified as a business or matrimonial asset, however, under the *Matrimonial Property Act* is, in my opinion, controlled by the intention of the parties.** There are many ways in which married persons can provide for their old age and retirement. Depending upon the financial circumstances of the parties, future security may be accomplished by pensions, insurance, annuities, RRSP's, coin collections, or the accumulation of assets which will produce future income when it is necessary for the maintenance of the parties after their incoming-producing years. If it is intended by the parties to use

> these techniques to provide a future nest egg or security in retirement then it cannot, in my opinion, be said that the asset chosen was primarily used or held for or in connection with a commercial, business, investment or other incoming-producing or profit-producing purpose. A business asset, in my opinion, is one which is used for relatively immediate gain and not one that is merely held for the purpose of future security**. Many investments are primarily used to obtain income from surplus capital and fall into the category of business assets under the Act but the parties may be holding them for other purposes which may take them out of the business classification and allow them to fall back into the category of matrimonial assets.**
>
> [18] **This Court has already held that it is the intention of the parties that governs the classification of an asset which could be either business or matrimonial**. See *Herritt v. King* (1990), 25 R.F.L. (3d) 273, where it was found by the trial judge and approved on appeal that an asset in the name of a husband was really being kept for the future and retirement of the family and, therefore, not a business asset. [Emphasis added]

[188] In ***Eyking v. Eyking***, *supra*, Wilson J held that intention may transform an otherwise business classification into a matrimonial one:

> [114] … The definition of business assets have been restricted to assets that are truly of a business character which involves the employment of capital for the purposes of generating income in an entrepreneurial sense. A business asset is one which is used for relatively immediate gain and not one that is merely held for the purpose of future security. **The intention of the parties govern the classification of assets and assets which would normally fall into the classification of a business in the ordinary sense of the meaning of that word could be classified as a matrimonial asset depending on the intention of the parties**. [Emphasis added]

[189] In ***Gillis v Gillis***, [1995] NSJ No 476 (SC), MacAdam J held that classification involved a two-step process. First, to classify as a business asset, proof of generation of income in the entrepreneurial sense must be produced. Second, if established, then proof of the parties' intention in acquiring, using or holding the asset could reclassify an otherwise business asset as matrimonial: para 111. MacAdam J cautioned, however, that proof that "an asset may provide some form of security, in the future, is not necessarily determinative…": para 117.

[190] Justice MacAdam's concerns were later expanded on by B MacDonald, J in ***L (JW) v M (CB)***, *supra*:

> [16] Reliance upon intention to classify an asset has its dangers. Unsophisticated entrepreneurs may refer to their business assets as security for retirement but that would not necessarily mean they would keep those assets if they continued to lose money. As a result income production could be important and may be the primary reason why an asset is retained. The primary purpose for keeping an asset, in such a situation, would be the production of that income even though the owner expects the asset to provide a retirement income or a profit on a sale that may be used to provide a financially

> secure retirement in the future. In this case the production of retirement income would be a secondary purpose not the primary purpose for retaining the asset.

[191] In ***Buchhofer v Buchofer***, 2015 NSSC 358, Macleod-Archer J considered the classification of a lodge that "was acquired as both a going concern (immediate income to support the family) and a retirement plan (to sell and create a retirement fund)": para 32. She held that the despite a blended purpose, the court was not precluded from classifying the lodge as a matrimonial asset: paras 33 – 35.

[192] The parties' treatment of an otherwise business asset is often linked to the determination of intention. For example, in ***Robaczewski v Larson**, supra,* Jollimore, J linked the use of corporate money for personal purposes as an indicator of intention to classify the contested asset as matrimonial:

> [55] Throughout his evidence, Mr. Larson equated the companies with himself. This is understandable. He used money they held for his personal purposes whenever he chose. The companies were created for a personal purpose: to minimize taxes and thereby maximize the money available for the family in the years when he would not be working. The primary purpose of saving and lessening income taxes is not entrepreneurial: *Tibbetts*, 1992 CanLII 2541 (NSCA) at para 17.
>
> [56] I accept that the apartment building was intended to provide for the parties' financial security in their retirement, notably, after Mr. Larson's consulting contract ended when he was 65. Mr. Larson said he had "no pension" and "did not have very much" saved for when he stopped working. The apartment was bought in 2012 and Mr. Larson's consulting contract was scheduled to end in 2016. Retirement was clearly a concern. The parties' intention is relevant to the apartment building's classification: *Hebb*, 1991 CanLII 2523 (NSCA) at para 15.
>
> [57] A range of assets might be used to provide income in retirement. If parties intend assets to "provide a future nest egg or security in retirement then it cannot [. . .] be said that the asset" is a business asset: *Hebb*, 1991 CanLII 2523 (NSCA) at para 15.
>
> [58] Mr. Larson has failed to establish that the apartment building is a business asset. I find the apartment building is a matrimonial asset and, as such, presumed to be equally divided.

[193] A similar approach is found in ***RWB v DCB***, *supra,* and ***Young v Young**, supra.* However, I find that the decision of ***Fisher v Fisher**, supra,* is not relevant because ***Fisher*** involved a discussion of exempted inherited property and not exempted business assets.

Summary

[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.

Decision

[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. I will now outline the five reasons for my conclusion.

[196] First, I find that one of the purposes that led to the creation of the companies was the generation of income in the entrepreneurial sense. The parties discussed and agreed that Mr. Wolfson would quit working as a lawyer to develop and operate rental properties. The family's primary income source was derived from the rental properties. Income generation was one of the primary focuses of the companies.

[197] Second, the other primary purpose of the rental properties was the creation of a retirement vehicle for both parties. While the rental properties were a source of income, they were also a source of significant savings and investment. The rental properties increased in value because of debt repayment and because of the appreciating nature of the rental properties. The increase in the value of the rental properties is "in the nature of a capital gain" which is "distinguished from income or profit": ***Best v Best**, supra*, para 20. Capital assets are, in appropriate circumstances, properly classified as matrimonial**.**

[198] Third, I accept the evidence of Ms. Wolfson about the parties' intention, including when there is a conflict in the evidence. I find that the parties intended that the rental properties would be an immediate retirement vehicle. Therefore, although the rental properties generate income, Mr. Wolfson was holding the rental properties as the parties' primary retirement vehicle. This intention was not a fleeting, future or inconsequential plan, casually or inadvertently spoken. Rather, this intention was one that was specially planned and orchestrated. In so concluding, I find as follows:

- Ms. Wolfson was concerned about retirement investments.

- Mr. and Ms. Wolfson discussed retirement planning. Mr. Wolfson assured Ms. Wolfson that the apartments were their retirement.
- There was also a general discussion that the larger penthouse unit at 7145 Quinpool Road would serve as the parties' retirement home.
- The parties' RRSPs and Ms. Wolfson's pensions have a combined value of $148,291, about 48% of which stems from Ms. Wolfson's pre-marriage pension plan. The matrimonial homes have a combined equity of $953,868, of which Ms. Wolfson contributed at least $125,000 from the sale proceeds of her condo which she owned before the marriage and $125,000 from her pre-marriage South Point investment. Thus, about 26% of the equity in the matrimonial homes is derived from Ms. Wolfson's pre-marriage assets. The parties' investments and bank accounts total $911,876, about 35% of which is derived from Ms. Wolfson's pre-marriage gift from her father.
- In the context of this family, the above assets are insufficient to fund the parties' retirement. The amount of investment and savings required to fund retirement is based on lifestyle. The Wolfsons had an affluent lifestyle. For example, Mr. Wolfson has life insurance coverage of $20 million and the parties' assets consist of two Porsche collector vehicles, two other vehicles, a boat, two matrimonial homes, together with savings and investments for themselves and their children. Such a lifestyle could not be maintained from the parties' assets held personally.
- The Wolfsons intended that the rental properties would be owned, operated and managed as their retirement vehicle.
- I do not accept Mr. Wolfson's suggestion that capital assets can only be classified as retirement assets when retirement is imminent.[viii] The Nova Scotia Court of Appeal did not indicate such a restriction. Further, effective retirement savings must begin early.

[199] Fourth, the Wolfsons used the company assets for personal purposes as follows:

- On two occasions, corporate money was loaned, interest free, to the Wolfsons to assist with the acquisition of the Shaw Island summer home. The companies loaned money to the parties for the closing of this property, which was later repaid by money from Ms. Wolfson's South Point investment. Then Cocowood Holdings Limited and Windsor and Almon Holdings Limited loaned the parties $444,000 to pay off the cottage

mortgage. After separation, the parties' joint line of credit was used to repay the corporate loan.

- Although the decision of the companies to provide interest-free loans is in keeping with Canada Revenue Agency policies, there is no legitimate business reason for the companies to do so. The companies received no benefit from providing the Wolfsons with an interest-free, unsecured loan.
- 2759 Windsor Holdings Limited paid for the construction of a climate controlled garage at 2759 Windsor Street for the sole purpose of housing Mr. Wolfson's two Porsche vehicles. No personal funds were expended for the garage's construction. Mr. Wolfson does not pay storage fees for the use of the garage. There is no legitimate business reason for the company to construct and provide rent-free space to house Mr. Wolfson's vehicles.
- Mr. Wolfson drives the GMC Sierra truck for his daily use including transporting the children. The company pays for this vehicle and its gas.
- LSC Leasing Incorporated pays Mr. Wolfson's Sunlife Life Insurance Policy in the amount of $20,400 per year.

[200] Fifth, some of the equity in the rental properties was acquired from funds that would otherwise be available for family use. Peppermint Properties pays about $400,000 on the principal of the mortgages each year. I find that this amount accelerates the growth of the corporate investment at the expense of the family. Further, the Inglis Street property was a matrimonial asset that was transferred to Mr. Wolfson' s family members to resolve a family rift, and to expedite Mr. Wolfson's receipt of the remaining rental units from his grandfather's estate. The parties were not paid for their interest in the Inglis Street property. The benefit arising from the transfer was received by Peppermint Properties.

[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.

[203] **Did Ms. Wolfson prove entitlement to a s. 18 claim?**

Section 18 of the *MPA* provides:

> **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,
>
> 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.

Position of Ms. Wolfson

[204] Ms. Wolfson sought monetary relief pursuant to s. 18 of the *MPA*. In the event Mr. Wolfson's shares were classified as business assets, Ms. Wolfson claimed a lump sum payment of $2 million. If, however, all or a portion of the shares were classified as matrimonial, then Ms. Wolfson requested a prorated lump sum based on the percentage of classification. Given my classification ruling, Ms. Wolfson is therefore seeking $1 million for her contributions to the companies.

[205] Ms. Wolfson relied on several cases to support her position, including the following: ***Lynk v Lynk,*** 1989 CarswellNS 60 (SCAD); ***Reid (Smith) v Reid*** (1989), 99 NSR (2d) 207 (TD); ***Mood v Mood***, 1997 CanLII 4542 (NSSC) as aff'd at 1999 CanLII 3053 (NSCA); ***Faddoul v. Faddoul***, 2005 NSSF 21; ***Marshall v Marshall***, 2008 NSSC 11; ***Whitty v Whitty***, 2008 NSSC 243; ***Cole v Luckman***, 2012 NSSC 118; ***Thomas v Thomas***, 2012 NSSC 440; ***Parke v Vassallo,*** 2014 NSSC 68; ***Burghardt v Burghardt,*** 2019 NSSC 106; and ***Pirie v Pirie,*** 2020 NSSC 206.

[206] Given the legislation and caselaw, 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.

Direct Contribution

[207] Ms. Wolfson provided extensive details of her direct work contribution which she stated was rendered over an 11-year period, including full-time work between September and December 2014. She detailed her direct work contribution at pages 19 to 29 of exhibit 20. Ms. Wolfson stated that she was heavily involved in many aspects of the business, including the following types of work for the companies or on the properties that were acquired during the marriage:

- Planning and reviewing floor designs, configurations of rooms within units, common space areas, and renovations to the exterior of the buildings.
- Helping with details associated with spacing, placement of utilities, and the prioritized use of the properties.
- Working with other professionals such as architects, contractors, kitchen specialists, and landscapers.
- Selecting paint colours, art work, and, at times, furniture for common areas.
- Providing writing, logo design, and revisions for the webpage, which required extensive work with the web page developers, including describing units, buildings and neighbourhoods.
- Writing rental ads for posting on Kijiji.
- Assisting with the design of the logo and business cards for Peppermint Properties, which included choosing the appropriate colour scheme and working with a graphic artist.
- Helping to design the layout of flyers used for Peppermint Properties.
- Helping to create promotional ideas for Peppermint Properties, such as designing oven mitts with the Peppermint Properties logo.
- Rolling coins from the washers and dryers used in the rental properties.
- Purchasing and arranging residential and commercial tenant gifts.
- Planning the staff holiday party, and other events to ensure positive working relations.

Contribution of Money and Money's Worth

[208] Ms. Wolfson stated that her contribution of money and money's worth included the following:

- When she contributed at least $125,000 from the sale of her condo towards the purchase price of the home, which ensured that the companies did not have to contribute more than $26,330 towards the purchase price.
- When she contributed the value of the Inglewood property to the grandfather's estate, which in turn expedited the transfer of 7145 Quinpool Road from the grandfather's estate to the business. The Inglewood property had an assessed value of $406,600 at the time of transfer.

- When she contributed $125,000 from her South Point investment to the companies to pay part of a loan associated with the summer home, which helped ensure that neither Mr. Wolfson or the companies incurred substantial taxes.
- When the parties contributed the sale proceeds from 6252-56 Shirley Street to the business. Mr. Wolfson acquired 6252-56 Shirley Street in his personal name. The properties were improved with Ms. Wolfson's assistance and then sold for a sizeable profit – a net gain of about $955,000. The profits do not appear to have gone into the matrimonial accounts but rather were reinvested in the business.

Contribution by Assumption of Risk

[209] Ms. Wolfson stated that she and the family assumed risk on behalf of the companies when the couple's safety plan was not followed. The couple's safety plan ensured that the matrimonial properties were held in Ms. Wolfson's name to minimize risk. This safety plan was compromised when Mr. Wolfson acquired and financed properties in his personal name. Mr. Wolfson obtained the following properties in his personal name:

- 6275 Liverpool Street (PID: 00160077).
- 6252-56 Shirley Street (PID: 00164004/00163998).
- 2834 Windsor Street (PID:00123026).
- 2840 Windsor Street (PID: 00123018).
- 2844 Windsor Street (PID: 00123000).

[210] In addition, Mr. Wolfson took out a series of mortgages in his personal name on 6275 Liverpool Street, 6252-56 Shirley Street, and 2844 Windsor Street. Although Mr. Wolfson claimed that he was holding these properties in trust, he did not provide a copy of the trust documents. Further, 2834 Windsor, 2840 Windsor, 2844 Windsor and 6275 Windsor Street were listed on a statement of prorated/shared expenses from LSC Holdings Inc as personal holdings of Mr. Wolfson.

[211] Ms. Wolfson further stated that in the Royal Bank of Canada documentation entered as exhibit 28, Mr. Wolfson is noted as a guarantor to the agreement, at page 2, with the document bearing his signature as guarantor at page 5. This guarantee was in support of Cabin 5 Holdings and was in the amount of $1,700,000.

[212] On this basis, Ms. Wolfson took the position that there was a risk to the family based on the associated purchase arrangements and financing agreements. Ms. Wolfson acknowledged that while the risk was not as extensive as had she personally signed a loan or a guarantee, the family was nonetheless exposed to risk.

Summary and Impact of Dividend Payments

[213] In summary, Ms. Wolfson argued that she successfully dislodged the evidentiary burden by proving that she contributed to the business by providing direct services, by contributing money and money's worth, and by assuming risk. From her perspective, given the value of the companies, $1 million is an appropriate payment to satisfy her s. 18 claim.

[214] In addition, Ms. Wolfson disputed the suggestion that she was compensated based on dividend payments received because such payments were a form of income splitting for tax purposes, not earnings. Ms. Wolfson distinguished ***Rushton v Rushton***, 2006 NSSC 149 and ***French v French*,** 1997 CanLII 4543 (NSSC), relied on by Mr. Wolfson, which did not involve income splitting, but instead involved spouses who were paid a fair compensation for their work. In addition, she stated that ***Klefenz v Klefenz***, 2015 NSSC 196 is not relevant because the wife only worked for the business before the husband acquired it.

[215] In the alternative, Ms. Wolfson noted that if dividends are considered a form of payment, these payments only addressed her direct work contributions, but did not compensate her for the other two prongs of her claim. As such, her claim should succeed as it relates to her contributions of money or money's worth and her assumption of risk.

Position of Mr. Wolfson

[216] Mr. Wolfson contested Ms. Wolfson's claim for two key reasons. First, he disputed Ms. Wolfson's factual assertions. Second, he stated that, in any event, Ms. Wolfson was compensated for any contributions she made by way of the dividend payments she received over the course of the marriage. In the alternative, Mr. Wolfson argued that a nominal payment in the range of $2,000 to $5,000 was appropriate.

Incorrect Factual Assertions

[217] In contesting Ms. Wolfson's factual assertions, Mr. Wolfson stated as follows:

- There is no evidence that Ms. Wolfson contributed money to the business. No matrimonial asset was ever sold to purchase a business asset. No matrimonial asset was ever leveraged for business purposes. Ms. Wolfson never signed a business loan or other business debt. Ms. Wolfson was not a guarantor on any business debt.
- Ms. Wolfson's claims are largely based on her own evidence that she provided opinions and emotional support to Mr. Wolfson, and that she occasionally ran business errands. These inconsequential and occasional acts do not support the claim that Ms. Wolfson espouses.
- Although Ms. Wolfson claims to have helped and assisted with many things during the marriage, her own evidence is extremely vague and, in many respects, exaggerated. For example, Ms. Wolfson seemed to suggest that she should be compensated for merely walking by the rental buildings when the couple went for an evening walk.
- The undisputed evidence is that professionals were hired and paid by the businesses to perform the tasks that Ms. Wolfson claims she performed, such as choosing paint colours and designing business cards.
- The e-mails presented during cross-examination did not boost Ms. Wolfson's testimony. For example, two emails involved a discussion that Ms. Wolfson was supposed to be at the office – not that she was actually there. Mr. Wolfson said that Ms. Wolfson didn't work in the office and that he instead hired the babysitter to do so.
- Mr. Wolfson's evidence was supported by Mr. Green and Mr. Raftus who discussed their limited interactions with Ms. Wolfson at the business sites.
- Ms. Wolfson performed no office work or book keeping for the business.
- Notably, Ms. Wolfson made no claim of meeting tenants, taking rent money, or showing apartments, which is the core work of Peppermint Properties.
- At most, for a brief period in the fall of 2014, Ms. Wolfson tried to work for the business. The three emails, entered as exhibits, in which she is being asked to assist with tasks are all from this period. Although the parties disagree about how quickly the experiment ended, there is common ground that Ms. Wolfson ceased to work for the business by the end of 2014.

Compensation Already Paid

[218] Mr. Wolfson argued that Ms. Wolfson's pre-separation compensation negated her s. 18 claim. Mr. Wolfson noted that a spouse already compensated for their contributions cannot be successful in a s. 18 claim: ***French v French***, *supra*, and ***Rushton v Rushton***, *supra*. Further, compensation can also include indirect benefits provided to the contributing spouse: ***Hurst v Gill,*** 2011 NSCA 100.

[219] From his perspective, Mr. Wolfson noted that dividends from the business were a source of income for Ms. Wolfson throughout the marriage. For example, Ms. Wolfson received $177,000, $124,000 and $80,000 from the companies in the three years prior to separation. She was paid generously for the work she claims to have done.

[220] Mr. Wolfson said that if Ms. Wolfson's s. 18 claim is based on contributions, without regard to relationship, then her compensation should also be assessed in this manner. As a result, the income Ms. Wolfson received should not be discounted solely because of an intention to income split. Ms. Wolfson was compensated fully for her contributions.

Alternate Position

[221] In the alternative, Mr. Wolfson argued that any payment should be nominal based on awards granted in previous cases, such as:

- ***Murphy v Murphy***, *supra* - $2,000.
- ***Burghardt v Burghardt,*** *supra* - $3,000**.**
- ***Marshall v Marshall***, *supra* - $7,000.
- ***Pothier v Pothier,*** *supra* - $5,000.

Summary

[222] In summary, Mr. Wolfson denied the factual claims as presented by Ms. Wolfson as exaggerated and untrue. In any event, Mr. Wolfson said that Ms. Wolfson was already generously paid for her contributions through the sizeable dividends she received on an annual basis. In the alternative, Mr. Wolfson argued that a nominal payment is all that should be ordered in the circumstances.

Law

[223] Section 18 of the *MPA* provides the court with the jurisdiction to order an array of discretionary relief in appropriate circumstances. In ***Marshall v Marshall***, *supra*, this court summarized the law concerning a s. 18 claim:

[62] There are many cases in which the courts have considered a claim pursuant to section 18 of the *Act.* The outcomes in these cases are based upon the unique facts which were presented.

[63] Courts have denied claims for contribution for two reasons. First, where a spouse has already been paid for her/his contribution, then an award pursuant to section 18 in usually denied: ***Rushton v. Rushton*** (2006), 244 NSR (2d) 242 (SC) and ***French v. French*** (1997), 162 N.S.R.(2d) 104 (SC). Second, claims are also denied where the contribution has been minimal: **Crosby v. Crosby** (2002), 207 N.S.R.(2d) 195 (SC) and ***Baggs v. Baggs*** (1997), 161 N.S.R.(2d) 81 (SC). However, where the wife was paid an insufficient amount for her work, a further award of $15,000 was deemed appropriate: ***Mason v. Mason*** (1981) 47 N.S.R. (2d) 435 (CA).

[64] Some courts have preferred an unequal division as a method of achieving justice where there are business assets, rather than making an award pursuant to section 18 of the *Act*: ***MacDonald v. MacDonald*** (2007), 255 NSR (2d) 270 (SC); ***Pelrine v. Pelrine*** (2006), 251 N.S.R.(2d)29(SC); and ***Todd v. Todd*** (1995), 144 N.S.R.(2d) 340 (SC). The Court of Appeal appears to have acknowledged the impact that unequal division awards have upon sec. 18 claims. In ***Sproule v. Sproule*** (1986), 73 N.S.R. (2d) 131 (CA), the Court of Appeal affirmed a $20,000 s. 18 claim to a wife for her extensive contributions to the business, given that an unequal division had also been awarded in the wife's favour.

[65] In other cases, a cash payment is provided to the non-owning spouse, the amount of which varies for the services provided. In **Lynk v. Lynk**, supra, the wife was awarded a one-third interest in the business because of the financial exposure she had accepted. In ***MacDougall v. MacDougall*** (2005), 231 N.S.R.(2d) 270 (SC), the wife was awarded $10,000 for her contribution to the business. In **Reid v. Reid** (1989), 99 N.S.R. (2d) 207 (SC) the wife was awarded one-fourth of the value of the fishing operation for her contribution which consisted of painting the boat, acquiring and transporting bait, and bookkeeping. In ***Campbell v. Campbell*** (1986), 74 N.S.R. (2d) 25 (SC), Nathanson, J., awarded the wife a 10% interest in the value of the business as she cosigned business loans.

[224] In ***Marshall,*** this court awarded the wife $7,000 for her contributions to a company with assets of $30,000, representing about 23% of the total value of the business. In addition to the cases reviewed in ***Marshall***, the following cases are instructive as to the relief ordered after a finding of contribution:

- In ***Mood v Mood***, 1997 CanLII 4542 (NSSC) as aff'd at 1999 NSCA 79, Goodfellow, J awarded the wife a 5% share of the husband's fishing business based on exposure to risk, together with an additional 7% interest, for a combined total of 12.5% of the company based on the wife's cumulative contributions.

- In ***Faddoul v. Faddoul***, 2005 NSSF 21, Coady, J indicated that while he found the rental property to be a matrimonial asset, the non-titled spouse would have been entitled to a half interest under s. 18 of the *MPA* had the asset been deemed to be a business asset.
- In ***Whitty v Whitty***, 2008 NSSC 243, Wilson, J awarded the wife a 7.5% share in the husband's fishing business, given the wife's direct contributions and her exposure to risk by co-signing a business loan.
- In ***Cole v Luckman***, 2012 NSSC 118, Muise, J awarded the wife a 15% interest in the husband's farming business, and a 10% interest in the farrier business based on the combination of contributions and exposure to risk.
- In ***Thomas v Thomas***, 2012 NSSC 440, MacAdam, J held that the wife was entitled to a 17% share of the husband's fishing business, calculated at a rate of 10% for direct contributions and 7% from exposure to risk given the placement of a collateral mortgage on the matrimonial home for the benefit of the business.
- In ***Parke v Vassallo,*** 2014 NSSC 68, Jollimore, J awarded the wife $10,000 on a business valued at $32,760.80 given the wife's work contributions and her direct financial assistance to the business.
- In ***Burghardt v Burghardt,*** 2019 NSSC 106, Warner, J affixed a value of $3,000.00 for the contributions of the non-titled spouse even when the business was noted to have no value.
- In ***Pirie v Pirie,*** 2020 NSSC 206, Jesudason, J awarded a 40% interest in the sale proceeds of a dental practice to the non-titled spouse based on both ss. 18 and 13 of the *Act*.

[225] Counsel did not dispute the above noted law. They did, however, dispute the impact that income-splitting dividend payments have on the question of compensation. Mr. Wolfson argued that dividend payments are a form of compensation under s. 18, while Ms. Wolfson argued that they are not.

[226] The only case that appears to directly mention this issue is ***Pothier v Pothier***, *supra*, wherein Warner, J held that "[t]he dividends paid to her from the business and family trust were primarily for tax-planning purposes, as Mr. Pother's spouse, and therefore not a set-off against her minimal work contributions to the businesses": para 89. Mr. Wolfson argued this case is not determinative for reasons previously discussed.

Decision

[227] In my decision, I will address the issues of contributions and compensation.

Contributions

[228] Ms. Wolfson based her claim on three prongs – direct services contribution; contribution of money or money's worth; and risk assumption contribution. I will now review each of these claims.

[229] First, I find that Ms. Wolfson did contribute extensive direct services to the companies after the parties married until the end of 2014, including providing most of the services which she described in her affidavit. Much, but not all, of the direct service work was done during the initial acquisitions and renovations of the properties. As the buildings were completed, and as staff were hired, both Mr. and Ms. Wolfson spent less time on the operations.

[230] In so finding, I recognize the conflict in evidence. In resolving this conflict, I find as follows:

- Mr. Wolfson substantially minimized the amount and quality of work that Ms. Wolfson undertook on behalf of the business. Some of the minimization was strategic; some related to flaws in memory and the passage of time; and some arose because Mr. Wolfson simply undervalued Ms. Wolfson.
- Although Ms. Wolfson did contribute extensive services, her recall was not without error, likely because of the passage of time and flaws in memory.
- The evidence of Mr. Green and Mr. Raftus does not significantly distract from Ms. Wolfson's testimony. Their recall was also hampered by the passage of time and flaws in memory. Further, they were not always present to observe Ms. Wolfson's work.
- Ms. Wolfson's evidence was detailed and specific. It was not vague or filled with generalizations.

[231] Second, I find that Ms. Wolfson was only partially successful in her claim related to contribution of money or money's worth. The only factor relevant relates to the Inglewood property. I previously found that the lot was a matrimonial asset because it was an engagement gift to both parties. This lot was transferred to expedite Mr. Wolfson's purchase of the Quinpool Road property from his grandfather's estate. The lot was assessed for $406,600 at the time of the transfer. I therefore find that Ms. Wolfson contributed money's worth to the business because the transfer of the lot resolved the family rift and enabled the Quinpool Road acquisition to proceed without further difficulty.

[232] I do not accept that the other examples provided by Ms. Wolfson are valid examples of money or money's worth contributions because they are either not connected to the business or, in the case of Shirley Street, there is insufficient evidence to prove the allegation.

[233] Third, I find that case law appears to limit assumption of risk contributions to cases where the non-titled spouse personally signed a loan, guarantee, or other debt on behalf of the company. There is no evidence of Ms. Wolfson so doing.

Compensation

[234] Now I must address the compensation issue. Was Ms. Wolfson compensated by being paid dividends? To some extent, yes. Dividends are a form of compensation, even if paid out as a tax strategy. The dividends were placed in the parties' joint account and used for family purposes. Ms. Wolfson would not have treated the compensation any differently had she been paid a salary, because Ms. Wolfson consistently placed her family's welfare in priority to her own. I infer that if Ms. Wolfson received a salary, it too would have been placed in the joint account and used for family purposes. Given this reasoning, I find that Ms. Wolfson was compensated to an extent from the dividend payments.

[235] In light of my decision on classification and dividend compensation, I have determined that it is appropriate to address Ms. Wolfson's contributions as part of my analysis of the s. 13 unequal division claim. This approach is in keeping with ***Ryan v Ryan***, 2010 NSCA 2, wherein Hamilton, JA held:

> [15] … The cases indicate that where applications for division of a business asset are made under both sections, indirect contributions to the asset (such as assumption of child care and responsibility for the household) are properly considered under s. 13(f), while direct contributions to the asset (such as bookkeeping) are properly considered under s. 18; see for example **Matthews v. Matthews** (1990), 96 N.S.R. (2d) 376 (S.C.), that point upheld on appeal (1991), 104 N.S.R. (2d) 140 (C.A.), **MacDonald v. MacDonald**, 2007 NSSC 174, **Bennett v. Bennett**, [1992] N.S.J. No. 188 (C.A.), **O'Regan v. O'Regan**, 2009 NSSC 181, and **Grant v. Grant**, 2001 NSSF 13 at paras. 120-126.

[236] **Did Ms. Wolfson prove that an equal division is unfair or unconscionable?**

[237] Section 13 of the *MPA* provides the court with the jurisdiction to grant an unequal division in limited circumstances, as follows:

> **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;

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

Position of Ms. Wolfson

[238] In the event Mr. Wolfson's corporate shares were not classified as matrimonial, Ms. Wolfson sought an unequal division pursuant to s. 13 of the *MPA,* relying on subsections (a), (b), (e), (f), (g), (i) and (j).

[239] Ms. Wolfson also asked the court to consider the following decisions: ***Ryan v Ryan***, *supra;* ***Pirie v Pirie***, *supra*; ***Young v Young,*** *supra*; ***Thomas v Harwood***, 1981 CanLII 4167 (NSCCAD); ***Bennett v Bennett***, 1992 CanLI 2623 (NSSCAD); ***Khoury v Khoury***, 2003 NSSF 11; ***Matthews v Matthews***, 1990 CanLII 4213 (NSSCTD) as aff'd at 1991 CanLII 2605 (NSSCAD); and ***Voiculescu v Voiculescu***, 2003 NSSF 29.

[240] I will now address each of the s. 13 subsections relied upon by Ms. Wolfson.

Section 13(a) - Unreasonable Impoverishment

[241] Ms. Wolfson stated that she proved impoverishment based on four examples. First, Mr. Wolfson placed the family at risk when he financed property acquisitions personally, and when he signed as a guarantor to the corporate debt.

[242] Second, Mr. Wolfson failed to lead evidence about the substantial sale proceeds from 6252-56 Shirley Street, which property was personally held and later sold after being renovated. An inference of impoverishment is appropriate.

[243] Third, Mr. Wolfson built up the equity in the companies at the expense of the family, as evidenced by the following examples:

- The pre-tax RRSP balances are $15,515 for Ms. Wolfson and $88,745.76 for Mr. Wolfson. Both parties' tax returns indicate sizable deduction limits. Ms. Wolfson's 2017 Income Tax Return noted a deduction limit of $63,990 with a contribution of $300, while Mr. Wolfson's 2018 Income Tax Return noted a deduction limit of $100,349.
- Rather than maximizing personal savings, the companies amassed significant equity. Since the parties separated in January of 2018, the principal paid down on the long-term corporate debt was $1.2 million, a figure approximately twelve times the amount of RRSPs that the parties accumulated over 12 years of marriage.
- Using Mr. Wolfson's Tab A, solely for comparative purposes, the bank accounts, investments, pensions and RRSPs total $1,075,774.10. This amount, accumulated over 12 years of marriage and includes pre-marriage assets, is also less than the principal payments made on the companies' debt in the three years post-separation.

[244] Fourth, Ms. Wolfson submitted that the treatment of the Inglewood property is consistent with a matrimonial asset being diverted to acquire business assets as previously described.

Section 13(b) - Debts and Liabilities

[245] Ms. Wolfson stated, and as previously discussed, some of the business debt was indeed held personally and secured by a personal guarantee.

Section 13(e) Date and Manner of Acquisition of Assets

[246] Ms. Wolfson stated that the evidence supports a finding under this ground based on the following:

- 19 of the 21 apartment buildings, or 90% of the buildings, were acquired during the marriage.

- Some of the apartments were acquired with the assistance of the matrimonial assets, including 7145 Quinpool Road, given the role of the parties' Inglewood lot in the resolution of the family rift.
- 6252-56 Shirley Street properties were acquired and sold under Mr. Wolfson's personal name, including personally signed mortgages. The substantial proceeds were likely re-invested in the companies.
- Ms. Wolfson applied dividends from her South Point investment to pay out the shareholder loans used to purchase the parties' summer home.
- The corporate assets are worth approximately nine times more than the matrimonial assets, before debt is considered.
- The companies and buildings were intended for the parties' retirement.
- The companies and buildings afforded the parties numerous benefits and the parties' intention was that this would continue as they reached older age.
- She provided many, and previously detailed, direct contributions to the acquisition, maintenance, and operation of the corporate assets.
- She provided substantial pre-marriage assets for the benefit of the family, including approximately $150,000 to the Shaw Island property, $125,000 towards the purchase of the Inglis Street property, and the South Point investment now valued at $321,658. Her pensions are also matrimonial, the largest one arising before the marriage.

Section 13(f) – Domestic Responsibilities and Business Assets

[247] Ms. Wolfson claimed proof of an unequal division by her disproportionate assumption of domestic responsibilities, as confirmed by the following evidence:

- As between the parties, she was responsible for the majority of the household work throughout the marriage and, in particular, from 2007 to 2012.
- She remained at home following the birth of their children until 2012.
- Until separation, she was the parent dedicated to ensuring the appropriate health, education, faith, and general welfare needs of the children were met.
- Her affidavits afford the Court with a snapshot into her extensive domestic responsibilities in the Wolfson household.

- Almost all of the properties were acquired between 2007 and 2012 when Ms. Wolfson was out of the workforce. The only property that was acquired after her return to the workforce was 2834 Windsor Street, which was purchased in 2013. This means that the companies acquired a total of 20 properties, disposing of two of them since, during the time Ms. Wolfson was out of the workforce. Her substantial efforts in the home and as a parent were a contributing factor for the acquisition and maintenance of the rental properties.
- Only the Pepperell Street apartments were acquired before the marriage.

[248] On this basis, Ms. Wolfson submitted that s. 13(f) was made out.

Section 13(g) - Contribution to Career Potential

[249] Ms. Wolfson noted that she greatly contributed to Mr. Wolfson's career potential as follows:

- She left her position in Ontario as a school teacher on a "leave of absence", because the parties were unsure where they would ultimately reside. Her formal resignation came two years later when the parties decided to remain in Halifax.
- Her flexibility regarding her employment in Ontario was integral in allowing Mr. Wolfson to grow the companies and acquire the buildings owned by the companies.

[250] Ms. Wolfson submitted that many of the previous arguments consistent with this point are also sufficient proof that an unequal division is warranted.

Section 13(i) - Contribution to Welfare of the Family

[251] Ms. Wolfson repeated her previous submissions regarding her disproportionate domestic contributions to the family unit in support of an unequal division finding under this ground.

Section 13(j) - Increase in the Value of the Assets

[252] Ms. Wolfson submitted that at the time of the marriage, only the Pepperell Street buildings existed. All other rental buildings had not yet been acquired and many of the other corporations were not yet incorporated. As noted above, the companies acquired 90% of their current portfolio during the parties' marriage.

[253] Further, the Pepperell Street Properties represent only 4% of the current value of the portfolio, when the amount of $31,462,700 between the Robar Report and Altus Report is used as the comparator.

[254] Ms. Wolfson therefore submitted that the properties and other assets owned by the companies have increased significantly in value during the parties' marriage.

[255] Ms. Wolfson further submitted that her efforts towards maintaining the family cannot be viewed in isolation. Her efforts allowed Mr. Wolfson to exit his career in the legal field and transition fully into working within the property development and rental property field. Ms. Wolfson repeated the arguments presented previously to underscore the importance of her contribution to the overall growth and development of the family and corporate holdings.

Summary of Ms. Wolfson's Position and Quantum Sought

[256] Ms. Wolfson stated that she proved entitlement to an unequal division. She urged the court to grant her between $2 to $5 million of the value of Mr. Wolfson's corporate shares, in addition to an equal division of the matrimonial assets.

[257] Ms. Wolfson acknowledged the jurisprudence which often highlights the court's reluctance to "kill the goose that lays the golden egg". On this basis, she suggested a creative resolution to ensure that the interests of both parties are respected, such as:

- Her award could be secured by a mortgage attached to the properties that would be paid out by Mr. Wolfson over time, or at the time of sale of any of the properties. The value of Ms. Wolfson's entitlement could be divided amongst a number of properties.
- Mr. Wolfson could re-finance the properties to pay out Ms. Wolfson's share over time, or could reduce the principal paid off each year to begin to buy out Ms. Wolfson's share.
- She could be provided with ownership of the associated percentage of buildings, while Mr. Wolfson could then be provided with a right of first refusal to purchase the properties from Ms. Wolfson using a mix of liquidity and financing.
- Ms. Wolfson's award could be paid out on a yearly basis similar to the dividends that she formerly received as an income-splitting measure during the marriage.

[258] Ms. Wolfson noted that the court ordered creative solutions to the division of assets in a number of prior decisions, such as in ***Khoury v Khoury***, *supra*; ***Matthews v Matthews****, supra*; and ***Voiculescu v Voiculescu,*** *supra.*

Position of Mr. Wolfson

[259] Mr. Wolfson strenuously disputes the unequal division claim. He asked the court to review ***Gouthro v Gouthro***, *supra* for general principles and ***JWL v CBM***, 2008 NSSC 215. He also put forth reasons to deny Ms. Wolfson's claim, which include the following:

- There is no evidence that any matrimonial assets were impoverished. They were not diverted to acquire business assets or to pay business expenses or debts. They were not even put at risk as security. RRSPs were not cashed and invested in the business. In fact, the RRSPs of the parties increased substantially during the marriage, as did their personal real estate equity, unregistered investments, and personal net worth.
- Mr. Wolfson's income was used to support the family, allowing Ms. Wolfson to work only part time and pursue her education while focusing on the children in the earlier years to the mutual benefit of the family, and still their personal assets grew by millions.
- The vacant lot on Inglewood was gifted to Mr. Wolfson by his grandfather. The vacant lot was never used for family purposes and is an exempt asset.
- The debts and liabilities of the spouses include usual mortgages and lines of credit used to acquire matrimonial assets. Visas were paid monthly. None of the business debt was joint debt or personally secured. To the contrary, the matrimonial homes were placed in Ms. Wolfson's name to ensure they were never at risk.
- The parties benefitted from the interest-free loan from one of Mr. Wolfson's companies, which was used to pay down the mortgage on the summer home. This loan reduced the interest that was otherwise payable. As a result, the equity in the summer home grew faster, to the mutual benefit of the family.
- The first business assets were acquired before the marriage and the equity in those assets was used to fund further acquisitions, while income was used to fund the family's lifestyle.
- Mr. Wolfson was an active parent, more so than a traditional father.
- Ms. Wolfson was able to complete her master's degree during the marriage, which improved her own employability. Ms. Wolfson remained out of the job force and then returned to part time work when the children were in school.

- Ms. Wolfson will continue to enjoy the spoils of their joint efforts by dividing matrimonial assets valued at about $2.5 million, while receiving significant support from the exempt business assets.
- The parties' joint efforts and mutual contributions are the very basis for an equal division - not an unequal division. Both parents contributed in various ways to the home and family life, which suggests an equal division rather than an unequal division. Ms. Wolfson did make some non-traditional contributions, such as working part-time and running a few errands for the business, but similarly, Mr. Wolfson was a more involved father than tradition would indicate.
- The value of both business assets and matrimonial assets increased substantially during the marriage. The business assets are worth more, but they must continue to generate income to support both parties and their children. The equity in the business is not cash that can be accessed. The equity is needed to generate revenue to support the parties.
- The simple fact that business assets are worth more than matrimonial assets is not sufficient to justify an unequal division: ***JWL v CBM***, *supra*.

[260] In summary, Mr. Wolfson stated that the evidence supports an equal and not an unequal division. From Mr. Wolfson's perspective, Ms. Wolfson did not lead evidence sufficient to dislodge the heavy burden upon her. He asked that Ms. Wolfson's claim be dismissed.

Law

[261] Section 13 of the *MPA* provides the court with the limited jurisdiction to award an unequal division if an equal division of the matrimonial assets would be unfair or unconscionable. The Law Reform Commission of Nova Scotia, in its 2017 Final Report on *Division of Family Property*, summarized the high threshold that must be met to support a successful s. 13 claim, at pages 200 to 201:

> Among Canadian jurisdictions, the standard of unfairness is at the lower end of the spectrum for an unequal division. The standard of unconscionability tends toward the higher end. For instance, in Ontario the unconscionability standard significantly limits judicial discretion in ordering an unequal division.
>
> Nova Scotia courts have taken a fairly constrained view of their discretion under section 13. In *Morash v. Morash*, Bateman J.A. warned that when deciding an unequal division claim: "the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair."
>
> ….

Despite the fact that the plain wording of section 13 provides for an unequal division of matrimonial assets where an equal division would be “unfair or unconscionable,”, the cases have tended to favour the higher standard of unconscionability, rather than mere unfairness.

[262] In ***Cunningham v Cunningham***, 2017 NSSC 244, as aff’d at 2018 NSCA 63, this court reviewed general principles that apply to a claim for unequal division at para 27. The legal principles identified are as follows:

- The ***Matrimonial Property Act*** must be given a liberal interpretation in keeping with its remedial purpose: ***Clarke v. Clarke***, [1990] S.C.J. No. 97 (S.C.C.).
- The ***Matrimonial Property Act*** affords significant rights to spouses. Asset division is not based on a strict economic analysis as often occurs in unjust enrichment claims. To the contrary, the ***Matrimonial Property Act*** recognizes the intrinsic value of noneconomic contributions and views marriage as a partnership. In **Young v. Young**, supra, at para 15, Bateman, J.A. confirmed that the “predominant concept under the **Act** is the recognition of marriage as a partnership with each party contributing in different ways”. Marriage is neither a business nor an economic enterprise.
- All real and personal property acquired by either spouse is presumed to be a matrimonial asset, unless falling within certain narrow exceptions, and is subject to a presumptive equal division: **Morash v. Morash**, 2004 NSCA 20, para 16, per Bateman, J.A.
- Section 4(1) of the ***Matrimonial Property Act*** confirms that pre-marriage assets are captured within the definition of matrimonial assets; “… the mere fact of prior acquisition does not remove the asset from *prima facie* equal division:” **Young v. Young**, supra, para 20, per Bateman J.A.
- The burden of establishing entitlement rests upon the spouse who seeks an unequal division.
- An unequal division is only permitted where “there is convincing evidence that an equal division would be unfair or unconscionable”: **Young v. Young**, supra, para 15, per Bateman, J.A.; or where there is “strong evidence showing that in all the circumstances an equal division would be unfair or unconscionable on a broad view of all relevant factors:” **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414 (A.D.) at para 7, per MacKeigan, C.J.N.S.
- Although the word “unfair” and “unconscionable” do not have “a precise meaning”, they nonetheless evoke “ethical considerations and not merely legal ones:” **Young v. Young**, supra, para 18, per Bateman, J.A.
- Unconscionable has been held to mean "unreasonable", "unscrupulous", "excessive" and "extortionate" and when “coupled with the requirement that "strong evidence" must be produced to support an unequal division, the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous:” **Jenkins v. Jenkins** (1991), 107 N.S.R. (2d) 18 (T.D.), at para 10, per Richard, J.

- The question to be asked is "whether equality would be clearly unfair – not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified:" **Harwood v. Thomas**, supra, para 7, per MacKeigan, C.J.N.S.
- Courts are instructed to examine all the circumstances, and not to simply weigh the respective material contributions of the parties, except in unusual circumstances: **Young v. Young**, supra, paras 15 and 19, per Bateman, J.A.
- When focusing on a claim grounded in s.13 (e) of the **Matrimonial Property Act**, the court must examine relevant factors including "the timing of the contribution", "the parties' use of the asset", "the length of the marriage", "the significance of the asset relative to the entire pool of matrimonial assets"; and "the age and stage of the parties at separation:" **Young v. Young**, supra, para 20, per Bateman J.A.
- When focusing on claims grounded in s. 13 (d) of the **Matrimonial Property Act**, the length of cohabitation is a reference to short term, not long term unions: **Briggs v. Briggs** (1984), 64 N.S.R. (2d) 40 (N.S. T.D.) as affirmed at (1984), 65 N.S.R. (2d) 126 (N.S. C.A.) and **Donald v. Donald** (1991), 103 N.S.R. (2d) 322 (N.S. C.A.) per Chipman, J.A.
- The determination of whether an equal division will produce an unfair or unconscionable result is a fact-based decision, as shown in the divergent results reported in the various cases relied upon by counsel, which I reviewed.

[263] In ***Lynk v Lynk,*** *supra*, Chipman, JA overturned the trial decision and awarded the wife a 1/3 interest in the fast food business operated by the husband. The court held that the trial judge erred when he "completely overlooked that, in a marriage such as this, the wife's lot was thrown in fully with that of her husband and whatever he lost, she lost as well": para 15**.** The wife contributed money's worth to the business by signing a personal guarantee and was successful in her s. 18 claim. The court also noted, however, that the same result was warranted under s. 13(e) of the *Act*.

[264] In ***Ryan v Ryan***, *supra*, Hamilton, JA, while acknowledging that the trial judge erred in his application of s. 18 of the *Act*, held that he did not err in his alternate conclusion that the wife "was entitled to an unequal division of matrimonial assets or a division of the Newfoundland business pursuant to s. 13 to compensate her for her extraordinary contribution to the family which enabled Mr. Ryan to manage, maintain, operate and improve his business asset": para 16. Hamilton, JA further noted that "[w]ithout her contribution to the running of the household and her child care during the ten weeks the appellant spent in Newfoundland each year, Mr. Ryan would have been unable to run the business": para 16.

[265] In ***Pirie v Pirie****, supra*, Jesudason, J awarded the wife 40% of the net proceeds of the sale of the husband's former dental practice, which was sold after separation. In confirming an unequal division, the court held that the expansion of the dental practice was financed by a LOC secured against the matrimonial home; the wife transferred her corporate shares to the husband; the wife assumed a greater role in childcare and household tasks than the husband; the husband's career was advanced during the marriage while the wife's career was not; all of the business' growth occurred during the marriage; and the wife's pension was to be divided while the husband had no pension.

[266] An opposite conclusion was reached in ***JWL v CBM***, *supra*, primarily because the trial judge did not find any s. 13 factors present in the evidence. The trial judge held that the motivating factor in seeking an unequal division related "to the differences in the parties' net worth": para 84. She also noted that "[t]his is not a factor directly enumerated in section 13 but it may be a reason for deciding an equal division is unfair or unconscionable if an enumerated factor is present": para 84.

[267] Further, the facts in ***JWL*** are not similar to the Wolfson case. For example, the ***JWL*** case was a non-traditional marriage involving parties who married when they were 38 and 43. They had no children together, although the wife's children lived with them. The wife's education, career and earning potential was not impeded by the marriage. The wife was compensated for her business interests.

Decision

[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.

[269] I will now explain my reasons.

Section 13 (1)(a) - Impoverishment of the Matrimonial Assets

[270] This heading is often invoked for reasons associated with gambling or substance abuse, such as found in ***Crane v Crane***, 2008 NSSC 33. Does this subsection apply to the Wolfson case where no such flaws exist? Although not as strong a factor as found in other headings, I find that s. 13(a) nonetheless does apply for the following reasons:

- The words used in s. 13(a) are not restrictive. They therefore should not be interpreted in a restrictive manner, given the remedial nature of the legislation.
- Factually, the evidence confirms that the equity in the companies greatly increased in priority to that of the matrimonial assets, consistent with the parties' intention that their retirement needs and goals would be met via the companies. Afterall, the companies were intended as the parties' retirement vehicle. After separation, complications arose, however, because of the business asset exemption found in the *MPA*.
- When comparing the equity in the other assets against the equity in the companies, a stark contrast is immediately evident. The companies' equity is climbing at a rapid pace. while the equity in the other assets is only slowly advancing. For example, the principal on the corporate debt is being paid at a rate of about $400,000 annually. The equity in the matrimonial assets substantially lags behind, as previously presented by Ms. Wolfson's counsel at para 243. Similarly, the rental properties acquired in Mr. Wolfson's personal name were financed by conventional mortgages and were paid out more quickly in comparison to the debt encumbering the two matrimonial homes.
- The Inglewood lot, an engagement gift to both parties, was transferred to the grandfather's estate to expedite the transfer of the Quinpool Road property to one of the companies. No benefit flowed to Ms. Wolfson from this transaction.

[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.

Section 13(b) - Debts and Liabilities

[272] I do not find this section applicable; Ms. Wolfson's rationale is best examined under another heading, although I do recognize that Mr. Wolfson is a guarantor on a substantial corporate debt.

Section 13(e) - The Date and Manner of Acquisition

[273] This factor was compelling in my decision to grant an unequal division for five reasons. First, with the exception of Pepperell Street, all other rental properties were acquired during the 12 year marriage, including the two which were bought and then sold after renovations were effected.

[274] Further, although the two Pepperell Street buildings were owned before the marriage, I infer that they had limited equity. Mr. Wolfson bought the property with funds loaned from his father and a CIBC mortgage. Extensive renovations were not completed until about five months before the marriage. The renovations were financed through loans from Mr. Wolfson's father and a LOC. All debt was repaid once the renovations were completed through refinancing with RBC. Therefore, although the Pepperell Street buildings were acquired before separation, most of the equity was earned during the marriage.

[275] Second, Ms. Wolfson used her substantial pre-marriage assets for the benefit of the family, and maintained them in a typical matrimonial-based fashion. For example, Ms. Wolfson acquired a pension while employed as a teacher in Ontario with a commuted value of $116,467. Ms. Wolfson also owned the South Point investment, which was purchased by her father on her behalf when she was a child. It has a current value of $318,624. Ms. Wolfson owned a condo before the marriage. She sold it and used about $125,000 towards the purchase of the matrimonial home. In addition, dividends received from the South Point investment were deposited into the joint account and used for family expenses, including $125,000 towards the parties' summer home. Every dollar of Ms. Wolfson's substantial pre-marriage assets was used for the benefit of the family and is divisible as matrimonial assets.

[276] In contrast, the pre-marriage assets owned by Mr. Wolfson included the Pepperell Street apartment buildings, which were heavily financed. Although the income generated from the rentals was used to fund family expenses, Mr. Wolfson asked that the asset itself be classified as an exempt business asset, not to be shared with Ms. Wolfson.

[277] Third, the parties' engagement gift of the Inglewood lot, although held in Mr. Wolfson's name, assisted with the acquisition of 7145 Quinpool Road as previously discussed. No money changed hands for the transfer of the Inglewood lot.

[278] Fourth, the companies and rentals were intended to be a source of income for the family and a vehicle for the parties' retirement. It was for this reason that Ms. Wolfson made the many sacrifices that she did, including moving to Nova Scotia; using her pre-marriage assets to benefit the family; changing career paths; becoming a stay-at-home mother for a period of time; agreeing to Mr. Wolfson's plan to stop practicing law in favour of developing rental properties; and assisting Mr. Wolfson with the companies. To use the words of Chipman, JA in ***Lynk v Lynk,*** *supra*, Ms. Wolfson's "lot was thrown in fully with that of" Mr. Wolfson -

his successes were her successes and if he were unsuccessful, that too would have been shared.

[279] Fifth, the corporate assets are worth substantially more than the other assets. The equity in the companies is at least at $13,908,662. In comparison, the equity in the other assets is about $2,317,087. [ix] Therefore, the corporate assets are worth slightly more than six times the non-corporate assets. If, however, one-half of the value of Mr. Wolfson's shares are classified matrimonial, then the companies are worth more than 1.5 times the value of the matrimonial assets.

Section 13(f) – Effect of Domestic Responsibilities on Business Asset

[280] This is another compelling factor to support my unequal division finding. Ms. Wolfson assumed an enormous and disproportionate amount of child care and domestic responsibilities so that Mr. Wolfson could devote almost all his time and energy into successfully acquiring, maintaining, and improving the rental and property development business.

[281] The rental properties were acquired between 2005 and 2013. Significant renovations and improvements were effected on the buildings after purchase. As a result, Mr. Wolfson had little available time to consistently dedicate to the children and domestic life until 2015.

[282] Instead, Ms. Wolfson assumed almost exclusive responsibility for the care of the children and domestic tasks. She had little assistance from Mr. Wolfson until 2015 when all the renovations and improvements were completed. The fact that a babysitter and house cleaner were engaged from time to time does not minimize the enormous tasks and responsibilities assumed by Ms. Wolfson. I accept Ms. Wolfson's evidence when she described her roles in exhibits 20 and 43. I also note that when Ms. Wolfson took a trip to Israel, extra help was enlisted, as stated at para 39 of exhibit 43, because Mr. Wolfson could not undertake the work that Ms. Wolfson typically did, even for a brief period of time. Mr. Wolfson's focus was on the heavy demands of the rental properties.

[283] This finding neither detracts from Mr. Wolfson's love for his children nor his positive relationship with them. This finding does, however, recognize that the time and effort associated with planning, preparing, and executing the many tasks associated with the children and their nurturing home fell to Ms. Wolfson. Ms. Wolfson excelled in this role.

[284] Mr. Wolfson would not have been able to acquire, manage, maintain, operate and improve the business had Ms. Wolfson not assumed a disproportionate share of child care and domestic responsibilities. Ms. Wolfson's extraordinary

contributions are likely greater than those found in ***Ryan v Ryan***, *supra,* because they extended over a longer period of time.

Section 13(g) - Contribution to Education or Career Potential

[285] The facts found previously apply to this heading. Ms. Wolfson's contributions to the family and companies, both direct and indirect contributions as previously outlined, greatly enhanced Mr. Wolfson's career.

[286] In addition, I also find that Ms. Wolfson's education was enhanced during the marriage because she successfully obtained a Master's degree, which allowed her to teach at MSVU.

Section 13(i) – Contribution to Marriage and Family

[287] The facts found previously apply to this heading. In addition, I also find that Mr. Wolfson contributed to the family, as the companies generated income which was the family's primary revenue source. The companies also provided financial benefits to the family.

Section 13(j) – Assets Substantially Appreciating

[288] This is another compelling factor in favour of an unequal division. As previously explained, the equity in the companies substantially appreciated during the marriage. The two Pepperell Street buildings had little equity at the time of the marriage. The other rental properties had yet to be acquired. The companies have a current value of at least $13,908,662, most of which accrued during the parties' 12 year marriage.

Summary of Finding and Amount of Unequal Division

[289] Upon a broad view of all relevant factors, I find that Ms. Wolfson proved, by convincing and strong evidence, that an equal division would be unfair or unconscionable. In particular, when one examines the facts surrounding the acquisition of the assets; Ms. Wolfson's disproportionate assumption of child care and domestic responsibilities and its impact on Mr. Wolfson's ability to focus on the business; and the substantial increase in the value of the assets over the 12 years of the parties' marriage, my conclusion is inescapable. In these circumstances, an equal division would produce a result that would offend the concepts of fairness and conscionability.

[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. The equalization schedule, equalization payment, and payment terms will be discussed under the next issue.

[292] **What is the appropriate division of the assets and debts?**

[293] The parties are to equally divide the balance of the matrimonial assets, except for the parties' joint chequing account and Mr. Wolfson's CIBC Visa which are exempted because their balances were used in the place of maintenance. Before providing the equalization schedule, three other notations are made.

[294] First, the household contents will be equally divided by a process of alternating selection as follows:

- Ms. Wolfson will compile a list of the household contents existing at separation at the Inglis Street home.
- Mr. Wolfson will compile a list of the household contents existing at separation at the Shaw Island home.
- Once the listings are complete, Mr. Wolfson will have access to the Inglis Street property to confirm Ms. Wolfson's listing, while Ms. Wolfson will have access to the Shaw Island property to confirm Mr. Wolfson's listing.
- The parties will alternate selecting the household contents that they will retain from each home from the master lists.
- The parties will divide the contents of the Inglis Street property before dividing the contents of the Shaw Island property.
- Ms. Wolfson will have first selection of the contents of the Inglis Street property; Mr. Wolfson of the Shaw Island property.

[295] I retain jurisdiction to determine any issues arising from the division of household contents.

[296] Second, I deny Mr. Wolfson's request to have the right of first refusal in the event Ms. Wolfson decides to sell the matrimonial home at some future time. Both parties will be free to list and sell the home that they retain without further complications.

[297] Third, each party will assume the debt associated with the home they will retain.

[298] The equalization schedule for the balance of the division is as follows:

I.	Assets	Value	Husband	Wife
	Real Estate			
1.	6137 Inglis Street	$ 861,387	$ -	$ 861,387
2.	88 Shaw Island Road	$ 950,925	$ 950,925	$ -
	Motor Vehicles			
3.	2014 Acura MDX	$ 28,000	$ -	$ 28,000
4.	1997 Porsche 911 Turbo - Appraisal	$ 175,000	$ 175,000	$ -
5.	1997 Porsche 911 Carrera - Appraisal	$ 110,000	$ 110,000	$ -
6.	2001 Boston Whaler	$ 32,000	$ 32,000	$ -
	Bank Accounts			
7.	LW RBC Savings	$ 3,833	$ -	$ 3,833
8.	LW CIBC Chequing	$ 4,982	$ 4,982	$ -
9.	LW American Accounts	$ 613	$ 613	$ -
10.	LW RBC TFSA	$ 12,073	$ 12,073	$ -
11.	JW RBC TFSA	$ 12,095	$ -	$ 12,095
12.	JW Chequing with Karen	$ 24,390	$ -	$ 24,390
13.	JW Chequing	$ 14,626	$ -	$ 14,626
	Investments			
14.	LW CIBC Investments (combined)	$ 333,158	$ 333,158	$ -
15.	RBC GIC	$ 1,119	$ -	$ 1,119
16.	JW CIBC Investments	$ 133,458	$ -	$ 133,458
17.	JW Southpoint	$ 318,624	$ -	$ 318,624
18.	Life Insurance CSV	$ 36,445	$ 36,445	$ -
19.	Israel Bond	$ 347	$ -	$ 347
	Pensions	Net Value		
20.	JW Pension Ontario (commuted value)	$ 81,527	$ -	$ 81,527
21.	JW Pension Nova Scotia	$ 3,412	$ -	$ 3,412
	RRSPs	Net Value		
22.	LW RRSPs	$ 62,122	$ 62,122	$ -
23.	JW RRSPs	$ 10,860	$ -	$ 10,860
	Corporate Shares			
24.	Matrimonial Portion of Companies	$ 6,954,331	$ 6,954,331	$ -
	Total Assets	**$ 10,165,327**	**$ 8,671,649**	**$ 1,493,678**

II.	**Debts**	**Balance**	**Husband**	**Wife**
1.	Inglis Street Mortgage	$ 283,839		$ 283,839
2.	Inglis Street LOC	$ 122,034		$ 122,034
3.	Shaw Island Road LOC	$ 8,571	$ 8,571	$ -
4.	JW Visas (2)	$ 230	$ -	$ 230
5.	Porsche Loan	$ 35,235	$ 35,235	$ -
6.	Shareholder Loan - For Summer Home	$ 444,000	$ 444,000	$ -
	Total Debts	**$ 893,909**	**$ 487,806**	**$ 406,103**
	Total Equity	**$ 9,271,418**	**$ 8,183,843**	**$ 1,087,575**
	Equalization Payment		**$ 3,548,134**	
	Plus $1 Million Unequal Division		**$ 4,548,134**	

[299] Based on this equalization schedule, Mr. Wolfson is required to transfer the sum of $4,548,134 to Ms. Wolfson. Two questions emerge. First, when will Ms. Wolfson be paid? Second, how will Mr. Wolfson reimburse Ms. Wolfson?

[300] In response to these questions, I do not require Mr. Wolfson to immediately transfer the equalization payment to Ms. Wolfson for two reasons:

- The corporate funds were intended as a retirement vehicle. Ms. Wolfson's access to these funds can thus be delayed, provided there is suitable security and interest. Parties do not ordinarily access retirement funds until they are closer to retirement age. This factor, however, must be balanced against Ms. Wolfson's right to control and manage her own assets.
- The longevity of the companies must be considered. I note, however, that in many Canadian jurisdictions, business assets are divided and support paid without the collapse of either the "goose" or its "golden egg." Nevertheless, Ms. Wolfson's equalization transfer can be paid out through a combination of lump sum and periodic payments, which can be timed to coincide with the cessation of maintenance.

[301] Further, I agree that a creative solution is necessary. I therefore order Mr. Wolfson to provide security to Ms. Wolfson in the amount of the equalization payment. Security may include a combination of matrimonial and business assets, personal and real property, and life insurance. An appropriate interest rate must also apply until the equalization transfer is paid in full. In the absence of

agreement, the parties are to file their proposals on the security, interest rate, and pay-out details no later than September 21.

[302] **What is the income of Ms. Wolfson?**

Position of Mr. Wolfson

[303] Mr. Wolfson sought to impute income to Ms. Wolfson in the amount of $60,000 based on s. 19(1)(a) of the *Child Support Guidelines.* He stated that Ms. Wolfson is under-employed and woefully overqualified for part-time work with earnings of $35,000 per year, and "hoping" for $40,000 in 2021. In support of his argument, Mr. Wolfson relied on: ***Smith v Helpi***, 2011 NSCA 65; ***Hurst v Gill***, 2011 NSCA 100; ***Parsons v Parsons***, 2012 NSSC 239; and ***Hanson v Hanson,*** [1999] BCJ No 2532 (SC).

[304] Mr. Wolfson stated that the following facts about Ms. Wolfson prove she is underemployed:

- She is 44 years old with 20 more years of working before retirement. She has a bachelor's degree, a Bachelor of Education, an Honors Specialist Certification in Special Education, and finally, a Master of Education degree. She is bilingual.
- She has years of experience working full-time in schools, as well as experience substituting, lecturing, and supervising.
- After the parties' marriage and her move from Ontario, she found full time employment after only one year of substitute teaching. She has chosen not to try to make new connections to secure a permanent teaching position.
- She claims entitlement to support primarily because she gave up her job teaching in a public school in Ontario. Yet, she now refuses to consider exactly that work in Nova Scotia. While public school teachers in Nova Scotia earn slightly less than public school teachers in Ontario, they earn far more than what Ms. Wolfson currently earns working part-time.
- Had Ms. Wolfson immediately engaged in substitute teaching after separation, on a balance of probabilities, she would now be employed on a full-time basis.
- She applied to very few positions in the past three years. Ms. Wolfson did not look for full-time work in 2018. In all of 2019, Ms. Wolfson applied for only four positions – none of them in the public school system. Exhibit 38 reveals that in 2020 she applied for 23 jobs, but 12 of those were in

universities, where no matter how many jobs she applies for, she is limited to part-time work by the terms of the collective agreement. Her own evidence is that she is unlikely to ever earn full-time income in the university environment.

- She could earn $60,000 if employed for the Halifax Regional Centre for Education ("HRCE") with her level of education and years of experience.

[305] Further, Mr. Wolfson stated that Ms. Wolfson's under-employment is not required to meet the needs of the children who are 13 and 11. Both children are at an age of increased independence. They do not require a parent available to them 24 hours a day. There is afterschool care at their school. The children are typically away at summer camp during the summer. They are also of an age where it is appropriate for them to be left at home for short durations.

[306] If Ms. Wolfson chooses not to work full-time, Mr. Wolfson argued that her part-time earnings must be supplemented, noting that Ms. Wolfson did not disclose her interest in P.G. Miller Enterprises or Magnum Petroleum or a family trust. To the extent that Ms. Wolfson does not earn $60,000 annually through employment, she clearly has another income source available to "top up" her employment earnings to this amount.

Position of Ms. Wolfson

[307] Ms. Wolfson disagreed. She stated that Mr. Wolfson did not prove that she was under-employed. Although she did not dispute the law as presented, she strenuously challenged its application to her circumstances. Ms. Wolfson stated that she accepts a prospective income of $48,000 as appropriate. Ms. Wolfson highlighted five points in her submissions.

[308] First, Ms. Wolfson noted errors in Mr. Wolfson's factual assertions, as follows:

- She is not working in a part-time capacity, but rather, she works full-time hours in a number of different jobs.
- She does not have an undergraduate degree.
- She is not bilingual and there is no evidence that she is.

[309] Second, Ms. Wolfson stated that she made consistent and concerted efforts to increase her income by applying for work. She stated that since separation, she reviews all new employment opportunities on a weekly basis. She also provided

samples of some of her job applications. Although some of her applications garnered interviews, she was never the successful candidate.

[310] Third, Ms. Wolfson did not agree that she should substitute in the public school system. Further, she did not agree that if she had substituted, she would now be working in a permanent position. Her response to these submissions included the following:

- The job of substitute teaching would actually pay her less than she is currently making at MSVU.
- There are no guarantees that substitute teaching will lead to a full-time teaching job.
- Substitute teaching is an erratic job, often involving last minute notice of the posting, which requires last minute teaching preparation.
- There is no consistent start time at all public schools. As a substitute teacher, she may have to leave home, on short notice, and very early, for a school that may be located up to forty-five minutes away. This will interfere with the children’s routine.
- Suggesting that Ms. Wolfson should be a substitute teacher fails to recognize that she has worked in a position related to practicum terms since 2012, when she worked at the Nova Scotia College of Early Childhood Education.
- She should not, once again, be expected to completely change career paths. She has full-time hours at MSVU and has moved up the associated pay grade while attempting to secure other internal positions.

[311] Fourth, Ms. Wolfson stated that Mr. Wolfson’s submissions about MSVU are erroneous, as follows:

- There is no evidence that she is unlikely to ever earn full-time income at MSVU. Ms. Wolfson recently moved up the associated scale at the Mount and received an increase in her income - the second increase since she began working there. Ms. Wolfson indicated that she applied to additional internal opportunities at the Mount, including one paying around $55,000.
- Ms. Wolfson found other employment opportunities at the Mount including practicum coordinator, practicum supervisor, course lecturer, independent study supervisor, and course development worker.
- Ms. Wolfson noted that she loves her job and highlighted its flexibility, which allows her to meet the children’s needs. Further, she currently works

at a fixed location which affords consistency and predictability for the children's out of school commitments.

[312] Fifth, Ms. Wolfson stated that Mr. Wolfson's submissions regarding available investment income is erroneous for several reasons, including:

- Magnum Petroleum does not exist anymore. Mr. Miller said it was amalgamated with P.G. Miller Enterprises. Ms. Wolfson does not have an interest in either company.
- She did provide disclosure regarding her interest in South Point Properties.
- She plays no role in determining whether dividends will be paid on her South Point investment, or the timing or the amount of any dividends paid.
- Although the cheques at exhibit 39 are in the approximate amount of $40,000, these represent a combination of the refinancing of South Point; July to December 2019 dividends; and the entirety of the 2020 dividends paid out.
- The largest cheque relates to the refinancing of South Point. Ms. Wolfson had no control over South Point's decision to refinance.
- The amount she receives from her investment in South Point is entirely outside her control. The evidence confirmed that she received two large cheques from South Point when it refinanced – once in 2014 and once in late 2020. Further, the amount she received from dividend payments varies. Exhibit 41 shows $7,000 paid in 2015, while $3,154 and $5,936 were paid out in two other years.

[313] Ms. Wolfson agreed to add the amount of $7,000.00 to increase her income, prospectively, to $48,000 to reflect dividend payments, despite noting that the dividend amounts received are largely unpredictable. She stated that there is no proof that any further income should be imputed to her.

Decision

[314] I apply the law as reviewed in ***Smith v Helpi***, *supra*; ***Hurst v Gill***, *supra*; and ***Parsons v Parsons***, *supra*. In the circumstances, I find that Ms. Wolfson was not under-employed in the past. I also find that she has a prospective, income-earning capacity of $55,000.

[315] In so finding, I do not accept that Ms. Wolfson should leave her present position at MSVU to begin to substitute teach, with the eventual hope of gaining a permanent position in the public school setting for the following reasons:

- If she substitutes, Ms. Wolfson will earn less money than what she earns now.
- There is no guarantee that substitution work will eventually lead to permanent employment.
- Ms. Wolfson should be able to pursue the career path that she started in 2012. She enjoys this work and it provides flexibility so she can meet the children's needs.
- Ms. Wolfson's income in this field has increased and will likely continue to do so.

[316] Despite these findings, I nevertheless conclude that Ms. Wolfson can and will likely earn $55,000 per year for the following reasons:

- Ms. Wolfson is resourceful and motivated to find work in her field.
- Ms. Wolfson will continue to earn income from contract work, mostly through the Mount. Further, she will increase her earnings from her contract work.
- Ms. Wolfson will be able to earn income in the summer once Debate Camp resumes.
- Ms. Wolfson will earn income from her South Point investment. At unknown intervals, the amount received may be large if there is refinancing. At other times, the amount paid out will be small. Thus, there will be years when her income may be less than $55,000, and there will be years when it will be substantially more. The figure of $55,000 takes into account these anticipated fluctuations.

[317] **Is CCA a permitted adjustment in determining Mr. Wolfson's income?**

[318] Mr. Wolfson's companies claim capital cost allowance for tax purposes. Do the *CSG* allow the court to add back allowable CCA on real property as an adjustment to income if the capital assets are owned by the spouse's company and not personally?

[319] Mr. Wolfson stated that the *Guidelines* do not. He said that s. 11 of Schedule III applies only to individuals. Further, he said there is no ability to adjust in either s. 18 or s. 19 of the *CSG*. As such, the CCA claimed by his companies cannot form an adjustment when calculating his personal income. Rather, in appropriate circumstances, the court may access the pre-tax corporate income pursuant to s.18 of the *CSG,* but without adjusting for CCA.

[320] In contrast, Ms. Wolfson urged the court to adopt the opposite conclusion. She stated that s. 11 of Schedule III applies to corporations. In the alternative, the adjustment can be made as part of the s. 18 analysis. In the further alternative, an adjustment can be made pursuant to s. 19. From her perspective, the CCA claimed by the companies should form an adjustment in the calculation of Mr. Wolfson's income because it is a notional expense.

[321] I will now briefly review the submissions of each of the parties.

Position of Mr. Wolfson

[322] Mr. Wolfson stated that the *CSG* do not permit the requested adjustment. His submissions focused on three concerns and one policy consideration.

[323] First, Mr. Wolfson stated that in her expert report, Ms. Robar crossed the line by providing legal analysis and, as a result, her opinion can be given no weight: ***MGH v KLDH***, 2020 NBCA 46 at para 72.

[324] Second, Mr. Wolfson stated that Ms. Wolfson's approach runs counter to the following case authorities: ***Richardson v Richardson***, 2013 BCCA 378; ***Schmidt v Beug***, 2009 SKCA 130; ***Novak v Novak,*** 2020 NSCA 26; ***Gossen v Gossen,*** 2003 NSSF 7; ***Thomas v Thomas***, 2012 NSSC 440; and ***Bembridge v Bembridge***, 2009 NSSC 158, which discussed either the application of s. 11 of Schedule III or capital expenditures in general. For example:

- In ***Richardson***, the British Columbia Court of Appeal held that although s. 11 did not permit an adjustment for corporations, a similar adjustment should be made under s. 19 of the *CSG* "absent evidence to support a finding that allowing such a deduction to be used to reduce the amount of money available for child support is reasonable in all the circumstances:" para 52.
- In ***Novak***, Scanlan, JA held that it was an error for the trial judge not to make allowance for the capital the business needed to continue operations.
- In ***Gossen,*** Smith, J, as she then was, accepted that s. 11 did not apply to corporations. In addition, she accepted the use of CCA as a proxy for necessary capital expenses and the payment of the principal portion of the debt. Further, the court held that a business is not required to borrow to fund capitalization.
- In ***Thomas***, MacAdam, J expressly rejected the mother's proposal to add back CCA; he ultimately accepted that CCA was a reasonable proxy for the payment of the principal portion of debt and the cost of reasonable future capitalization.

- In ***Bembridge***, B MacDonald, J held that it was acceptable for a business to finance expansion and growth out of earnings rather than debt, while expressing concern for the viability of the corporate operation.

[325] Third, Mr. Wolfson urged the adoption of his expert's approach when he stated that "the amortization deducted from the value of the buildings annually is a reasonable approximation of the cost, over the lifetime of the building, of its maintenance and eventual replacement": Pages 41 and 42; Mr. Wolfson's Post-trial Written Submissions; February 12, 2021. In contrast, Mr. Wolfson stated that Ms. Wolfson's approach runs counter to the needs of the business, the details of which will be examined more fully in the next issue.

[326] From a policy perspective, Mr. Wolfson said that the use of CCA to offset capital expenses will reduce the number of variation applications. Mr. Wolfson said that his income can fluctuate dramatically because of capital expenditures. If Ms. Wolfson's position is accepted, then an annual recalculation of child support will be necessary. If his position is accepted, then no annual recalculation is required because the CCA is a proxy for capital expenses. Multiple, protracted, and expensive variation hearings are not in the best interests of the children.

[327] In summary, Mr. Wolfson said that s. 11 of Schedule III does not apply to corporations and that ss. 18 and 19 do not permit the requested adjustment. Further, he stated that CCA must be considered a reasonable proxy for capital expenses over time. Mr. Wolfson said that, from a business and policy perspective, his approach should be accepted.

Position of Ms. Wolfson

[328] In contrast, Ms. Wolfson disagreed for policy, legal, and accounting reasons. From a policy perspective, she stated that either s. 11 of Schedule III, or ss. 18 or 19 of *Guidelines*, must permit an adjustment for CCA claimed by corporations. If not, children of parents who have incorporated businesses would receive less child support than children whose parents are self-employed.

[329] From a legal perspective, Ms. Wolfson stated that although no definite principle has emerged, there are decisions which suggest that s. 11 of Schedule III applies to corporations, such as ***Rudachyk v Rudachyk,*** 1999 CarswellSask 317 (CA) and ***Krammer (Ackerman) v Ackerman***, 2020 SKQB 280. Other appellate courts have held that s. 18 can be used to adjust for CCA claimed by corporations: ***Gosse v Sorenson-Gosse***, 2011 NLCA 58. Further, other courts have held that s. 19 can be used to impute income based on CCA: ***Richardson v Richardson***, *supra*; ***Jaasma v Jaasma***, 1999 ABQB 764.

[330] Ms. Wolfson also stated that appellate courts have noted that the *CSG* can be used as a technique to pierce the corporate veil, especially in the case of a controlling shareholder, should the court find that s. 16 of the *Guidelines* would not produce a fair determination of income: ***Goett v Goett,*** 2013 ABCA 216 and ***Baum v Baum***, 1999 CanLII 5387 (BCSC) as approved in ***Kowalewich v Kowalewich***, 2001 BCCA 450 and ***Wildman v Wildman***, 2006 CanLII 33540 (ONCA).

[331] In addition, Ms. Wolfson argued that although some Nova Scotia decisions refused to adjust for CCA, they nonetheless found that the court had the authority to do so under s. 18 of the *CSG*: ***McLellan v McLellan***, 2020 NSSC 161 and ***Gossen v Gossen***, *supra*.

[332] From an accounting perspective, Ms. Wolfson stated that an adjustment for CCA is necessary because it is a notional deduction only and artificially reduces the reasonable income that would otherwise be available for child support. This is especially important because Mr. Wolfson is the sole, controlling shareholder and the directing mind of the corporations. Mr. Wolfson has the ability to reduce his income, as has occurred since separation. Ms. Wolfson also asked the court to adopt Ms. Robar's conclusions based on sound accounting principles

[333] In summary, Ms. Wolfson urged the court to conclude that it has jurisdiction to adjust for CCA claimed by Mr. Wolfson's companies when determining Mr. Wolfson's income for policy, legal and accounting reasons.

Law and Authority to Adjust for CCA Claimed by Corporation

[334] Unfortunately, the law surrounding this issue is more muddy than clear. Our Court of Appeal has not yet provided guidance and appellate authority from other jurisdictions is mixed. I will now attempt a review of the law by referencing the legislative framework, legal commentary, interpretation principles, and case authorities before providing my decision. Before doing so, I confirm that my legal conclusions were not influenced by any suggestions that may have been offered by Ms. Robar.

The Legislative Framework of Child Support Guidelines

[335] Section 1 of the *Guidelines* lists the stated objectives as follows:

> **1** The objectives of these Guidelines are
>
> > **(a)** to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
> >
> > **(b)** to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

> **(c)** to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> **(d)** to ensure consistent treatment of spouses and children who are in similar circumstances.

[336] Section 11 of Schedule III discusses the adjustment for CCA related to real property as follows:

> **Capital cost allowance for property**
>
> 11 Include the spouse's deduction for an allowable capital cost allowance with respect to real property.

[337] Section 15 (1) of the *Guidelines* provides that "a spouse's annual income is determined by the court in accordance with sections 16 to 20."

[338] Sections 16 to 19[x] of the Guidelines provide as follows:

> **Calculation of annual income**
>
> **16** Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
>
> **Pattern of income**
>
> **17 (1)** If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
>
> **Non-recurring losses**
>
> **(2)** Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.
>
> **Shareholder, director or officer**
>
> **18 (1)** Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
>
> > **(a)** all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

(b) the spouse is exempt from paying federal or provincial income tax;

(c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Reasonableness of expenses

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*
SOR/2000-337, s. 5

Legal Commentary

[339] In *Financial Principles of Family Law*, (Westlaw online, 2021) at 38.2.4(i), Andrew J. Freedman & Sue C. Loomer write, "There is an inconsistency in the Guideline's treatment of CCA with respect to real property owned by an individual

(mandatory add back) and by corporations (no mandatory add back)". In the same section, the authors also noted:

> In our view, for the purposes of determining Guideline income, a corporation should not be permitted to deduct CCA with respect to property if an individual is precluded from so doing by virtue of Schedule III. It would be inequitable and inconsistent to permit the treatment of the CCA deduction differently for Guideline purposes simply because the owner of the real estate is a corporation rather than an individual.

[340] Further, Julien Payne and Marilyn Payne note in *Child Support Guidelines in Canada, 2020*, (Toronto: Irwin Law, 2019) at page 128:

> Capital Cost Allowances on Real Property
>
> Any capital cost allowance permitted to a spouse under the *Income Tax Act* with respect to real property, as distinct from personal property, must be added back into the spouse's income under section 11 of Schedule III of the Guidelines. Section 11 of Schedule III to the Guidelines refers not to a corporation's deductions but to a spouse's deductions for an allowable capital cost allowance with respect to real property. Section 11 of Schedule 3 of the Guidelines should not be read into the analysis of available corporate income under section 18 of the Guidelines. However, a payee spouse will not be disadvantaged by the omission of an equivalent provision in section 18, because if there is a finding that the spouse's annual income does not reflect what is actually available to him for child support, a court can consider (i) the pre-tax income of the corporation, or (ii) the value of the spouse's services to the company. And the former measure will necessarily add back all tax deductions subsequently utilized by the corporation, including amortization.

Interpretation Principles

[341] The *CSG* are remedial legislation, and, as such, "the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose": para 21, ***Clarke v Clarke,*** *supra***.** Further, in ***Sparks v Holland,*** 2019 NSCA 3, Farrar, JA reviewed basic principles of statutory interpretation:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he 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 (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.

> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
> 2. What did the Legislature intend?
> 3. What are the consequences of adopting a proposed interpretation?

[342] What is the meaning of the legislative text? Section 11 of Schedule III draws a distinction between CCA deducted for real property versus that deducted for personal property. A mandated adjustment is required for CCA deducted for real property. The rationale underlying s. 11 was discussed in James C. MacDonald and Ann C. Wilton, *Child Support Guidelines: Law and Practice*, 2nd ed (Westlaw: online) at 16.1.2(b)(ii):

> (ii) — Capital Cost Allowance: Real Property
>
> Although the *Income Tax Act* permits the taxpayer to take a capital cost allowance with respect to "real property", the Guidelines do not permit this deduction for support purposes. Section 11 of the Schedule III of the Guidelines requires the adding back in to a parent's or spouse's Total Income on the tax return, any deduction "for an allowable capital cost allowance with respect to real property". **Such a capital cost allowance consists of a calculation of depreciation on buildings. This adjustment eliminates the deduction because buildings usually do not decline in value over the years** ... It is important to note that s. 11 specifically refers to real property. The deduction of a capital cost allowance claimed for equipment, or other business or rental assets is not eliminated by s. 11 as these assets do depreciate in value and will have to be replaced from time to time … **The parent or spouse who claims a capital cost allowance with respect to real property on his or her tax return, typically, will be a person who derives rental income from residential or commercial property. Section 11 would disallow this claim for support purposes.** [Emphasis added]

[343] Section 11 of Schedule III ensures that child support is not artificially reduced based on a notional tax entry because, unlike personal property, real property generally appreciates in value. Section 11 is meant to safeguard children by ensuring that they receive child support in keeping with all income available to their parents, regardless of its tax deductibility.

[344] What did the legislature intend? As previously noted, s. 1 of the *CSG* outlines several objectives – establishing a fair standard of child support; reducing conflict; increasing efficiencies; and ensuring consistent treatment of parents and children in similar circumstances. The parties' proposed interpretations must be considered against these objectives.

[345] What are the consequences of adopting Mr. Wolfson's preferred interpretation? The most obvious result is that children whose payor parent operates an unincorporated rental business will likely receive a higher and a more objective standard of child support than children whose payor parent operates a rental business through an incorporated entity. Such an outcome offends at least s. 1 (a) and (d) of the *CSG* and is likely neutral in relation to s. 1(b) and (c). Moreover, I can think of no sound or rational public policy or business reason to justify such an outcome.

[346] Further, I disagree with Mr. Wolfson's suggestion that more litigation will ensue if Ms. Wolfson's interpretation is adopted. Child support involving business income and high income earners will be as complicated as the parties decide. If needless applications are made, a carefully crafted costs award can be ordered.

[347] What are the consequences of adopting Ms. Wolfson's preferred interpretation? The most obvious result is that children and parents in similar circumstances will receive consistent treatment and outcomes. A fair standard of support will be achieved. Children will benefit. Efficiencies will increase.

[348] Can the interpretation urged by Ms. Wolfson be reasonably accommodated given that "[t]he 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" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21) as quoted at para 28 of ***Sparks v Holland***?

[349] Can the words "… the spouse's deduction" found in s. 11 of Schedule III be reasonably extended to include a spouse who is the directing mind and sole shareholder of a corporation? Certainly, many cases confirm that in the family law setting, the corporate veil can and should be lifted in appropriate circumstances to ensure the fair and just payment of child support: ***Kowalewich v Kowalewich***, *supra*, and ***Wildman v Wildman***, *supra.*

[350] If s. 11 of Schedule III does not apply to incorporated spouses, are other sections of the *Guidelines* applicable? Authors Julien and Marilyn Payne suggest that s. 18 can provide similar relief. Another suggestion is s. 19. Unfortunately, other than s. 19 (1) (d), the balance of s. 19(1) also references the word "spouse". Section 19 (1)(d) is arguably applicable. If it is not, given that s. 19 is not an exhaustive listing, the court could include a complementary provision to capture the corporate deduction of CCA for real property. The difficulty with the s. 19 approach, however, is that the evidentiary burden switches to the non-titled spouse who neither owns the company nor control the records.

Case Authorities

[351] In ***Rudachyk v Rudachyk****, supra*, the Saskatchewan Court of Appeal held that CCA claimed on real property by a corporation controlled by a payor parent was to be added into the parent's income pursuant to s. 11 of Schedule III. Wakeling, JA, for the Court, wrote:

> **Capital Cost Allowance**
>
> [15] This allowance has been abbreviated to CCA and I shall refer to it as such hereafter. **The reason it arises in a situation such as this is that it is an expense which involves no cash outlay. Thus, in theory at least, the amount deducted as an expense is money available to the Company if it is not specifically set aside for replacement of the asset being depreciated. It is, of course, money available to the Company and not Wayne, but I am not inclined to make much of this fact since Wayne is the sole controlling shareholder of the Company. In this area of the law dealing with the determination of what is an appropriate payment for the maintenance and support of children, the distinctions and limitations of corporate law should not be viewed as insurmountable barriers which prevent the obtainment of a just result**.
>
> [16] Even before the guidelines existed, the Courts have had reason to consider how they should view CCA where it has impacted significantly on the income of a spouse required to provide support. Nothing useful is obtained from extensive review of these decisions and it is sufficient to indicate no clear and consistent policy has developed. Each situation has called for an approach which has application to that particular fact situation so that in some circumstances CCA has been viewed as an acceptable deduction and in other cases it has not.
>
> [17] The guidelines have attempted to bring some welcome consistency to the issue by including the following provision:
>
> > **Schedule III**
> >
> > ***Adjustment to Income***
> >
> > 11. Include the spouse's deduction for an allowable capital cost allowance with respect to real property.
>
> **This approach to CCA adopted by the guidelines suggests a different treatment should be accorded to CCA of real property from that accorded personal property**. The rationale for this distinction is not provided, but in all probability it is based on the realization that real property (which includes buildings) will generally be more durable than personal property and less likely to need regular replacement. Furthermore, as the requirement to pay child support is of limited duration, the obligation is not likely to outlast the real property and, it is therefore reasonable to conclude the real property will survive beyond the years for payment of support.
>
> [18] **Applying s. 11 to this situation means the income of the Company for 1997 should be increased by $17,556.00 being the CCA claimed on the Company's real**

> **property.** That means the pretax income which has been added to Wayne's income for 1997 would be increased by this amount making a total wage for 1996 of $62,883.00 calculated as follows: … [Emphasis added]

[352] Accordingly, the Saskatchewan Court of Appeal simply applied s. 11 of Schedule III to the CCA deductions claimed by the payor parent's corporation, adding those deductions back into his income for child support purposes.

[353] The British Columbia Court of Appeal, in ***Richardson v Richardson,*** *supra* also concluded that CCA deductions claimed by a payor parent's corporation could be imputed, but relied on s. 19 of the *CSG,* as follows:

> [57] *Rudachyk* is the only appellate authority which deals directly with CCA claimed by a corporation on real property. **In that case, the amount claimed was included in the payor's income through s. 11 of Schedule III: para. 18. With respect, I am unable to agree with that approach. By virtue of s. 11, any CCA with respect to real property claimed by a "spouse" is to be included in that person's income. Section 11 cannot be read as providing that CCA claimed by a spouse's corporation is to be included in that spouse's income.**
>
> [58] However, that does not end the matter. **In my view, interpreting the Guidelines in a manner consistent with their objective to provide children with fair support based on an objective assessment of their parents' means, CCA claimed on real property by a corporation controlled by a payor can be "imputed" through s. 19(1). As Mr. Justice Tysoe observed in *Ouellette* at para. 66, "Section 19 gives the court a broad general discretion to impute income, and is not subject to the restrictions set out in ss. 16, 17 and 18." See also: *Riel v. Holland* (2003), 232 D.L.R. (4th) 264 at para. 36 (Ont. C.A.).**
>
> [59] Although *Egan* involved non-corporate CCA claims with respect to personal property, the approach taken in that case to the interpretation of s. 19 of Guidelines is nonetheless instructive. Notwithstanding the absence of any reference in Schedule III to such claims, this Court held that it was open to a court to assess their reasonableness in the context of child-support determination: para. 25. [Emphasis added]

[354] Since the trial judge held that the CCA claimed by the payor's companies could not be included in his income, she did not consider the reasonableness of the deductions in the child support context. The parties also neglected to address the issue in their appeal submissions. As such, Frankel, JA ordered that the issue be remitted to the trial judge to determine what adjustments, if any, should be made to the amounts of retroactive and ongoing child support.

[355] In ***Gosse v Sorenson-Gosse,*** *supra*, the Newfoundland Court of Appeal appears to rely on s. 18 of the *CSG* to adjust for CCA. At para 107, Wells, JA noted that the claimed CCA deduction was not an "actually incurred expense", but rather, "amounts to an artificial reduction" in the corporate income. At paras 110

and 113, Wells, JA confirmed that all CCA on real property would be added to the company's stated pre-tax income as follows:

> [110] Having based her decision solely on consideration of irrelevant factors, the UFC judge must be said to have erred in the exercise of her discretion. Mr. Gosse's appeal on that ground must be allowed and the decision of the UFC judge not to increase the amount stated as pre-tax income of SSDL, by the amount of capital cost allowance expensed, must be set aside. **For purposes of determining, pursuant to the *Guidelines*, all of the income available to Ms. Sorensen for child support, there will be added to the amounts shown as annual pre-tax income of SSDL, in the table submitted by counsel for Ms. Sorensen, the amounts shown as "current depreciation on real property" for each of the respective years.**
>
> …
>
> [113] **Thus, it must be concluded that the full amount of the pre-tax corporate income of SSDL is available to Ms. Sorensen for use as she sees fit. (**See *Hausmann* at paragraph 61; *Reis v. Bucholtz*, 2010 BCCA 115 (B.C. C.A.), at paragraph 48 and *Miller v. Joynt*, at paragraph 37) The manner in which the whole of that income is spent is entirely a decision for Ms. Sorensen. Whether she chooses to use it for child support, funding her own lifestyle, or business expansion of SSDL is her decision. **Imputing the whole of the amount shown as pre-tax profit of SSDL as income of Ms. Sorensen simply ensures that she is treated on the same basis as Mr. Gosse, and ensures "the fairest determination of [their] income". Mr. Gosse has to include all of the income "available" to him without any allowances for business investments or other endeavors he might wish to undertake.** [Emphasis added]

[356] In ***MGH v KLDH***, *supra*, the New Brunswick Court of Appeal described the following statement by the trial judge as a correct articulation of the law:

> 71 The judge, in this case, found "[...] the fact that it does not deal with CCA on corporate real estate does not preclude the exercise of the court's discretion to make a fair determination of a payer's Guidelines income by examining the CCA deducted as a corporate expense. The court can, under section 18 of the Guidelines, determine the reasonableness of such an expense as it directly affects the income of the corporation" (para. 96). This is a correct statement of the law; however, in defaulting to Mr. Whittaker's opinion, it is my view the judge did not properly exercise her judicial function. …

[357] In ***Duffus v Frempong-Manso***, 2017 ONCA 360, Hourigan, JA, without further analysis, held that the trial judge did not err by disallowing the amortization deductions in the calculation of the corporation's pre-tax income:

> 31 Similarly, the motion judge found, at para. 81 of his reasons, that the amortization deductions should be disallowed as expense deductions in the calculation of the Corporation's pre-tax income because he found that there were no actual payments made in relation to these expenses. Again, these amounts were not grossed-up but simply eliminated as deductions from the Corporation's pre-tax income.

[358] In ***Jaasma v. Jaasma***, *supra*, the mother applied to vary child support. The father operated a catering business through a numbered company. The Alberta Court of Queen's Bench relied on ***Rudachyk***, and increased the father's income by the amount of the CCA deduction because the father and his wife controlled 100% of the shares, stating as follows:

> [37] … I conclude that capital cost allowance for the real property as included in the financial statement should be added back into the Respondent's personal guideline income figure. **Even though the corporation is taking the deductions, the Respondent and his new wife together control 100% of the shares. The Respondent is 50% shareholder, together with the other 50% share holder who is his new wife, clearly control the Company. The Respondent's new spouse and the Respondent share a similar common financial interest, both with respect to the Company and with respect to maximizing deductions and minimizing the Respondent's guideline income**. [Emphasis added]

[359] Although there is no Nova Scotia appellate authority, some trial decisions have addressed the issue. In ***Gossen v Gossen,*** *supra*, Smith, J, as she then was, stated, without analysis, that s. 11 of Schedule III did not apply to corporate income and that any jurisdiction to adjust for CCA declared by a company must be found in s.18(1)(a) of the *CSG*:

> [83] It must be noted that the CCA in question is being claimed by the Petitioner's companies rather than by the Petitioner himself. While s.11 of Schedule III of the Guidelines directs the Court to adjust a spouse's annual income to include the spouse's deduction for an allowable capital cost allowance with respect to real property, no provision for such is made in relation to a corporation. The only specific adjustment that the Court is directed to make to a corporation's pre-tax income is for amounts paid to persons with whom the corporation does not deal at arm's length (see: s.18(2) of the Guidelines). **Accordingly, if the Court has the ability to adjust the corporation's income for capital cost allowance, it must be derived from the Court's entitlement to include in a spouse's income all or part of the pre-tax income of a corporation as set out in s.18(1)(a).** [Emphasis added]

[360] In ***Bembridge v Bembridge***, *supra*, B MacDonald, J held that CCA deducted by a corporation must be adjusted through s. 18, and not by s. 11 of Schedule III, if the CCA is merely a book entry and does not serve any real business purpose:

> [29] Section 18 does not direct a court to add back to personal income corporate income amounts that have been deducted from corporate income for capital cost allowance whether on buildings, equipment, or renovations. This direction appears in Schedule III as required by section 16 and is an adjustment to Line 150 income of a person - not a corporation. The Schedule III adjustments apply to persons who receive income from sources other than as a shareholder. **Schedule III adjustments do not apply to income received from a corporation. Capital cost allowance within the corporation must be**

> **taken into account when examining the corporate pre-tax income or lack thereof. If a capital cost allowance is merely a book entry and does not serve a real business purpose this may suggest there is or should be money available to pay more income to the shareholder. …** [Emphasis added]

[361] In ***McLellan v McLellan***, *supra*, McDougall, J held that s. 18 provided the authority to adjust for CCA if the allowance did not serve a business purpose: para 25.

Summary

[362] Given the remedial nature of the *Guidelines*, their stated objectives, and the case authorities, I find that I have the jurisdiction to adjust for the CCA claimed by Mr. Wolfson's companies either pursuant to ss. 18 or 19 of the *CSG* or through s. 11 of Schedule III. My preference is for such a calculation to occur under s. 18 or s. 11 because s. 19 would place the evidentiary burden on the spouse who lacks control of the asset and the associated evidence. In this case the burden is of no consequence, because even if it rests on Ms. Wolfson, she has overwhelmingly satisfied it.

[363] The adjustment that I make for the CCA claimed by the companies will be discussed in conjunction with the next issue.

[364] **What is the income of Mr. Wolfson?**

[365] Both parties retained experts to analyze and provide opinion evidence about the calculation of Mr. Wolfson's income. The qualifications of both experts were appropriately conceded. The expert evidence was most helpful given the complex nature of the issues and the evidence.

[366] Further, both parties relied on ***Reid v Faubert,*** 2019 NSCA 42 which listed factors that are to be balanced when determining the amount, if any, of the pre-tax corporate income (PTCI) to be imputed. Each party provided an analysis of these factors in conjunction with the expert opinion and other evidence presented.

[367] I will now briefly review each of the parties' submissions.

Position of Mr. Wolfson

[368] Mr. Wolfson acknowledged that his line 150 income is not the appropriate measure of his income for child support purposes. He conceded that the court should consider the incomes of the corporations he controls. Although he agreed that PTCI should be imputed, he noted that the PTCI varies dramatically each year depending on renovation, repair, and development expenses. For this reason, he urged the adoption of Mr. Bradley's five-year averaging approach.

[369] In addition, Mr. Wolfson clarified that although Mr. Bradley calculated an imputed, average income of $345,121, this figure includes 100% of the PTCI, which is the maximum amount that can be attributed to him. Whether the maximum amount or a lesser amount is appropriate is within the court's discretion and is based on the evidence. Even so, Mr. Wolfson said that "[i]f PTCI is calculated as provided by Mr. Bradley …, Mr. Wolfson agrees that 100% of the PTCI should be imputed to him, because the amortization expense is a sufficient proxy for the ongoing needs of the company to maintain cash reserves for various purposes:" Page 43; Mr. Wolfson's Post-trial Written Submission; February 12, 2021.

[370] Mr. Wolfson stated that there should be no adjustment for CCA from an accounting and evidentiary perspective, and for reasons which include the following:

- Amortization is an accounting technique used to spread out capital expenses related to assets over a specific duration – usually over the asset's useful life – for accounting and tax purposes" and is necessary so his companies can effect the necessary maintenance, repair, and eventual replacement of the rental buildings: Page 41; Mr. Wolfson's Post-trial Written Submission; February 12, 2021.
- Ms. Robar arbitrarily applied a deduction of $170,000 annually for capital expenditures after "normalizing" the companies' actual historic figures to disregard over $1 million in actual expenditures which Mr. Wolfson testified were incurred. Mr. Wolfson said that before his development plans were postponed, given the delay associated with the HRM Centre Plan, his average annual expenditure was $1 million.
- In the rental business, the value of renovations depreciates, and substantial investment must be made again and again, on a rotating and cyclical basis. This is evident from the five-year pattern of income reproduced in the Bradley report.
- Once the HRM Centre Plan is resolved, he will resume annual repairs and development work for the companies. Mr. Wolfson decided to wait until the Plan was finalized before making development decisions. He did not want to spend money on renovations which may later be demolished if the Plan permitted better development options.
- Mr. Bradley concluded that the "amortization (approximately $545,000 annually) is a reasonable proxy for actual expenditures, which will vary

from year to year and cause dramatic fluctuations in the corporate income:" Page 42; Mr. Wolfson's Post-trial Written Submission; February 12, 2021.

- Mr. Wolfson provided cost estimates for outstanding capital expenditures including repair and restructuring work. The total budget for these projects is close to $40 million. If only ¼ of this amount was spent annually over the next ten years, it would double the notional depreciation.
- There is insufficient equity to secure financing for even a small portion of these repairs if the artificially increased income was paid out to Mr. Wolfson. With only $6 million in equity, financing is limited to $2.5 million – an insufficient amount to address repairs and renovations: Page 43; Mr. Wolfson's Post-trial Written Submission; February 12, 2021.
- Increased income following renovations does not always cover the cost of increased debt. A review of Mr. Bradley's report confirms that even before the pandemic, the corporate income was on a decreasing trend.
- The principal payment of the debt, although not a tax deduction, is a real expense that must be paid. There should be no adjustment for CCA because of these corporate needs.

[371] Mr. Wolfson relied on Nova Scotia cases to support his conclusion. He provided examples such as the following:

- In ***Novak***, Scanlan, JA held that it was an error for the trial judge not to make allowance for the capital the business needed to continue operations.
- In ***Gossen,*** Smith, J, as she then was, accepted the use of CCA as a proxy for necessary capital expenses and the payment of the principal portion of the debt. Further, the court held that a business is not required to borrow to fund capitalization.
- In ***Thomas***, MacAdam, J expressly rejected the mother's proposal to add back CCA; he ultimately accepted that CCA was a reasonable proxy for the payment of the principal portion of debt and the cost of reasonable future capitalization.
- In ***Bembridge***, B MacDonald, J held that it was acceptable for a business to finance expansion and growth out of earnings rather than debt, while expressing concern for the viability of the corporate operation.

[372] If CCA adjustments are made, then Mr. Wolfson does not accept that all the PTCI should be imputed as income to him. He said the court must closely examine

the evidence and the corporate need for cash reserves. Mr. Wolfson disagreed with Ms. Robar's suggestion that cash reserves were not required for debt payments or capital expenditures. He also disagreed with Ms. Robar's suggestion that the capital expenditures should be financed, which is contrary to the cases cited above.

[373] Mr. Wolfson asked the court to make its decision based on the current needs of the business and not past practice. Mr. Wolfson said that although the companies financed major renovations in the past, this does not mean that financing was the only source of funding, or that the companies should use financing to fund future development and renovations.

[374] Additionally, Mr. Wolfson said there is insufficient equity to finance future projects. If the loan to value ratio is 60% at maximum, then only $1.8 to $2 million is available for financing.

[375] Further, in the event the court adjusts for the CCA claimed by the companies, Mr. Wolfson relied on ***Boykiw v Boykiw***, 2013 BCSC 1107. Mr. Wolfson stated that although in ***Boykiw***, "the court chose to add amortization back to the income of the company", the court did not "attribute all of the PTCI to the business owner, recognizing (at 42 and 43) that the accumulation of cash reserves was entirely reasonable for a rental company, which had need for cash to fund cash expenses including mortgage principal payments and renovations and repairs": Page 44; Mr. Wolfson's Post-trial Written Submission; February 12, 2021. As a result, the court imputed 2/3 of the adjusted PTCI to the business owner.

[376] Mr. Wolfson stated that he proved that calls on corporate income are for legitimate business purposes. The business has legitimate need for a significant portion of the PTCI to fund the necessary work, costing approximately $1 million annually over the history of the company, until the City Centre Plan delays. The cost of future development is considerably more than $1 million annually. None of this evidence, Mr. Wolfson argued, was disputed.

[377] Additionally, Mr. Wolfson said that he provided corroborating evidence of banking restrictions on the use of corporately borrowed funds for anything other than corporate purposes. He argued that the covenant precludes him from borrowing money for personal reasons, such as increasing his income for support purposes.

[378] Further, Mr. Wolfson stated that the pandemic created other complications and a greater need for cash reserves. Many of his properties focus on the student market. Students are increasingly attending school from home. Although not suggesting that the court engage in speculation, the pandemic underscores the

uncertainty that is always present in the operation of a business. The pandemic would also likely impact Mr. Wolfson's ability to finance renovations and repairs.

[379] Finally, although Mr. Wolfson acknowledged that some of his personal expenses are paid by the business, he stated that there is no evidence that any significant income should be imputed to him as a result. For example:

- Despite Mr. Wolfson's vehicle expenses being corporately paid, there is no measurable increase in mileage relating to Mr. Wolfson dropping off or picking up the children. The home, work, and school are all within a few kilometers of each other.
- Although the Porsche vehicles are stored in a heated garage owned by the business, there is no evidence about the amount of lost rental opportunity. Imputing income for this purpose would lead to speculation.
- The suggestion that Mr. Wolfson should be imputed income because his business does not pay rent to one of the companies where his office is located is not logical.
- There is no evidence that the companies paid for the debt associated with the summer home. It is speculation that the companies did.
- The evidence confirmed that the cash from the coin laundry was fully accounted for in the books of the companies. Mr. Wolfson noted that Ms. Fuller stated that the laundry money declared by the companies was reasonable. It is speculation to suggest otherwise.
- The $26,329 from LSC Leasing to fund the closing of the matrimonial home purchase was declared as income.

[380] In summary, Mr. Wolfson stated that his income should be as calculated by Mr. Bradley. However, even if the court adjusts for CCA, the end result should nonetheless be as stated by Mr. Bradley given the legitimate business need for cash reserves. If there is an adjustment for CCA, not all the PTCI should be imputed. In either scenario, his income should be no more than $345,121. There should be no adjustment for the benefits which Mr. Wolfson receives from the business.

Position of Ms. Wolfson

[381] Ms. Wolfson asked that the court adopt the expert opinion of Ms. Robar and find that Mr. Wolfson's income is at least $734,000, plus an additional $33,479 for the value of some of the personal benefits paid by companies. Ms. Wolfson argued

that the income suggested by Mr. Wolfson would produce an inappropriate and inadequate outcome.

[382] In presenting her argument, Ms. Wolfson explored some of the assumptions and conclusions reached by Mr. Bradley. She noted four points. First, she noted that Mr. Bradley outlined two scenarios. In the first scenario, Mr. Bradley did not adjust for CCA, while in the second scenario, he adjusted for CCA and then deducted for sustaining capital expenditures. Ms. Wolfson highlighted the following points in relation to Mr. Bradley's second scenario:

- Mr. Bradley stated that Mr. Wolfson's 2019 income was $567,868; and in 2018, it was $618,112.
- Mr. Bradley completed a five-year averaging exercise at the request of counsel and not based on the *CSG*. Mr. Bradley stated that Mr. Wolfson's annual income, averaged over five years, was $550,969.
- Mr. Bradley used a figure of $340,041 as a deduction for sustaining capital, which amount was based on a five-year average and on the assumption that cash from the business would be used to fund capital expenditures. Mr. Bradley, however, acknowledged that in the past, the business financed major renovations. Mr. Bradley also acknowledged that sustaining capital expenditure was also accounted for in the long-term debt of the companies.

[383] Second, Ms. Wolfson stated that Mr. Bradley acknowledged that a three-year average produced an annual income of about $625,000 to Mr. Wolfson, while $651,333 is the result when Ms. Robar's calculations undergo a similar analysis. Ms. Wolfson stated that the court has jurisdiction to average corporate and personal income for three years, and not five, pursuant to s. 17 of the *CSG*. Ms. Wolfson relied on ***Mason v Mason***, 2016 ONCA 725 as confirmation that s. 17 applies to the s. 18 analysis.

[384] Third, Ms. Wolfson addressed the dividends paid by the company. She stated that in both expert reports, it was noted that about $1,007,500 was taken out of the companies in the form of dividend payments between 2015 and 2018. In 2019, Mr. Bradley said that Mr. Wolfson was paid a dividend of $106,100. Thus, $1,113,600 was paid out as dividends between 2015 and 2019.

[385] Fourth, Ms. Wolfson stated that the evidence clearly shows that Mr. Wolfson's income is more than he argued. Ms. Wolfson arrived at this conclusion by addressing the amounts which Mr. Wolfson acknowledged paying out since separation – the $345,865 increase in the LOC; at least $5,000 per month paid on

the Visa; and $105,218 for his annual child's budget. Mr. Wolfson's lifestyle confirmed that his income is more than $345,121.

[386] Following this discussion, Ms. Wolfson provided an overview of Ms. Robar's expert opinion. Because Mr. Wolfson's 2019 income tax return had not been completed, Ms. Robar's report focused on 2015 to 2018. Ms. Robar stated that Mr. Wolfson's imputed income for each of those years was as follows:

2018	$734,000
2017	$760,000
2016	$460,000
2015	$268,000

[387] Ms. Wolfson reviewed Ms. Robar's calculation exercise, starting with line 150 income, and making prescribed adjustments, including replacing the reported taxable dividend with the actual amount received, and adjusting for the corporate CCA deduction. Ms. Robar also adjusted for the dividends paid out to Ms. Wolfson, as these represented income splitting. Ms. Robar, like Mr. Bradley, made a further adjustment for 100% of the PTCI after first deducting for the actual dividends paid, so as to not double count.

[388] Further, Ms. Robar's calculation included an estimated sustaining capital expenditure. Ms. Wolfson stated as follows in her submissions:

> 111. Accounting amortization related to real property, net of estimated sustaining capital expenditures was calculated for 2018 as accounting amortization on real property: $485,309 less the average sustaining capital expenditure funded from cash flow, estimated at $170,000.00, for a total of $315,309.00 (Exhibit 5, Schedule 1, Note 4).
>
> 112. The amortization on real property was calculated as the total amortization reported as an expense in the Companies' financial statements plus non-cash losses, net of gains on disposal of real property. Paragraphs 38 to 41 and Appendix C of the PWC Report contain a discussion regarding the adjustment for accounting amortization on real property.
>
> 113. The average sustaining capital expenditures of $170,000 represents a reduction of the accounting amortization add-back as discussed in paragraphs 42 to 46 and Appendix C of the PWC Report. The amount is calculated as a straight-line average over the 4 years 2015 to 2018 to reflect the capital expenditures on real property that are financed from cash flow as opposed to debt.
>
> 114. The amortization was added back in both the Deloitte Report and the PWC Report. In the PWC report, the amortization amount is discussed in paragraph C. 17 (page 23) where it is noted that the amortization is a non-cash expense that reflects the depreciation of capital assets over time and by use. This figure does not run through the financial

statements of the company and can represent repairs and maintenance that did not flow back through the company.

115. On cross-examination, there was a discussion of cash flow with Ms. Robar. Ms. Robar noted that you do not use cash for renovations and that if cash flow was used then it would have to be included in the cash flow to the 2966 Windsor Street renovation.

116. She noted that this would add one million dollars in cash. She further noted that borrowing the one million dollars for the renovation was a one-time event that is not considered income.

117. Ms. Robar further noted that income is not a cash flow analysis.

[389] Ms. Wolfson said that all of the PTCI should be included in Mr. Wolfson's income for the following reasons:

- The onus rests on Mr. Wolfson to prove that all or some of the PTCI is not available.
- Mr. Wolfson is the sole, controlling shareholder. He owns 100% of the voting shares. Mr. Wolfson controls the companies in their entirety. He can, and has, reduced his income since the parties' separation in January 2018.
- The PTCI was not adjusted for the personal and discretionary expenses incurred by the companies on behalf of, or for the benefit of, Mr. Wolfson.
- Interest on the corporate debt is an expense that is deducted in the calculation of the PTCI.
- The companies are healthy, as is evident from their value and their loan to value ratio.
- The companies are not in a start-up stage of growth.
- Renovations are cyclical, but are financed from an historical perspective.
- Mr. Wolfson acknowledged that he would not be completing all renovations at once, but would do so on a piecemeal basis consistent with his affidavit and overall history. Renovations will be prioritized.
- Ms. Robar's calculation of sustaining capital expenditure was based on her observations and assumptions of comparable investments in a real estate company - typically they are financed by debt rather than the operating cash flow.
- Mr. Wolfson failed to produce expert evidence as to the requirement for renovations. He simply provided quotes.

- Renovations will improve the financial position of the companies, as Mr. Wolfson himself confirmed in his evidence. Mr. Wolfson said that he seeks the highest and best use for his properties. As an example, Ms. Robar noted that 2966 Windsor Street reported an increase of $1.3 million in long-term debt in May 2016, and an increase in income from $118,684 to $174,000 between 2015 and 2016; to $301,994 in 2017;to $311,885 in 2018; and 308,428 in 2019.
- Renovations increase the value of the real property. Ms. Robar noted that the assessed values are typically less than appraised values.
- The properties have significant development potential, as noted by Ms. Fuller in her report and testimony.
- Mr. Wolfson typically takes the older, weaker properties and renovates them to become higher earning properties, which in turn can be used to finance renovations of other properties.
- The business has access to several credit lines. Mr. Wolfson's statement of property confirmed that 5900 Holdings Limited, Lioncore Holdings Limited, and Cabin 5 Holdings Limited have four credit lines with $1,648,342 in available funds. Further, LSC Leasing Inc has a $100,000 LOC. The operating credit lines available through the TD Bank are $435,000 for Cocowood Holdings, and $555,000 for Cabin 5 Holdings.
- The Royal Bank loan agreement relates to one company only – Cabin 5 Holdings. No other covenant restrictions are in evidence.
- The CCA deduction, in this case, is an accounting entry only for the purposes of reducing income: ***GL v DKL***, 2016 ABQB 71 citing ***Beaudry v Beaudry***, 2010 ABQB 119.

[390] In addition to Ms. Robar's calculation, Ms. Wolfson sought to increase the income imputed to Mr. Wolfson to represent some of the benefits paid by the companies on his behalf. Some of the benefits include:

- The climate controlled garage built to store Mr. Wolfson's collector vehicles. The cost of the garage was paid by the companies. Mr. Wolfson pays no storage fees to the companies.
- The $20,000 annual payment made by the business towards his life insurance.

- The personal use of his truck, which is 100% expensed through the companies, including acquisition, maintenance, repair, gas, insurance, registration, and parking fees.
- The provision of free services, including cell phone, cable and internet for his home.
- The cash from the laundry machines.

[391] Ms. Wolfson asked that an additional $33,479[xi] be added to Mr. Wolfson's income because the above benefits were not included in Ms. Robar's calculations.

[392] In addition to the other cases previously identified, Ms. Wolfson relied on ***Richards v Richards****, supra;* ***Gosse v Sorensen- Gosse****, supra;* ***Potzus v Potzus*****,** 2017 SKCA 15; ***Kowalewich v Kowalewich****, supra;* ***Miller v Joynt***, 2007 ABCA 214; and ***Jenkins v Jenkins***, 2012 NSSC 117 in support of her submissions under this issue.

[393] In summary, Ms. Wolfson stated that Mr. Wolfson's income in 2018 is at least $734,000, calculated as follows:

$243,745 Guideline line 150 with adjustments

($185,000) Dividends

$360,271 PTCI

$315,309 Accounting amortization less sustaining capital expenditure

$734,000.00 Total Income

Law

[394] I will address three points in my discussion of the law – general principles, averaging, and PTCI factors.

General Principles

[395] Courts have confirmed that the *CSG* exist to ensure that payor parents meet their child support obligations in "a fair and equitable manner": para 54, ***Richardson v Richardson,*** *supra*.

[396] In ***Gosse v Sorenson-Gosse,*** *supra*, the Newfoundland Court of Appeal, disputed the assertion that imputation strips the company of its resources, stating:

> [94] **Neither imputing pre-tax corporate income to a shareholder, nor adjusting the amount shown as pre-tax corporate income to offset non-cash expensing, in the course of establishing the basis for calculating child support obligations under the *Guidelines,* requires the corporation to alter its financial records or its business**

decisions in any manner. It does not require the actual transfer of any of its financial resources to the sole shareholder. That remains a decision of the corporation, as guided and directed by the sole shareholder. **Imputing is only a theoretical exercise for the purpose of making "the fairest determination" of an income level by which to judge the level of responsibility the shareholding spouse should have for child support, when compared with the income level of the other spouse.** The corporation is not a party to the action and no order is directed at the corporation. In the case of a sole shareholder, **the effect is, essentially, to ignore the corporate structure, for *Guidelines* income assessment purposes only, and treat the shareholding spouse in the same manner as that spouse would be treated if the business were carried on in the name of that spouse personally.** When applied to this case, that requires Ms. Sorensen to account for "all the money available to [her] for the payment of child support", on precisely the same basis as Mr. Gosse has been required to account for all the money available to him for that purpose. Only in that manner can a primary objective of the *Guidelines*, "the fairest determination of that income" be achieved.

[95] In my view that assessment of the *Guidelines* is reasonably consistent with the views expressed by the British Columbia Court of Appeal in *Kowalewich*. There Huddart J.A. wrote:

> [40] … A court **need not look for signs of bad faith or undeclared personal benefits** to support a conclusion of intentional avoidance of a child support obligation before reaching the opinion required to trigger an adjustment under ss. 17 or 18. Nor should it look only to the value of a payor"s services to a company that parent owns or controls.
>
> [41] I note **the use of pre-tax corporate income as a basis for the determination of child support does not strip a spouse of his available money. It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support.**
>
> **...**
>
> [45] **To determine whether "Total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the *Guidelines,* the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.** (Emphasis added.)

Averaging

[397] Caselaw confirms that courts can apply a three-year average when considering corporate income. In ***Mason v Mason,*** *supra*, Simmons, JA stated:

> [164] As I see it, it would make little sense to permit consideration of a spouse's income over the three-year period without permitting consideration of the spouse's access to pre-tax corporate income in each year of the three-year period.

> This is particularly the case where, as here, the payor spouse now wholly owns the corporation (which was formerly owned by him and the wife). Otherwise, the exercise of considering a pattern of, or fluctuations in, income would be artificial.
>
> [165] Further, this interpretation, is consistent with the language of s. 17:
>
> ….
>
> [166] Had it been the legislature's intention to restrict the three-year review of the spouse's income to line 150 income, the legislature could easily have said the court may have regard to the spouse's annual income over the last three years as determined under s. 16. But instead of using that or similar language, s. 17 refers to the "spouse's income over the last three years." "Income" in this context is not restricted to the spouse's annual income as determined under s. 16; it can fairly be read as meaning the payor's annual income as defined under s. 15 – meaning the payor's income as determined in accordance with ss. 16 to 20.
>
> [167] In addition, interpreting the sections in this way avoids any incentive to manipulate corporate income leading up to a trial or the inevitability of a variation in the event of an unusual year.
>
> [168] This approach is also consistent with the fundamental object of the *Guidelines,* which is to ensure fairness to both spouses, and to their children, in determining what amount of money is in fact reasonably available for the payment of support.
>
> [169] Finally, I am not persuaded by the concerns expressed in *Bear v. Thompson*, that this type of interpretation will lead to unfair or egregious results for corporations or that courts will disregard legitimate corporate interests. In attributing pre-tax corporate income to a payor for any particular year, it will be incumbent on the court to have regard to the status of the corporation as a distinct legal personality as well as to legitimate corporate interests in retaining pre-tax corporate income and the degree of the payor's involvement in the corporation. See *Brophy v. Brophy*, (2002), 2002 CanLII 76706 (ON SC), 32 R.F.L. (5th) 1 (Ont. S.C.J.), aff'd (2004), 2004 CanLII 25419 (ON CA), 180 O.A.C. 389 (Ont. C.A.), at para. 36, and *Thompson v. Thompson*, 2013 ONSC 5500, at para. 92, where the courts highlight the relevant considerations.

PTCI Factors

[398] *In* ***Reid v Faubert,*** *supra,* Bourgeois, JA reviewed principles that apply when analyzing PTCI. She confirmed that the burden rests on the payor to adduce clear evidence that some or all of the PTCI is unavailable:

> [29] Numerous courts have concluded that in applying s. 18, the onus rests on the payor to adduce clear evidence demonstrating that some or all of the pre-tax corporate income is unavailable for the payment of child support. See *Richards v. Richards*, 2012 NSCA 7 at para. 44; *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-61, leave to appeal to

S.C.C. refused [2009] S.C.C.A. No. 135; *Cunningham v. Seveny*, 2017 ABCA 4 at para. 28; and *Potzus v. Potzus*, 2017 SKCA 15 at para. 13.

[399] In addition, Bourgeois, JA confirmed the contextual factors that courts should consider when determining whether all or some of the PTCI is available for child support purposes:

> [30] How does a court determine how much of a payor's pre-tax corporate income is available for the payment of child support? Courts have identified a number of factors that are relevant to a s. 18 analysis. In *Bembridge*, *supra*, Justice MacDonald pointed out there are multiple factors that courts should consider, and focusing solely on retained earnings can lead to problematic results. She wrote:
>
>> [36] Other courts examining this issue have commented that decisions made pursuant to section 18 require a court to understand (for example):
>>
>>> - the historical practice of the corporation for retaining earnings;
>>>
>>> - the restrictions on the corporation['s] business including the amount and cost of capital equipment required;
>>>
>>> - the type of industry is involved and the environment in which it operates;
>>>
>>> - the potential for business growth or contraction;
>>>
>>> - the level of debt;
>>>
>>> - how the corporation obtains its financing and whether there are banking or financing restrictions;
>>>
>>> - the control exercised by the parent over the corporation.
>>
>> [37] This list is not exhaustive. Failure to understand exactly where the additional money can be found to increase the parent's income can lead to an incorrect result and ultimately, if the parent cannot find the expected additional money, may undermine the operation of the corporation and eventually "kill the goose that lays the golden egg".
>
> [31] A proper s. 18 analysis requires a broad contextual approach. In *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law Inc., 2017), Julien D. Payne and Marilyn A. Payne write at page 165:
>
>> **It is pre-tax net corporate earnings and not retained earnings that should be used in applying section 18 of the Guidelines.** [*Miller v. Joynt,* 2007 ABCA 214; *Johnson v. Barker*, 2017 NSCA 53; *Mayer v. Mayer*, 2013 ONSC 7099] In *Nykiforuk v. Richmond* [2007 SKQB 433; *Johnson v. Barker*, 2017 NSCA 53], Ryan-Froslie J. (as she then was) of the Saskatchewan Court of Queen's Bench (Family Division) observed that, in determining whether to exercise its discretion pursuant to section 18 of the Guidelines, the court must be satisfied that additional money is actually available and that it can be paid to the shareholder without endangering the financial viability of the company. **Merely looking at the retained earnings of the corporation is of limited assistance.**

> **Retained earnings are a shareholder's equity in the corporation (its assets less its liabilities). They do not represent cash available for distribution, nor do they reflect the pre-tax income of the corporation.** In making a determination pursuant to section 18 of the Guidelines, a wide range of factors must be considered, including:
>
> 1) The pre-tax income of the corporation;
>
> 2) The nature of the business involved (Is it capital intensive or service-oriented? Is it subject to seasonal fluctuations or economic cycles?);
>
> 3) The corporate share structure, including any obligation imposed by shareholders' agreements;
>
> 4) The financial position and general operations of the company (What are the company's operating requirements, its inventory, accounts receivable and accounts payable? Are there bank covenants which may affect payment out of funds? Is there a necessity to upgrade equipment, etc.?); and
>
> 5) Is the company a well-established one or merely in its start-up phase?
>
> (Emphasis added)

Decision

[400] Given the legislation and the law, I must determine the amount of income that is fairly and equitably available to Mr. Wolfson for child support. As conceded, I find that Mr. Wolfson's line 150 income does not represent the income that is fairly and equitably available. As such, I must access ss. 16 to 18, and alternatively, s. 19 of the *CSG*.

[401] In determining available income, I reviewed the evidence and the expert opinion. In particular, I reject Mr. Bradley's first scenario because it fails to adjust for CCA. I have, however, considered Mr. Bradley's second scenario because of its inclusion of CCA in the calculation of income. In addition, I considered Ms. Robar's expert opinion. For the most part, the experts did not deviate when calculating Mr. Wolfson's income until they considered the treatment of capital expenses.

Capital Expenses

[402] The significant issue which I therefore must decide concerns the amount of capital expenses and their impact on available PTCI. I have considered the lengthy submissions of both parties and the expert evidence. I also note that the major difference between Mr. Bradley's second scenario calculations and Ms. Robar's calculations concerns the capital expense figure. For his part, Mr. Bradley employed an annual figure of $340,041 while Ms. Robar applied $170,000. I must now determine the appropriate figure to assign.

[403] In determining this issue, I am cognizant that accounting amortization and CCA do not represent an actual expense. There is no outflow of cash associated with the accounting entry or tax deduction. I am also aware that accounting amortization and CCA may differ in quantum. A company may choose not to deduct the full amount of available CCA, but rather carry it forward in future years. Corporate decisions are based on a number of factors, including perceived tax advantages.

[404] For the purposes of my decision, it is also important to distinguish between debt payment and income. Debt impacts value. As noted by Ms. Robar, debt is reported on the corporate balance sheet and any new borrowings are added to the liability account in the balance sheet. Only interest payments are recorded as deductions. Noticeably, debt proceeds are not recorded as income in the company's PTCI.

[405] Further, I agree with the comments of Ms. Robar as to the potential for double counting if one adjusts for debt payments when determining income. Ms. Robar noted at page 29 of exhibit 5:

> D.18 The primary issue with adjusting income for debt lies in the concept of measuring value owned by a spouse as distinct from measuring income of a spouse. ….
>
> D.19 To adjust guideline income for all or part of the principal portion of debt repayments in a jurisdiction where business assets are included as matrimonial property would have the impact of both reducing business value (appropriately) and reducing income, or double counting. This further emphasizes that adjustments related to the principal portion of debt are tied to net worth and division of assets. To adjust guideline income for debt in isolation, without consideration of the impact on the business owning spouse's net worth made lead to an unintended consequence in terms of calculating the spouse's income when also giving consideration to an equitable division of matrimonial property.

[406] Both experts used an average of capital expenditures reported by the companies to calculate the appropriate capital expenditure figure. Mr. Bradley used average figures from 2015 to 2019 while Ms. Robar used figures from 2015 to 2018. A further distinction is found in Ms. Robar's treatment of the $1,000,699 capital expense figure posted in 2016. In her calculations, Ms. Robar added back the disposal of $128,789 from Harvard Properties and deducted $1,114,359 from the 2016 capital expenditures "to reflect the transfer to and addition of financed real property in 2966 Windsor:" page 11, exhibit 5. I accept Ms. Robar's rationale in so doing. Although 2966 Windsor Holdings incurred capital expenses, it immediately refinanced once the property was leased. As a result, the debt associated with the capital expenditure is now included as part of the long-term

debt. Ms. Robar noted that "… for the fiscal year ended May 31, 2016, 2966 Windsor Holdings increased its long-term debt by $1.3 million, net of any principal repayments that may have been made during the year": page 11, exhibit 5.

[407] The following of my findings of fact also inform my decision:

- Mr. Wolfson exercises full control over all companies. He has 100% of the voting shares. He directs and determines all operational and management decisions involving the rental properties and companies. Mr. Wolfson is an astute and strategic business person.
- The companies operate rental properties in a market where there is great demand and a limited supply. There is significant opportunity for growth, especially with the current underdeveloped properties.
- The companies historically financed most of their capital improvements, while repairs and maintenance costs were correctly funded through the operating cash flow of the business. Even when operating cash flow was tapped to pay for some of the capital improvements, once finished, financing was secured to cover their cost. I infer that this strategy ought to continue in the future and that it would only be interrupted should Mr. Wolfson want to negatively and inappropriately impact his support obligations.
- The companies have access to a sizeable amount of credit both through existing credit lines and as a result of the equity in the properties. The companies have a healthy loan to value ratio. Restrictive covenants relate to business use and apply to one company and one debt-holder.
- Typically, improved properties have acted as security to fund capital improvements of weaker properties. I infer that this strategy ought to continue in the future and that it would only be interrupted should Mr. Wolfson want to negatively and inappropriately impact his support obligations.
- The capital improvements and redevelopment work that will be undertaken will be completed over time. Historically, the companies moved in a piecemeal and somewhat cautious fashion. I infer that this strategy ought to continue in the future and that it would only be interrupted should Mr. Wolfson want to negatively and inappropriately impact his support obligations.

- As capital improvements are completed, the companies will enjoy a sizeable increase in revenue. Historically, under Mr. Wolfson's management, revenues increased after each capital improvement. I infer this trend will continue in the future.
- There is no evidence to suggest that the pandemic has negatively impacted the value of real property in HRM or the rental market in HRM. I refuse to make such an inference.

[408] In summary, a figure mid-way between that used by each expert is appropriate, given the historical pattern and substantial anticipated development costs.

Average Income

[409] Mr. Bradley incorrectly used a five-year average to determine Mr. Wolfson's income. When asked to calculate the outcome of a three-year average under his second scenario, Mr. Bradley confirmed an annual income of $624,761, based on the following:

2017	$688,303
2018	$618,112
2019	$567,868

[410] As previously stated, however, these figures require upward adjustment based on my conclusion on the capital expenditure issue.

[411] In contrast, the three-year average based on Ms. Robar's calculations is $651,333, albeit using 2016 to 2018 figures, as follows:

2016	$460,000
2017	$760,000
2018	$734,000

[412] Ms. Robar's calculations should be adjusted downward because of my conclusion on the capital expenditure issue. Further, Ms. Robar's calculations did not include 2019. For this exercise, I use Mr. Bradley's calculations but adjust for the sustaining capital expenditures as follows:

Adjusted line 150 income	$64,121
PTCI	$315,522
Amortization Added	$528,267

Sustaining Capital Expenses	($255,020)
Total Income	$652,890

Income of Mr. Wolfson for Support Purposes

[413] Having considered the evidence, including the expert opinion and Mr. Bradley's 2019 calculations, together with my findings, I conclude that Mr. Wolfson's annual income for child support purposes is approximately $660,000. In arriving at this amount, I recognize that significant capital expenses will be incurred as the companies proceed with their development plans. Although revenue will be negatively impacted during the process of expansion and growth, it will increase once the capital projects are completed.

[414] Further, this figure excludes the benefits provided to Mr. Wolfson by the companies. I did not impute additional income to Mr. Wolfson to account for these benefits because I have limited evidence about their value. Some of these benefits, however, will be discussed when I consider the parties' circumstances in the calculation of child and spousal support.

[415] **What is the appropriate child support award?**

[416] Child support must be analyzed based on the shared parenting provisions of the *CSG*, which provide as follows:

> **Shared parenting time**
>
> **9** If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account
>
> > **(a)** the amounts set out in the applicable tables for each of the spouses;
> >
> > **(b)** the increased costs of shared parenting time arrangements; and
> >
> > **(c)** the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

Position of Mr. Wolfson

[417] Mr. Wolfson stated that in the event that more than $345,121 is imputed to him, he relies on s. 4 in addition to s. 9 of the *CSG*. He said that s. 9 does not exclude a s. 4 analysis because his income is more than $150,000. However, when discussing a potential monthly child support payment of $8,302, Mr. Wolfson stated that "[i]t is our submission that Mr. Wolfson's income is not so high as to invoke concerns about child support exceeding the reasonable needs of the children": page 15, Reply Submissions of Mr. Wolfson dated March 2, 2021.

[418] In calculating child support, Mr. Wolfson relied on ***Contino v Leonelli–Contino,*** 2005 SCC 63 and adopted its analysis. Mr. Wolfson noted that the court must first establish the set-off support. Then, the court must examine the children's budgets and determine who pays for the budgeted expenses. This evidence is filtered through s. 9(b) and (c) to determine the increased costs associated with shared parenting, and the conditions, means, needs, and other circumstances of the parties and their children.

[419] Mr. Wolfson noted that he paid all expenses for the children since separation in lieu of a retroactive award. He also noted that both parties will equally experience an increase in costs because of the shared parenting arrangement. He stated that both parties will have similar expenses, although he pays for the children's cell phones.

[420] Mr. Wolfson said that the children lived a comfortable, though not extravagant lifestyle, and continue to do so in both homes post-separation. The children continue to participate in activities in their religious and social communities.

[421] Depending on the property division, and the amount of the parties' income, Mr. Wolfson favoured the set-off amount. Mr. Wolfson also asked that each party be ordered to pay support to the other, amounts to be based on the set-off, so that each parent can benefit from any applicable tax advantages.

[422] Mr. Wolfson also addressed s. 7 expenses. He stated that the two most expensive s. 7 expenses are the private school tuition and the cost of the summer camp, which total $48,046 per year. Other activities cost about $6,000 annually. He further confirmed that he paid the cost associated with the son's Bar Mitzvah, and for much less than budgeted by Ms. Wolfson. From his perspective, the parties should share in the cost of their daughter's Bat Mitzvah.

[423] Mr. Wolfson said that the s. 7 expenses must be fairly and equitably shared. If he is required to pay for all these expenses, then he has less money available for spousal support. If the expenses are prorated, then spousal support payable to Ms. Wolfson must form part of the calculation.

[424] Finally, Mr. Wolfson objected to including the Waegwoltic membership as a s. 7 expense, given the time that the children spend at camp and with him at the summer home.

Position of Ms. Wolfson

[425] Ms. Wolfson also relied on ***Contino*** in her submissions and endorsed its analysis. She further relied on ***BPE v AE,*** 2016 BCCA 335; ***AJB v JM***, 2020 BCSC 242; ***Potzus v Potzus,*** *supra*; ***Woodford v MacDonald***, 2014 NSCA 31; ***Boudreau v Marchand***, 2012 NSCA 79; ***Dillon v Dillon***, 2005 NSCA 166; ***MacDonald v Brodoff,*** 2020 ABCA 246; ***McCrate v McCrate,*** 2019 NSSC 167; and ***Lozinski v Lozinski***, 2017 BCCA 280.

[426] Ms. Wolfson compared the children's budget presented by both parties and noted that after adjustments are made for nonrecurring expenses, the parties indicated similar expenses for the children.

[427] Ms. Wolfson asked the court to examine the financial realities of both parties and the children to ensure that there is no significant variation in the children's standard of living as between households. Ms. Wolfson argued that the household standards is a major consideration, particularly in light of the fact that the children spend more time at her home than at Mr. Wolfson's. In the end, Ms. Wolfson also asked that the set-off amount be ordered, as such will allow for consistency between households.

[428] Ms. Wolfson also requested s. 7 expenses, including private school tuition, Bat Mitzvah and tutoring; Synagogue membership; Waegwoltic membership; camp fees; activity expenses; and medical expenses. In particular, the parties' daughter required physiotherapy. Ms. Wolfson asked that these expenses be apportioned in a manner consistent with other s. 7 expenses.

[429] Ms. Wolfson also sought retroactive child support consistent with ***DBS v SRG***, 2006 SCC 37, but noted that Mr. Wolfson's assumption of post-separation debt would stand in the place of the retroactive support, both spousal and child. Ms. Wolfson intended that the debt would include the loan of $444,444 due to one of the companies.

Law

[430] Although the law was not disputed, I will briefly provide an overview of the factors which I considered. First, where both ss. 4 and 9 are engaged, courts favour the unique legislative framework of s. 9, and suggest that any inordinately high support payments can guide the exercise of discretion under s. 9: ***BPE v AE,*** *supra*, at para 69; and ***AJB v JM***, *supra,* at para 81. Further, in ***Potzus v Potzus,*** *supra*, the court held that there is an "elastic range within which various amounts of child support are appropriate", and it is "only when the amount is so high as to exceed 'the generous ambit within which reasonable disagreement is possible' that the amount becomes inappropriate": para 117.

[431] Second, courts have consistently cautioned against using the set-off as the default, as it is counter to the required ***Contino*** analysis: ***Woodford v MacDonald***, *supra;* ***Boudreau v Marchand,*** *supra;* and ***Dillon v Dillon***, *supra.* However, as noted in ***Dillon,*** there are circumstances where the set-off is the appropriate outcome provided that it is supported by the s. 9(b) and (c) inquiries.

[432] Third, the apportionment of special expenses under s. 7 should be done after spousal support is calculated, such that spousal support paid is deducted from the payor's income and included as income to the payee: s. 2 of Schedule III of the *CSG*. Nevertheless, where there is a shared parenting arrangement, special expenses may be granted pursuant to s. 7 or they may be considered as part of s. 9 (c) of the *CSG*: Julien Payne and Marilyn Payne; *Child Support Guidelines in Canada, 2020*.

[433] I now return to the required three-step ***Contino*** analysis, which starts with the calculation of the set-off payment to focus the assessment:

> 49 Hence, the simple set-off serves as the starting point, but it cannot be the end of the inquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. Full consideration must be given to these last two factors (see Payne, at p. 263). The cliff effect is only resolved if the court covers and regards the other criteria set out in paras. (b) and (c) as equally important elements to determine the child support.

[434] Next, I must review the increased costs of shared parenting as noted in ***Contino***:

> 52 What should the courts examine under this heading? Section 9(b) does not refer merely to the expenses assumed by the payor parent as a result of the increase in access time from less than 40 percent to more than 40 percent, as argued in this Court. This cannot be for at least two reasons. First, it would be irreconcilable with the fact that some applications under s. 9 are not meant to obtain a variation of a support order, but constitute a first order (see Payne, at p. 261). Second, as mentioned earlier, the Table amounts in the Guidelines do not assume that the payor parent pays for the housing, food, or any other expense for the child. The Tables are based on the amount needed to provide a reasonable standard of living for a single custodial parent (see Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report, at p. 2). **This Court cannot be blind to this reality and must simply conclude that s. 9(b) recognizes that the total cost of raising children in shared custody situations may be greater than in situations where there is sole custody**: Slade v. Slade, at para. 17; see also Colman, at pp. 71-74; Wensley, at pp. 83-85. Consequently, all of the payor parent's

costs should be considered under s. 9(b). This does not mean that the payor parent is in effect spending more money on the child than he or she was before shared custody was accomplished. As I discuss later in these reasons**, it means that the court will generally be called upon to examine the budgets and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has in effect resulted in increased costs globally. Increased costs would normally result from duplication resulting from the fact that the child is effectively being given two homes.** [Emphasis added]

[435] Ms. Wolfson also referenced the article *The TLC of Shared Parenting: Time, Language and Cash*",[xii] wherein Rollie Thompson provided commentary about subsection 9(b) of the *Guidelines*, indicating at page 334 that:

> Under s. 9(b), a court has two concerns: the over-all increased total costs of child-rearing for both parents, especially duplicated costs; and any disproportionate assumption of spending by one parent or the other. The child-related expenses should be apportioned between the parents based upon their incomes, to verify the set-off and to determine the need for significant adjustments to the set-off amount.

[436] Finally I must examine s. 9(c) which focuses on the condition, means, and needs analysis. The broad discretion conferred by s. 9(c) is explained in ***Contino***:

> 68. Section 9(*c*) vests the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. As mentioned earlier, this suggests that the Table amounts used in the simple set-off are not presumptively applicable and that the assumptions they hold must be verified against the facts, since all three factors must be applied. **Here again, it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.**
>
> …
>
> 71 Moreover, **given the broad discretion of the court conferred by s. 9(*c*), a claim by a parent for special or extraordinary expenses falling within s. 7 of the Guidelines (see Appendix) can be examined directly in s. 9 with consideration of all the other factors** (see *Slade v. Slade*, at paras. 26-30). Section 9(*c*) is conspicuously broader than s. 7. [Emphasis added]

[437] At page 334 of *TLC of Shared Parenting,* Rollie Thompson described the analysis under subsection 9(c) as follows:

> The consideration of these two factors (*ability of each parent to bear the increased costs of shared custody and the standard of living for the children in each household*) lies at the heart of the s. 9(c) analysis. In assessing each parent's ability to bear the increased costs of shared custody, a court should look at the incomes of the parents,

> the disparity in incomes, and their assets and liabilities. Most importantly, children should not experience a significant variation in the standard of living as they move from one household to another.

Decision

[438] I will now proceed with the ***Contino*** analysis. Under step 1, I must focus on the set-off amount. The table amount payable by Mr. Wolfson based on an income of $660,000 is $8,108. The table amount payable by Ms. Wolfson based on an income of 55,000 is $784. The set-off payment therefore equals $7,324.

[439] Under step 2, I must focus on the over-all increased costs of the shared parenting arrangement, by identifying duplicated costs and any disproportionate assumption of spending by either party. This step is complicated by the fact that Mr. Wolfson was paying most of the children's expenses post-separation, in lieu of support. Once support is ordered, a new pattern will emerge. The historical data is therefore is of limited value.

[440] Despite the limitations of historical data, there are, as both parties noted, significant duplicated expenses because of the shared parenting arrangement, such as those related to shelter, clothing, and toiletries. Other expenses, however, which would ordinarily be duplicated are not, because some expenses incurred by Mr. Wolfson are paid by his companies, including internet and cable expenses, his cell phone, transportation and parking expenses, and life insurance payments. Ms. Wolfson will thus incur more expenses than will Mr. Wolfson because of the company benefits.

[441] Under step 3, I must assess the ability of each parent to bear the additional costs associated with shared parenting, as well as the standard of living between households. Without a significant amount of child and spousal support, there would be a sizable disparity in the household standards of living because Ms. Wolfson's annual income is $55,000, while Mr. Wolfson's income in $660,000. In addition, although there is an equal division of the matrimonial assets, Mr. Wolfson retained more than 67% of the equity in the remaining business assets. Further, Ms. Wolfson will not receive all of the equalization transfer due to her, given the anticipated delayed payment schedule as previously discussed.

[442] I also recognize that the parties and the children enjoyed an affluent standard of living. The word "comfortable" does not adequately convey the lifestyle adopted by the family pre-separation, which included private schooling, expensive activities and social engagements, travel, two collector luxury vehicles, a renovated home in the south end of Halifax, and a renovated summer home with

waterfrontage and an inground pool in the Chester area. The children should enjoy a somewhat equal standard of living with both parents.

[443] The parties' budgets also reflect the standard of living that the family enjoyed pre-separation. The parties' budgets should be relatively equal, except to the extent that some of Mr. Wolfson's expenses are paid by his companies.

[444] After conducting the ***Contino*** analysis, I agree with both parties that the set-off approach correctly captures the spirit and intent of s. 9. Thus, the amount of $7,324 is the appropriate child support figure, together with the following s. 7 expenses, which are to be prorated between the parties after spousal support is calculated:

- Private school tuition, fees, and all school supplies.
- Camp Kadimah expenses and camp supplies.
- The daughter's Bat Mitzvah and tutoring expenses.
- All extracurricular activity expenses, including registration, equipment, clothing, and tournament related expenses.
- All medical and dental expenses after insurance reimbursement.
- Synagogue membership.
- ½ of the cost of the Waegwoltic family membership which the children have always enjoyed.

[445] Although neither party mentioned, drivers education training and graduation expenses are also ordinarily included as s. 7 special expenses.

[446] If the parties are unable to agree on a process to manage the payment of the special expenses, then submissions are to be provided by September 21.

[447] I further find that the amount of child support that I order is not so high as to "exceed 'the generous ambit within which reasonable disagreement is possible' that the amount becomes inappropriate": ***Potzus v Potzus,*** *supra*, para 117.

[448] Child support is payable as of September 1, 2021 and continuing on the first day of every month thereafter. If Mr. Wolfson did not continue paying all debt and expenses as he had prior to the trial, then the child support start date will be adjusted to reflect that reality.

[449] Further, I am unable to conduct an analysis to determine what amount, if any, of retroactive child support is due because the evidence lacked an accounting of expenses and debt paid. I also recognize that Ms. Wolfson paid for some of the

children's expenses. Further, the amount of some of the expenses were reduced because of Covid limitations. No retroactive child support is ordered in the circumstances. I have already addressed the company debt when dividing the parties' assets.

[450] **What is the appropriate spousal support award?**

[451] The factors which I must consider when deciding spousal support are stated in s. 15.2(4) of the *Divorce Act*:

> 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:
>
> > (a) the length of time the spouses cohabited;
> >
> > (b) the functions performed by each spouse during cohabitation; and
> >
> > (c) any order, agreement or arrangement relating to support of either spouse.

[452] The objectives to be considered are set out in s. 15.2(6) of the *DA*:

> 15.2(6) An order made under subsection(1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> > (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> >
> > (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
> >
> > (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> >
> > (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Position of Mr. Wolfson

[453] Mr. Wolfson acknowledged that Ms. Wolfson is entitled to spousal support. The contentious issues are that of quantum and duration. Mr. Wolfson argued as follows:

- Ms. Wolfson's budget is grossly inflated and her reasonable needs are substantially less than she suggested. Mr. Wolfson said that the projected deficit is an unrealistic depiction of her actual circumstances. He listed 14 areas of particular concern.
- Although Ms. Wolfson was out of the work force for about five years, she increased her employability by completing her master's degree.

- Ms. Wolfson returned to the work force on a part-time basis in 2012, where she continues to use her education and skills in a field of choice.
- The marriage was mid-length.
- The shared parenting arrangement frees up time so Ms. Wolfson can concentrate on her career.
- Ms. Wolfson will leave the marriage with significant assets. If an unequal division is granted in favour of Ms. Wolfson, then additional income should be imputed based on the unequal division, with interest at a rate of at least 5% annually on those additional assets.
- Ongoing child support will likely be paid for another 10 to 12 years.

[454] Mr. Wolfson asked the court to consider the *Spousal Support Advisory Guidelines*. Because his income is more than $350,000, Mr. Wolfson argued that the "ceiling" under the *SSAGs* becomes a relevant consideration. Mr. Wolfson relied on the following articles: *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* prepared by Professor Carol Rogerson, Faculty of Law, University of Toronto and Professor Rollie Thompson, Dalhousie Law School (March 2010); and *The Advisory Guidelines Three Months Later: Cases, Criticisms and Responses, Revisions* prepared by Professor Carol Rogerson, Faculty of Law, University of Toronto and Professor Rollie Thompson, Dalhousie Law School (May 31, 2005).

[455] Mr. Wolfson also said that a reasonable quantum of spousal support is dependent on how child support and s. 7 expenses will be paid. He further acknowledged an equal standard of living as an appropriate goal at page 57 of his Post-trial Final Submissions dated February 12, 2021:

> … [T]he overriding focal point is this: we submit that the parties' net disposable incomes ought to be equalized so that the children enjoy access to similar standards of living in both households. Although this can be done through adjustments of child support, section 7 expense payments, or spousal support, the net effect should be the same.
>
> Given that these parents will have equal time with their children, and equal responsibility for supporting them, and will have control over his/her own expenses, we submit that there is no basis for either parent to have any greater share of income than the other. In each case, this is the low end of the range of support produced by *SSAGs*.

[456] Additionally, Mr. Wolfson asked to provide further *SSAG* calculations once the incomes of the parties and child support particulars are set. In this way the court will have accurate figures before establishing the quantum of support.

[457] In terms of duration, Mr. Wolfson suggested that, like the marriage, a mid-range spousal support order is appropriate. He noted that both children will have graduated from high school in about six years. He therefore suggests spousal support should continue to be paid until July 2028. He said that his proposal falls at the high end of the duration range and will fully compensate Ms. Wolfson for her role during the marriage.

[458] Furthermore, Mr. Wolfson asked that a review be set in two years to ensure that Ms. Wolfson has made all reasonable efforts to secure full-time employment.

[459] Finally, Mr. Wolfson proposed that he retain all post-separation matrimonial debt in lieu of retroactive child and spousal support. Because he lost the opportunity to receive the tax benefit associated with the thousands of dollars he paid, Mr. Wolfson asked that the court acknowledge the portion of those payments associated with spousal support so that Mr. Wolfson can claim the payments and obtain tax relief.

Position of Ms. Wolfson

[460] Ms. Wolfson stated that she has both a strong compensatory and non-compensatory claim to spousal support. Ms. Wolfson referenced the *DA*, caselaw, and the *SSAGs*. She relied on ***Moge v Moge***, [1992] 3 SCR 813; ***MacDonald v MacDonald***, 2017 NSCA 18; ***Bracklow v Bracklow***, [1991] 1 SCR 420; ***Shurson v Shurson***, 2008 NSSC 264; ***Volcko v Volcko,*** *supra;* ***Haggerty v Haggerty,*** 2010 NSSC 9; and ***Gates v Gates***, 2016 NSSC 49. Ms. Wolfson also referenced commentary on the *SSAGs.*

[461] Ms. Wolfson highlighted the following facts in support of the strength of her compensatory and non-compensatory claims:

- She made significant contributions to the marriage, including the assumption of the majority of child care and performance of household duties and responsibilities.
- Her contributions came at the expense of her career trajectory in Ontario when she moved to Nova Scotia.
- She remained out of the traditional workforce from 2007 until 2012, although she did provide assistance to the various companies during this time.
- Ms. Wolfson's almost exclusive assumption of child care and household tasks enabled Mr. Wolfson to focus on the business.

- Ms. Wolfson's relocation to Nova Scotia impacted her accrual of pension benefits.
- The parties and children enjoyed a high standard of living throughout the marriage.
- Since separation, Ms. Wolfson's circumstances have changed. For example, she had to reduce services related to housekeeping, landscaping, and snow removal. In addition, she lost the use of the summer home. Other expenses were reduced because of Covid restrictions.
- There is a significant disparity in the incomes and income earning potential of each party.
- Since the parties separated, Ms. Wolfson applied for jobs and made concerted and reasonable efforts to increase her employment income.
- Mr. Wolfson has the ability to pay support; she has a corresponding need.

[462] Ms. Wolfson disagreed with Mr. Wolfson's arbitrary slashing of her budget. She noted that her budget is reflective of the pre-separation standard of living. Further, her submission is supported by the amount of money which Mr. Wolfson stated that he has paid since the parties' separation. Mr. Wolfson paid off Ms. Wolfson's monthly Visa and placed between $5,000 to $6,000 per month into the bank account. This represents between $12,000 to $13,000 in tax-free payments. She also deposited her income into the bank account. Therefore, even with reduced Covid spending, Ms. Wolfson's budgeted need is confirmed. Further, Mr. Wolfson's payment of certain other of the children's expenses is not reflected in the accounting exercise. For example, Mr. Wolfson paid most of the private school tuition, the 2018 and 2019 camp expenses, and some of the son's Bar Mitzvah expenses.

[463] In respect of the retroactive payment, Ms. Wolfson repeated the arguments that she made when discussing the child support issues.

[464] In summary, Ms. Wolfson sought spousal support for 10 more years at a rate of $13,000 per month. I am mindful, however, that this request was premised on outcomes not adopted in my decision, including the determination of the parties' incomes, child support assumptions, and debt payment.

Law and Decision

[465] Section 15.2(1) of the ***Divorce Act*** provides the jurisdiction to grant a spousal support award. Ms. Wolfson bears the burden of proof. In ***Bracklow v.***

Bracklow, *supra*, the Supreme Court of Canada confirmed that entitlement to spousal support is grounded in one, or more, of the following three principles:

- Compensatory support to address economic advantages and disadvantages flowing from the marriage, or the roles adopted during the marriage.
- Non-compensatory support to address the disparity between the needs and means of the parties, and arising from the marriage breakdown.
- Contractual spousal support, either expressed or implied.

[466] Further, the factors which I must consider in a spousal support determination are set out in s. 15.2(4) of the *DA*, while the objectives are found in s. 15.2(6). I also acknowledge the binding direction stated in ***Strecko v Strecko***, 2014 NSCA 66 as confirmed in ***MacDonald v MacDonald,*** *supra* – although the *SSAGs* are not law, they are a useful tool which can enhance legitimacy and consistency. Therefore, my primary focus must be on the factors and objectives stated in the *DA*, while using the *SSAGs* as a useful comparative tool. I am also aware of the comments of our Court of Appeal in ***Volcko****, supra*, at para 79, where it was stated the *SSAGs* were not helpful because the husband's income was far in excess of $350,000.

[467] Entitlement is properly conceded. It is nevertheless critical to review the facts, because amount and duration are based on the strength of the claims. In this regard, I find that the following facts support a strong compensatory and non-compensatory claim:

- Ms. Wolfson was educated and successfully employed in the public school system in Ontario. Although the parties discussed living in Ontario, this plan was rejected in favour of Nova Scotia where Mr. Wolfson lived and was employed. Ms. Wolfson therefore left her province and employment. She moved to Nova Scotia to start life anew.
- While Ms. Wolfson found work in Nova Scotia, that too was interrupted because of the needs of the family. Ms. Wolfson remained out of the work force for about five years, almost exclusively caring for the children and home so that Mr. Wolfson could focus on his career and the development of the rental properties. Ms. Wolfson also assisted Mr. Wolfson with the apartments.
- Ms. Wolfson's career was interrupted during a pivotal period, and the consequent economic loss is well described in ***Moge v Moge***, *supra*.

- Ms. Wolfson's return to the work force was tailored around the needs of the children and family. It resulted in part-time, flexible work. At present, Ms. Wolfson continues to experience employment challenges because of the roles adopted during the marriage. The income which she currently earns is also reflective of the roles adopted.
- Ms. Wolfson has looked diligently for employment in her chosen field since the parties separated.
- Mr. Wolfson was able to successfully leave a career which he disliked and concentrate on a demanding career that he loved. He was able to do so even as two children joined the family unit. He was able to successfully navigate this new path because Ms. Wolfson almost exclusively cared for the children and home. Mr. Wolfson's asset base and income are not only a reflection of his work and commitment, but are also a reflection of Ms. Wolfson's work and commitment.
- There is a massive disparity in the income and income earning potential between Mr. Wolfson and Ms. Wolfson. Economically, Mr. Wolfson flourished. Ms. Wolfson did not.

[468] The amount and duration of support is also based on the fact that the marriage is mid-length and that Ms. Wolfson was able to earn a master's degree during the marriage.

[469] In determining quantum, it is important to examine the parties' budgets and pre-separation lifestyle. The outcome of this analysis can then be compared to the *SSAG* outcomes as a useful, but not determinative, tool.

[470] As previously stated, I find that the parties enjoyed an affluent lifestyle. As such, and especially given the shared parenting arrangement, the parties should have a similar standard of living. When examining budgets and needed income, I note that Ms. Wolfson will incur some expenses that Mr. Wolfson will not, given the benefits that he derives from the companies.

[471] In addition, I generally agree with Ms. Wolfson's comments about her budget. Ms. Wolfson's budget was not unrealistic in light of the lifestyle enjoyed during the marriage. In response to Mr. Wolfson's comments, I find as follows:

- Ms. Wolfson is responsible for the payment of her mortgage based on the division of assets and debts.
- Ms. Wolfson does spend the equivalent of $50 for postage and courier and mail related fees.

- Ms. Wolfson will require money for regular maintenance and repair.
- Ms. Wolfson should be able to hire service providers for housekeeping, lawn maintenance, and snow removal as was enjoyed prior to separation.
- $1,000 a month for food is not grossly inflated, especially given the ages of the children. It is likely more.
- Ms. Wolfson's clothing budget is reasonable and is based on three people. The children do not share clothing. They are getting older. Name brands tend to be expensive. Mr. Wolfson is likely to soon learn first hand about the actual cost of clothing and footwear for the children.
- The private school, activity, and special expenses will be shared.
- The gift budget is not unreasonable in the context of the parties' lifestyle.
- Charitable expenses are an appropriate part of Ms. Wolfson's budget.
- Vacation expenses are not inflated based on the parties' lifestyle, and as described during the hearing. Further, I recognize that vacation expenses during Covid were significantly reduced, much like other expenses which were impacted by Covid restrictions.
- Ms. Wolfson will not have access to most of the equalization transfer until after the support obligation terminates.

[472] As requested, I will allow the parties to recalculate their spousal support figures based on the outcome of my decision and to reflect the parties' deemed incomes, the sharing of the children's special expenses, the payment of debt, and Ms. Wolfson's need for more income to pay for expenses that Mr. Wolfson does not personally incur. The parties can file their new calculations by September 21, 2021.

[473] The parties are also to confirm any agreement on health coverage and security through life insurance.

[474] In respect of duration, I find that Ms. Wolfson is entitled to support until January 2030 which represents 12 years of support commensurate with the length of marriage.

[475] My ruling on retroactive support is as previously stated. I will not grant an order allowing for backdating in the circumstances of this case. There are too many unknown variables. Further, it is inappropriate for Ms. Wolfson to incur an

income tax debt. If an income tax debt is a consequence of backdating, then Mr. Wolfson would be required to pay more support to cover that debt.

Conclusion

[476] In summary, the following relief is ordered:

- A divorce.
- A finding that the net value of Mr. Wolfson's shares in the companies is at least $13,908,662. Disposition costs of $35,025 for legal fees; $542,732 for marketing and commission expenses; and $1 million for capital gains tax is granted. All other claims are rejected.
- A finding that $6,954,331 of the value of Mr. Wolfson's shares in the companies is matrimonial. This figure represents half of the net value of $13,908,662.
- A finding that Ms. Wolfson did not prove a s. 18 claim because she was, to an extent, compensated by dividend payments.
- A finding that Ms. Wolfson is entitled to an unequal division of the assets as reflected in the equalization chart.
- A division of the assets and debts as outlined in the equalization schedule.
- A finding that Mr. Wolfson must transfer an equalization payment of $4,548,134 to Ms. Wolfson, the details of which are to be determined as stated in paras 300 and 301. Absent agreement, submissions are due on September 21, 2021.
- A finding that Ms. Wolfson's income is deemed to be $55,000 per annum.
- A finding that I have jurisdiction to adjust for CCA claimed by the companies when determining Mr. Wolfson's income.
- A finding that Mr. Wolfson's income is deemed to be $660,000 per year.
- A finding that the set-off amount is the appropriate child support award in keeping with the spirit and intent of s. 9 of the *CSG* and the agreement of the parties. The net effect is that Mr. Wolfson must pay Ms. Wolfson $7,324 per month in child support. The parties will share stated special expenses.
- A finding that Ms. Wolfson has a strong compensatory and non-compensatory claim for spousal support. Spousal support will be paid until January 2030. The quantum will be determined after the parties provide their

submissions based on my findings and including the need to achieve a relative equal standard of living. Submissions are due September 21, 2021.

- Confirmation that no further retroactive support order is granted provided Mr. Wolfson continued to pay all debt and expenses as he had prior to the trial. Otherwise, the date for the payment of child and spousal support will be adjusted. Mr. Wolfson is responsible for all post-separation incurred debt as provided in my decision.
- Rejection of Mr. Wolfson's request for a two-year review of spousal support.

[477] Counsel are thanked for the quality of their post-trial submissions.

[478] Mr. Wolfson's counsel is to draft the orders and present them to opposing counsel for review. Cost submissions can be filed once the September 21st details are confirmed.

Forgeron, J.

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[i] 1949 Oxford was included in the appraised value of Oxford East Holdings.

[ii] Mr. Wolfson noted in para 89 (s) of exhibit 11, that Peppermint Properties retains Turner Drake annually to review property taxes for potential appeals.

[iii] Mr. Wolfson confirmed this value in his Statement of Property dated February 2020 and at p.34 of Mr. Wolfson's Reply Submissions dated March 2, 2021.

[iv] Mr. Wolfson later clarified that it was a company owned by his father that purchased the home. Mr. Wolfson said that he pays a monthly rent of $2,800 to his father.

[v] Law Reform Commission of Nova Scotia; Final Report: Division of Family Property; (September 2017); Page 130:

> Nova Scotia is one of only a few jurisdictions in Canada that exempts business assets from a presumptive equal division, along with New Brunswick and Newfoundland and Labrador. On First Nations reserves in Nova Scotia on which the federal provisional rules apply, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* does not exclude business assets from the matrimonial interests or rights subject to an equal division upon relationship breakdown under that Act.

[vi] There is no restriction against a common law partner seeking a division of "business assets" if they successfully argue an unjust enrichment claim and prove the existence of a joint family venture as their remedy : ***Kerr v Baranow***, 2011 SCC 10.

[vii] Law Reform Commission of Nova Scotia; *Final Report: Division of Family Property*; (September 2017); Page 138; and Law Reform Commission of Nova Scotia*; Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*; (March 1997); Page 39.

[viii] For example, in ***Herritt v King,*** *supra***,** the Court of Appeal stated, "[t]he trial judge followed the decision of Davison, J., in Curren v. Curren…which held, quite properly, that the only assets that should be classified as business assets are those that are purposely held or used for the production of income. He found as a fact that the primary purpose of this savings account **was for the security of the parties when they grew older** and classified it as a

matrimonial asset."[Emphasis added] Although the ages of the parties are not referenced, this wording and the fact that the parties still had one dependent child are indications that retirement was not imminent.

[ix] This balance is without the inclusion of the joint chequing account or the RBC Visa in the equalization schedule because they were used in the place of support payments as will be discussed under the support issue. Also excluded was the value of the household contents.

[x] Section 20 of the *CSG* is not reproduced because it is not relevant.

[xi] Ms. Wolfson stated that this calculation excludes benefits such as the Macpass, taxi-expenses, and company resources used to pay for personal renovations, etc.

[xii] Rollie Thompson, "The TLC of Shared Parenting: Time, Language and Cash" (Paper delivered at the 27th Annual Institute of Family Law Conference, April 13-14, 2018) 2018 CanLIIDocs 10853