SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *A.A. v M.L.*, 2025 NSSC 268

Date: 20250814
Docket: HFD *SFHPSA*, No. 118596
Registry: Halifax

Between:

A.A.

Applicant

v.

M.L.

Respondent

Judge:	The Honourable Justice Cindy G. Cormier
Heard:	January 29, 2024; May 21, 22, 23, 24, 2024; June 18 and 19, 2024, and September 19 and 23, 2024, in Halifax, Nova Scotia
Final Written Submissions:	Respondent December 13, 2024 Applicant January 24, 2025 Respondent January 31, 2025
Counsel:	Jocelyn Campbell, counsel for AA Matthew Conrad, counsel for ML

1 By the Court: 2
2 History 4
2.1 Interim Agreements / Pre-trial Motions / Adjournments 6
3 Court Application / Interim Applications 9
4 Interim Agreements 10
5 Interim Child Support / Disclosure / Expert Evidence 11
6 Property / Appraisals / Valuation date 18
7 Final Trial 25
8 Additional evidence after trial concluded September 23, 2024 26
9 Issues 26
10 AA's income 27
10.1 Need / Lifestyle 35
10.2 Special and / or Extraordinary Circumstances 39
11 ML's Yearly Income for Child Support 44
11.1 The Expert Report 48
11.1.1 Joint Retainer 48
12 Attributing Income 51
12.1.1 Disclosure 55
12.2 Prospective Child Support 64
12.2.1 Non-cash assets 67
12.2.2 Section 19 of the Guidelines 68
12.2.3 Fair Market Value for Services / Arm's length 71
12.2.4 Depreciation and cash outflow 72
12.2.5 Financing the Company / Credit Cards 78
12.2.6 Personal Benefit / Debt Recorded within Company 80
12.2.7 Benefit to the Payor? 80
12.2.8 Personal credit cards 81
12.2.9 Shareholder Loan credit Card transactions / Loan Account 82

12.2.10 Exhibit 21 / Correction 84
12.2.11 Account number 2681 CSSH Visa OO21 87
12.2.12 Grossing up / Corporate Attribution 90
12.2.13 Corporate Re-investment 93
12.2.14 Debt Service Capital 96
12.2.15 Request to View Existing Debt Agreements 98
12.2.16 Debt Service Analysis / Ratio 100
12.2.17 Is the Disputed Property Inhabitable? 103
12.3 Redirect 105
12.3.1 Level of Financial Report 106
12.4 Chart Pre-tax Income of CSH and DDL 113
12.5 Recalculated Child Support from April 1, 2018 to June 1, 2020 119
12.6 Prospective Child Support July 1, 2020 – January 1, 2025 119
12.7 Recalculated Special and Extraordinary Expenses 120
13 Common Law Claim for Interest in Property 122
13.1 Property Appraised 123
13.2 RL's property with Quonset Hut, Porter's Lake Nova Scotia (PID 41057019): 123
13.3 Parties' Former Residence, Lake Loon Nova Scotia including adjacent lot #11 126
13.4 The Disputed Property "Porter's Lake" 127
13.4.1 Mr. Horswill's report presented by ML 129
13.4.2 Mr. Young's report 129
13.5 Law of Unjust Enrichment 129
13.6 The principled approach 135
13.7 Joint Family Venture 135
13.7.1 Has ML Been Enriched? 135
13.8 Has AA been deprived? 143
13.9 Juristic Reason 147
13.9.1 AA *Prima Facie* case 147

13.10 Has ML Established a Reason to Deny AA's Recovery 148
13.11 Remedy 154
14 Joint Family Venture 154
14.1 The Four Factors 155
14.2 Mutual Effort 156
14.3 Economic Integration 157
14.4 Actual Intent 159
14.5 Priority of the family 160
14.6 Monetary Claim 161
14.7 Remedy 162
15 Credibility 163
16 Conclusion 164
16.1 Guideline Income 164
16.2 Child Support 165
16.2.1 Recalculated Child Support from April 1, 2018 to June 1, 2020 165
16.2.2 Prospective Child Support July 1, 2020 – January 1, 2025 165
16.2.3 Recalculated Special and Extraordinary Expenses 166
16.3 Property 167
17 Order 167
18 Costs 167

1 By the Court:

[1] In early 2024, issues regarding parenting time and custody were resolved by agreement of the parties. An order was issued by the court on January 29, 2024 confirming that the applicant, AA would continue to have primary care of the parties' children.

[2] The applicant, AA has claimed child support from the respondent, ML pursuant to the *Parenting and* Support *Act*, R.S.N.S. 1989, c. 160 and the *Provincial Child Support Guidelines.* She is asking that I attribute and / or impute an income to ML of $444,000 per year which would attract a monthly child support payment of $5,516 per month, for the period between January 1, 2018 and the close of parties' submissions on January 31, 2025.

[3] AA requests an order that ML pay her $353,266.13 in recalculated table amount child support based on a calculation back to January 1, 2018 and $31, 248 in recalculated special or extraordinary expenses, for a total of **$388,362.00** owed. In addition, she is seeking that ML be ordered to pay prospective child support based on an imputed yearly income of $**444,000 or $5,516** per month, from February 1, 2025 onward.

[4] ML argued that no child support was owed to AA. He argued that as of February 1, 2024, he should be ordered to pay child support based on a yearly income of **$140,000**, and his ongoing monthly child support obligation should be set at **$1,872 as of February 1, 2024**. ML referenced AA's Statement of Expenses, arguing the children did not require the amount of child support AA was requesting.

[5] I will be addressing the issue of child support as a priority pursuant to s. 10 of the *Parenting and Support Act* which directs me to do so according to the *Guidelines.* Relevant provisions of the *Guidelines* include but are not limited to s. 3(1), s. 4, s.7 and ss. 16 - 20.

[6] AA has also sought relief based on the common law principle of unjust enrichment and / or joint family venture. She has claimed she contributed $254,367.00 to the construction of the home located at the disputed property, which both parties intended to be their "matrimonial home." As a remedy, she is seeking a monetary award of $254,367.00 plus interest at a rate of 6% for the period January 1, 2018 through January 31, 2024 at $15,262.00 per year = $106,834.00 = **$361,201.00**.

[7] ML "disputed that the parties engaged in a joint family venture," stating that "at best" AA was entitled to a monetary award in the range **of $15,000.00 to $20,000.00**. He referenced *Butt* v. *Patterson*, 2023 NSSC 422, and suggested the dispute should be resolved through the principles of constructive trust.

2 History

[8] The parties agree they began a relationship in 2002, however, they disagree about the exact timeline of their relationship and / or how to characterize their relationship for the period between 2002 and 2011. AA claims the parties separated in 2007 and reconciled in 2008 and thereafter became engaged. She suggested they had a 15-year relationship.

[9] ML claimed the parties broke up in 2006, and they "started talking again in the later part of 2009." Both parties agree they lived together at the parties' former residence in or around August 1, 2011 and either November 10 or November 20, 2017. The parties are the parents of two dependent children: L born in 2012 (who was diagnosed with symptoms of autism in April 2017) and C, born in 2014.

[10] On December 12, 2012, the parties participated in a symbolic marriage ceremony in Thailand with the understanding that they were not entering into a legally binding marriage. During their relationship, the parties vacationed together

and / or with their children and at other times their travel plans included members of AA's immediate and / or extended family.

[11] Over the years, AA has provided consulting services for IT project management to clients. In January 2023, AA was working for Adesso Project Management Inc as an IT consultant, and she was earning a gross annual income of $104,000.00.

[12] ML is 100% owner of Canadian Subsea Hydraulics Limited (CSH) and is the only employee. He also owns 50% of Dominion Diving Limited (DDL) with his brother, RL, which was taken over from their father in or around 2004. CSH provides services to DDL who owns offshore equipment for remote operated vehicles, including but not necessarily limited to the following assets: seven multipurpose vessels, cranes, forklifts, vehicles, and an adaptive tugboat. DDL and / or CSH are involved in marine construction, offshore energy, marine shipping, and international garbage handling.

[13] While the parties resided together ML travelled extensively for his employment, and he also travelled independently for pleasure. MM was often away from AA and the children for weeks and / or months at a time (up to four to six months per year).

[14] At separation in November 2017, ML moved out of the Montague Road home that the parties had shared with their children. AA and the children remained at the parties' former residence until March of 2018.

2.1 Interim Agreements / Pre-trial Motions / Adjournments

[15] On or about March 4, 2018, AA proposed a temporary one-year agreement to ML via email, stating it was her intention to vacate the parties' former residence with the children on March 30, 2018 and that the agreement could commence April 1, 2018:

- No more money from DDL to be paid to me, as of March 30.
- Phone to move to me as soon as it is released.
- Truck, including registration, insurance and loan to continue to be paid by you and used as a deduction for CSH.
- Medical insurance to continue for me and kids until a permanent agreement is in place.
- I take the king mattress, tv from basement, couches we bought from neiforths and a coffee maker. All other furniture and furnishings stay, including bunk beds and L's room to stay the same.
- Dog comes with me. I continue his insurance and meds. Any vet bill not covered by insurance we split.
- I continue to pay all childcare costs.
- I continue to pay for all sports and lessons.
- **$1350 month paid as child support**. Due on the first day of each of the month.
- We will share the cost of any legal agreement required to define the permanent situation, as long as we are agreeable.

[16] On March 4, 2018, ML responded to AA's proposal via email:

> First quick response is no not paying for your truck and insurance $1100 a month and medical $100 a month and paying $1350 child support, I'm not your ATM, I'll give you **$1100 for the kids** which is almost double the normal amount.
>
> Your (sic) not taking the TV, if you want one you can have the one in L's room, you can have one of the old coffee makers and yes the mattress is yours, you can have the couches in place of the washer and dryer machines as they are yours, you can have your fridge too.
>
> The dog is yours (sic) so you take him you take his bills, I'll help a bit with him. The bunk beds I'll pay you for if I didn't already pay for them on my visa. L's room stuff was mine from 2000 lol so thank you for allowing me to keep my stuff. As it is your (sic) already behind in truck payments and power bill that was last paid was for too feb 21 so free months power, I'll stop DDL payment this week. I want the truck out of my name, cant (sic) write it off your personnel truck but nice try. Plus need a number for what I owe you on loan.
>
> And we will not share legal cost
>
> Cheers.

[17] AA explained to ML that she was asking that he pay child support according to the "tables." ML responded to AA's suggestion about the "tables", suggesting he was not earning $250,000. That his T4 stated $86,000. Subsequently on March 5, 2018 ML stated:

…

> At the same time we will also expose the fact you got all the tax credits for the kids and tax evasion you did to get the most out of that? So I'm ok your path forward miss single rose street.
>
> Cheers
>
> At trial, ML filed evidence of text communications between the parties dated June 29, 2018 wherein the parties continued to try to negotiate the following: child support including extracurricular expenses; ownership transfer of the Mercedes truck, payments, and insurance; the salary from DDL; and compensation for contributions to "Porter's Lake." During that conversation the parties stated in part:

AA: Seriously? You pay for my truck, which is a gift, from your company so you write it off. The money you give me from dd doesn't impact you at all and you don't even take tax from it so it kills me at year end.

AA: truck payment is $946 and insurance is less than $1000 per year.

ML: Yes, it's my money you get from DDL and yet I pay for your truck my company doesn't use it so think about that but you're a smart girl.

AA: **Be grateful that's all you pay. Or realize that you not stepping up financially just hurts your kids**. Nah. You wouldn't see that. You only see the money as helping me. You don't see the money I spend on birthdays, swimming lessons, outings

…

AA: **I haven't asked for a fucking cent from you**.

AA: Ignorant as fuck.

ML: I'm saying I'll give you money if you take over the truck.

ML: I'm paying for your truck and insurance and your pay from DDL.

…

AA: **I know you would be on the hook for so much more but I don't care.**

AA: **I don't want your money**.

…

AA: **I do want my money back from porters' lake now that it is crystal clear you have no desire to be with me**.

…

AA: …I'm trying to be fair and you give me zero credit. So why am I **struggling to buy food for the family while you take exotic vacations** and live like a king.

…

ML: I've asked if you need anything.

ML: I said I'd take you to Costco.

AA: Yeah. Groceries. They aren't free.

ML: But nope you'd rather starve then accept anything.

AA: I know you think **$150 before tax is tons of money to support your kids** but it isn't…

(emphasis mine)

ML did not accept AA's offer as proposed by her on March 4, 2018. He counter offered and then he threatened to report AA to the CRA. She did not accept his counteroffer and despite the "in lieu of child support" payments in place from ML, AA identified that she and the children were "struggling" financially, that what he was providing was not enough and did not comply with the *Guidelines*. M.L was put on notice that the payments he was making were not enough to cover the children's usual and / or expected expenses as they had existed prior to separation.

3 Court Application / Interim Applications

[18] On June 25, 2020, AA filed a Notice of Application / Interim Motion seeking to address interim custody, child support, medical insurance, and common law property division. ML filed a Response in late September 2020, and on August 10, 2020 AA filed a Notice of Motion for Direction.

[19] On September 23, 2020, ML filed a Response to AA's Notice of Application. He sought to pay "appropriate child support" and have reasonable parenting time with the parties' children. He also demanded particulars regarding AA's common law claim for division of property or that her claim be dismissed summarily and / or he suggested he may counter-claim.

4 Interim Agreements

[20] A settlement conference was held on February 10, 2021. The parties were represented by legal counsel, and they came to the following agreements which related to child support and / or the division of common law property:

1. **ML would maintain the children on his medical plan;**
2. ML would provide AA with the insurance card for the vehicle which was in her possession and is owned by a company solely owned by ML, CSH;
3. ML agreed to continue to pay AA the salary she had been receiving through a company he owns jointly with his brother, DDL;
4. ML agreed to continue to pay all expenses for the vehicle AA had in her possession and was owned by a company solely owned by ML, CSH;
5. The parties agreed to jointly commission a Guideline Income Report to be completed by Mr. Dan Jennings (DJ) CPA, CA, CBV, CF. The parties both agreed to contribute to the cost of the report with AA's contribution being capped at $7,000.00 ("but the cost being shared equally") and the parties reserved the right to claim costs related to

the report at the end of the proceeding. Both agreed to provide information and documentation to DJ on a timely basis.

6. ML's counsel undertook to provide answers to questions posed by AA's counsel no later than March 5, 2021; and

7. AA agreed to provide documentation to support her common law claims, including statements of lines of credit, receipts, and her income tax returns and Notices of Assessment up to 2010.

5 Interim Child Support / Disclosure / Expert Evidence

[21] At a further settlement hearing held on or about July 27, 2021, the parties were unable to reach an agreement regarding ML's brother, RL, authorizing the release of financial information related to the business, DDL. ML and RL are joint owners of DDL.

[22] At the pre-trial scheduled on April 1, 2022, AA's counsel expressed concern about ML failing to complete interrogatories which were to be completed by February 19, 2021.

[23] On September 13, 2021, the parties agreed they would continue settlement conference discussions on January 31, 2022, as they anticipated the expert's, DJ's, Guideline Income Report would be available by that time. However, the follow up

settlement conference date scheduled January 31, 2022 was released by the parties on January 31, 2022.

[24] On February 18, 2022, counsel for AA changed. The parties acknowledged that an expert, DJ, had been jointly retained to complete the Guideline Income Report. In anticipation of the expert's Guideline Income Report being available to the parties by March 31, 2022, filing deadlines were provided for trial dates scheduled in June 2022.

[25] At the pre-trial scheduled on April 1, 2022, the court was advised that in December 2021, ML stopped paying child support which he had been paying based on an agreement the parties had reached at a settlement conference held in February 2021. Further, counsel raised the issue of failure to pay the expert's invoice for the Guideline Income Report as an issue impeding the parties' progress.

[26] On May 30, 2022, counsel for AA and ML both sought an adjournment of the trial dates fixed by the court in September 2021 for June 2022. AA argued there was outstanding disclosure needed from ML. ML's counsel suggested that due to "the complexities" of ML's involvement with DDL, he would not be ready to proceed to trial as scheduled in early June 2022.

[27] On July 7, 2022, AA's legal counsel filed a Notice of Motion for Interim Relief seeking to address the issue of interim child support pursuant to s.9 of the *Parenting and Support Act* / *Guidelines* pending a final trial. ML was still not paying AA child support according to the agreement the parties had reached at the settlement conference in February 2021.

[28] ML alleged AA had stolen an engagement ring from him and that she had sold it for $7,000. In or around July of 2022, ML had threatened to contact the police regarding AA's sale of a ring he suggested had been purchased in 2010, and he claimed was worth $100,000 to $200,000. AA claimed ML had purchased the ring for her in 2008 and that he had given her the ring. ML subsequently filed documents to support that in 2004 the ring in question had been appraised at $51,000.

[29] At trial, ML acknowledged that in July 2022, while he was still not paying child support according to the agreement the parties had reached in February 2021, he had threatened to report AA to the police for theft of the ring. ML agreed he had written an email to AA suggesting that her lawyer would be implicated in the police investigation regarding the alleged theft and sale of the ring.

[30] On July 12, 2022, I directed ML to follow the Interim Order on child support which had been issued on March 12, 2021. In September 2022, AA filed a Motion for Contempt against ML for non-payment of court ordered child support.

[31] The parties attended a case management conference on October 4, 2022. The parties were in receipt of a "draft" copy of DJ's Expert Guideline Income Report. ML indicated he needed time to consult with his bookkeeper and his accountant, and he did not anticipate DJ finalizing a Report for another three months. ML continued took the position that no additional financial documents from DDL should be disclosed to anyone other than DJ, in keeping with the parties' previous agreement. ML's legal counsel acknowledged that some older financial documents from DDL had previously been released to AA and to her legal counsel.

[32] The case management judge discussed the issue of interim child support with the parties. **Concerns were also raised about the payment of the children's health insurance** and about the contempt motion being brought by AA regarding child support. The case management judge emphasized that the child support agreed to by the parties in February 2021 needed to be paid by ML.

[33] At the pre-trial conference on January 23, 2023, AA's legal counsel suggested they had not received full financial disclosure from ML. That they were still requesting the following documents:

> 2021 year end financial statements from DDL
> 2021 Income Tax Returns and Notices of Assessment from DDL
> 2020 Income Tax Returns and Notices of Assessment from DDL

ML expressed concern that AA would release details about DDL's financial information to others. I granted an Order for Production for DDL's financial information directing AA's legal counsel to include a provision prohibiting AA from disclosing any of DDL's financial information to anyone other than her legal counsel.

[34] Following the pre-trial held on January 23, 2023, on or about January 26, 2023, a detailed Conference Memorandum was circulated to the parties. Paragraphs 27 through 32 addressed issues related to income determination. At paragraph 27 (h) I stated:

> (h) If ML wishes to challenge the findings in the Guideline Income Report he should consider calling another expert witness and that witness should also file a report at least three months in advance of the trial scheduled for the end of January and first of February 2024.
>
> …

According to my instructions, a rebuttal report was due from ML no later than **October 30, 2023**.

[35] A further settlement conference was held on April 25, 2023, and at that time issues related to interim parenting were resolved / and interim agreement placed on the record. The parties agreed to adjourn child support and AA's property claim to a full day settlement conference on October 16, 2023. Filing directions were discussed:

1. In response to the expert's report, ML indicated he would not be filing a rebuttal expert report (contrary to my suggestion in January 2023) but he indicated that by **May 25, 2023**, he would be filing affidavits from his bookkeeper and from his accountant for the expert to review and comment upon.

[36] In advance of the settlement conference in October 2023 and the trial dates in early 2024, both parties were directed to file updated Statements of Income, Statements of Expenses, and Statements of Property, and to file any updated affidavit evidence: AA was to file her documents **by September 11, 2023** and ML was to file his documents by **September 18, 2023.** A Conference Memorandum was provided to the parties.

[37] On May 28, 2023, ML requested an extension to **June 25, 2023** to file affidavits sworn by his bookkeeper and accountant for review by the expert, DJ, in advance of the settlement conference scheduled in October 2023. On July 11,

2023, AA wrote to the court objecting to ML's request for an extension. ML did not file a Notice of Motion to extend his filing deadline.

[38] A pre-trial was scheduled on or about November 6, 2023. ML did not appear at the pre-trial (later claiming there had been a death in his family).

1. AA's counsel requested I confirm the Order for Production for the financial records of DDL. The matter was scheduled for a conference / motion hearing on November 20, 2023.

2. New filing deadlines were provided for trial in January 2024 / February 2024:

> **Financial Statements and reports by December 11, 2023;**
> AA's evidence by December 18, 2023;
> ML's evidence by January 2, 2024;
> AA's reply evidence by January 8, 2024;
> Briefs by January 15, 2024
> Exhibit books by January 22, 2024
>
> (my emphasis)

[39] On November 20, 2023, legal counsel for DDL appeared at the conference / motion hearing, by agreement of the parties:

1. A term was added to the Order for Production I had granted in January 2023. The Order was Amended to specify that AA could

view DDL's financial documents but only her legal counsel would be provided with copies of the documents.

[40] ML requested the trial scheduled to begin at the end of January 2024 be adjourned. He was directed to file a Notice of Motion and supporting documents with the court by **December 11, 2023**, to be heard on December 18, 2023. He filed a letter. On December 18, 2023, the parties made submissions regarding ML's request for an adjournment of the trial dates or for the matter to be bifurcated. I denied ML's request for an adjournment / bifurcation. ML did not appeal my decision.

[41] ML advised the court that for the purposes of child support, an income of $140,000 (including benefits from his corporation) was a more accurate reflection of his income. Further, he stated that he continued to disagree with the report completed by DJ and that he had hired his accountant, IF, to prepare a report to be submitted at trial and that **the timeline for the preparation of the report was "unknown" to him at that time.**

6 Property / Appraisals / Valuation date

[42] At the case management conference on October 4, 2022, the parties confirmed they had agreed to "joint appraisals" on ML's three properties which

had been identified by AA, however, they had not yet worked out the "details" (identification of the appraiser; how to account for changes made to the properties since the parties' separation; and how to get an accurate value at separation). The court directed counsel to obtain instructions from their respective clients and to finalize the details of the appraisals within 24 hours or the matter should be scheduled for a motion hearing. Legal counsel for ML suggested he may also request an appraisal of property (Chezzetcook) he believed was owned by AA.

[43] On or about October 5, 2022, AA sought to address outstanding issues related to the preparation of appraisal(s) of ML's property. On November 30, 2022, ML's legal counsel advised AA's counsel that ML was no longer agreeable to sharing the cost of the appraisals.

[44] Later ML stated that following the case management conference held on or about October 4, 2022, he had never intended to share the cost of the appraisals of his property. On December 15, 2022, the day before the appraisals were scheduled to proceed, ML's lawyer advised AA's lawyer that ML had retracted his agreement to allow the properties to be appraised.

[45] On January 23, 2023, ML was representing himself. AA confirmed she would pay the cost of the appraisals, and I directed AA's legal counsel to draft an

order to reflect the parties' agreement to have three of ML's properties appraised. I also directed AA to cooperate with any requests by ML to appraise any property she owned.

[46] With respect to the appraisals, ML raised a concern about an inability to account for what he claimed were significant renovations which had been completed on his properties after the parties separated and a concern related to the valuation date the court may use. The court directed the parties to file a draft order detailing the partial agreement regarding appraisals which the parties had reached at and / or following the case management conference held in October 2022 and / or to file a Notice of Motion if relevant details could not be resolved by agreement. On May 4, 2023, my office confirmed with the parties that **absent other arguments and / or persuasive caselaw, counsel should be prepared to argue the factors / findings in *Simmons v Simmons*, 2001 CanLII 4617 (NS SF) when determining the valuation date.**

[47] On July 26, 2023, ML wrote to AA's legal counsel and stated in part:

> …
>
> At this point I'm willing to allow a appraisal on both or joint appraisal of locations by whoever you wish, **I am not paying anything towards fees as I'm not interested in this and find this a complete waste of time** on a witch hunt for the gold and I got raked over the coals for Dan Jennings report that is beyond stale now.
>
> I would like for your client **AA to prove her entitlement to my properties**? …

> Also my legal fees till I released them and all my admin staff cost too will be added to my counter claim and as the judge said she will assign to who ever the cost of the other if she finds out who is causing delays.

[48] On July 26, 2023, AA's counsel responded as follows:

> …
>
> Thank you for the quick response, and your agreement regarding the appraisals. I have attached a draft Order for your review which reflects the agreement. If you could print, sign, and dop off at my office (or scan and return to me via email), that would be greatly appreciated.
>
> I will contact Paul Young from Kempton Appraisals again. He will then contact you to actually schedule the appraisals…

[49] On August 23, 2023, AA filed a motion by correspondence requesting the case management judge grant an order respecting the parties' agreement with respect to the appraisals.

[50] On August 28, 2023, AA's counsel wrote to the settlement conference judge. She expressed concern that in advance of the settlement conference continuation on October 16, 2023, the parties had not yet filed "all disclosure and expert reports obtained and exchanged prior to that date" and the date was released from the docket. On September 6, 2023, AA's legal counsel wrote to the court seeking confirmation of filing deadlines for the final trial in January / February 2024. The parties were advised that any request to adjust filing deadlines would be addressed at the next court appearance in November 2023.

[51] On October 23, 2023, AA's legal counsel sent correspondence to ML asking him if he would be signing the draft order (re: appraisals) she had sent to him on or about July 26, 2023. She stated that if he was unwilling to sign the draft order, she would file a motion with the court. On October 24, 2023, ML responded as follows:

> …
>
> Please file a motion then as I'll take that as a threat on your part and the reason I didn't sign is because you have **a number of errors in the document again stating joint appraisals aka I'm paying for part**.
>
> **I'm not agreeing to paying for any part of a fictitious process of valuation** of my assets that your client has zero part in.
>
> I agreed to allow the appraisals to proceed and that was what I agreed to with Justice MacKeigan in October 2022, **since then it's been changed that I was paying and that was never agreed to by myself and never agreed to present day value which was another item presented before to make my (sic) retract my approval.**
>
> I agreed yes then the terms were twisted so I retracted and here we are again you present me with a similar document that I'd agree to pay and stuff lol then threaten me with a motion so please file a motion I would like the Justice to hear of these tactics you are trying to trick me into things.
>
> Further more I will be filing **notice pertaining to unjust enrichment with your client with Ms. C's knowledge which implements (sic) her in this crime committed of a $200,000 heart shaped diamond ring** that was stolen out of my safe and later sold when asked where it was plus it's (sic) return and furthermore sold for more then (sic) $5000 which under our laws is a act of grand thief or grand larceny examples below.
>
> I have full evidence of the ring in question and evidence it was sold for $7000 by Ms. C.

ML attached printed information related to the potential criminal penalties for theft over $5000.

[52] On October 25, 2023, AA filed a Notice of Motion (Family Proceeding) requesting an Order permitting access to the following properties for the purpose of the properties being appraised:

1. The disputed property, Porters Lake, Nova Scotia, B3E 1H7 (PID 41057001);

The parties' former residence, Lake Loon, Nova Scotia, B2W 3P3 (PID 00620559), including adjacent lot 11 Montague Road, Westphal, Lot 11 (PID 00620518);

2. RL's property with Quonset Hut, Porter's Lake, Nova Scotia, B3E 1H7 (PID 41057019):

An Order (Family Proceeding) with respect to the disputed property and the parties' former residence was granted by the case management judge having responsibility for the file in October 2022 and was issued on October 30, 2023. The order did not address who would pay for the appraisals or which valuation dates would / should be used. Both parties were ordered not to impede the preparation of the appraisals.

[53] AA suggested that on or about November 16, 2023, after AA and / or her counsel discussed with ML that the appraisals would include a retroactive value as

well as a current value, ML unilaterally terminated the appraisals. ML later suggested his brother, RL, had refused to allow the appraiser access to the Quonset Hut which was situate on land ML suggested was either owned by RL or held by RL or held by their mother. At that time ML confirmed that he owned the Quonset Hut. ML advised the court he was prepared to allow the appraiser to attend at Post Office Road on December 7, 2023 and to attend at Montague Road on December 14, 2023.

[54] AA sought costs related to the appraisal which did not proceed as previously agreed by the parties. It was agreed the **issue of costs for the motion would be addressed at the conclusion of the final hearing of this matter**.

[55] On January 9 and January 26, 2024, ML wrote to the court seeking to file updated financial information / an affidavit and / or a report to be considered by the expert forensic accountant, DJ. ML argued that if the court was allowing AA to file an appraisal(s) later than anticipated, that he should be permitted to file additional information related to the findings in the expert Guideline Income Report. I denied his request, and he did not appeal my decision.

7 Final Trial

[56] On the first day of trial on January 29, 2024, the parties recorded their final parenting agreement on the court record. There were several motions before me in relation to the remaining issues: income determination / child support; and the common law property claim. The parties agreed to a continuation of the hearing in May 2024 based on the following terms: ML would provide AA a without prejudice payment of $15,000; as of February 1, 2024, ML would pay AA a monthly child support amount of $3,000; and ML would continue to pay AA's vehicle expenses and insurance payments, and he would provide AA with a copy of the insurance card for her vehicle. AA reported that after ML paid $3,000 in February, March, April, and May 2024, and ML then reverted back to payments of $651.33 per month.

[57] I determined the only additional documents to be filed in advance of the trial scheduled to continue May 21 – 24, 2024, would be appraisal reports, which were to be filed by April 9, 2024, and calculations from the parties (re: child support owing). Neither party appealed my decision.

[58] On May 21, 2024, discussions ensued with respect to documents which had been filed on January 9, 2024 and then included in trial exhibits. I excluded certain documents as evidence at trial due to late filing. Neither party appealed my

decision. The matter continued May 22, 23, and 24, 2024; June 18 and 19, 2024, and was then adjourned to September 19 and 23, 2024 and finally to October 2024.

8 Additional evidence after trial concluded September 23, 2024

[59] During cross examination, ML claimed the unsigned "cohabitation" agreement submitted by AA and purported to have been drafted by ML's former legal counsel, FM, was falsified. ML claimed evidence from his former legal could prove the draft agreement was false. I adjourned the matter to October 10, 2024 to give M.L an opportunity to call evidence from his former counsel, FM. No further evidence was filed.

[60] By request of the parties, filing deadlines for submissions were initially December 3, 2024; January 10, 2025; and January 17, 2025. On November 28, 2024, legal counsel requested the deadlines for submissions be extended to December 13, 2024; January 24, 2025 and to January 31, 2025.

9 Issues

1. The Parties' Income for Child Support /
2. Child Support
3. Identification of Real Property
4. Common Law Claims for Interest in Real Property

5. Other property

6. Unjust Enrichment

    a. Enrichment

    b. Corresponding Deprivation

    c. Absence of Juristic Reason

7. Joint Family Venture

    a. Mutual Effort

    b. Economic Integration

    c. Actual Intent – Draft Cohabitation Agreement

    d. Priorities of the family

8. Remedy Unjust Enrichment

9. Credibility

10 AA's income

[61] AA suggested that she had an unincorporated Sole Proprietorship – AA and Co business services – and indicated that over the years she has provided consulting services – IT project management to clients. In January 2023. AA indicated she was working for Adesso Project Management Inc, as an IT consultant

and she was earning a gross annual income of $104,000.00. AA claimed her income for child support / sharing section 7 expenses was $103,946.00.

[62] AA stated that her responsibilities also included but were not limited to arranging for the children's: attendance at daycare / school; medical care including services for L's symptoms of autism; and outside activities and programs. She stated that she had always been the primary care giver, and was responsible for ensuring the day-to-day needs / care of the children were met in her home more than 60% of the time and at times closer to 100% of the time.

[63] ML described AA as a "business owner, independent contractor, and IT project consultant." He stated that "except for a few weeks after their children's births, she worked throughout the relationship." ML stated that AA took "brief maternity leaves, rejoined work easily, and had childcare funded by" him throughout the parties' relationship. ML suggested that AA's career remained unaffected due to AA having primary responsibility for the care of very young children during the parties' relationship and after the parties' separation.

[64] At trial, AA acknowledged that between 2012 and 2015, she was a 100% shareholder in an incorporated company, Black Orchid Project Management Inc. AA indicated she had not disclosed any financial information related to the Black

Orchid company and that the company ceased operations in 2015 / 2016, before the parties separated in 2017. She claimed she did not believe her income prior to separation was relevant, and she had lost much of her previous company's financial documents in a flood three or four years previously.

[65] AA claimed ML knew about her company and / or he should have known, and that ML's accountant, Mr. Flewellyn, helped her with the accounting for her company. I accept that the Black Orchid Project Management Inc. ceased operations before the parties separated. I would think that disclosure of the Black Orchid Project Management Inc. documents for the period between 2012 and 2015 might have been relevant to bolstering AA's claim that she earned sufficient income to contribute to the construction of the disputed property.

[66] I accept that ML may have known very little about AA's business(es) activities as he was often away for work. I also accept that AA likely offered ML very little information about her business(es). However, I would also note that ML loaned money to AA for one of her businesses (Concierge), and he claimed he had asked her to pay him back, and he believed she had paid him back, but he stated that he did not keep good records.

[67] AA filed Notices of Assessment indicating that between 2010 and 2015 her line 150 income was:

- 2010: $68,142
- 2011: $67,375
- 2012: $54,369
- 2013: $51,768
- 2014: $51,498
- 2015: $48,394

AA's line 150 income decreased after the birth of the parties' first child in 2012, and it remained quite low until after 2015, after she began receiving income from DDL.

[68] ML stated that in 2011 AA was earning approximately $50,000 per year and she would not have qualified for a $60,000.00 loan from third parties without his personal relationship with the lender. However, I find it is more likely than not that ML was aware that AA was earning more than $50,000 per year and he understood that not all of her income was reflected on her line 150.

[69] Messages between the parties indicate that ML made vague and at other times more pointed threats to AA about alerting someone (presumably the CRA) about AA not accurately reporting her personal / financial circumstances to the CRA. Presumably, any failure by AA to report personal / financial circumstances

which resulted in additional credits and benefits for the parties' children and / or family benefited both AA and ML.

[70] All evidence points to AA being a competent businesswoman who was likely earning more income than she reported on her line 150, not unlike many other self-employed business owners. I find that any unreported funds available to AA were most likely used for a family purpose, including but not limited to paying for a good portion of the children's extracurricular activities and / or when able, making contributions to the construction of the home at the disputed property.

[71] The parties agree that as of approximately 2015, AA received a salary of approximately $651.33 (credited $469 per month) or $7,812 per year (which she paid tax on) from Dominion Diving Limited (DDL). AA described the salary from DDL as a form of "income sharing" which she stated began while the parties were together. ML suggested AA was paid for organizing certain recurring corporate events for DDL and / or the salary was in place to provide AA with some security in case something happened to him as his job involved substantial risk. Later in his post trial submissions he suggested:

> despite not performing any work for DLL(sic). She used those funds as she wished and this was another source of money to pay for family expenses and that she claims credit for. Again, she received the benefit and did not have to use her own money.

On the one hand, when ML was being asked questions about economic integration etc…at trial, ML suggested AA was paid for work she did do for DDL – event planning. However, in his post-trial submissions he claimed "she received a salary from DDL without performing any work.

[72] The parties at times disagreed about why DDL paid a salary to AA prior to their separation. However, the parties did agree that after separation in 2017, AA did not provide any services for DDL and the salary DDL provided to AA should be considered as payment in lieu of child support and adjusted for tax consequences as necessary ($651.33 less 28%, $469 per month credit to ML) when recalculating any child support owed by ML to AA for their two children between **April 1, 2018 and June 2020** prior to formal notice and as of July 1, 2020, after AA filed her Notice of Application with the court and sought prospective child support.

[73] The parties also agreed that the vehicle expenses of ML's company, CSH, at times covered for AA after the parties' separation were being paid in lieu of ML paying child support to AA, and they must be accounted for towards child support. Following the parties' separation in November 2017, any payments made by ML on AA's Mercedes vehicle for the benefit of AA and the children in lieu of child

support, shall be considered as credits for child support owed by ML between April 1, 2018 and January 1, 2025 and thereafter.

[74] I find that on or about March 4, 2018, AA gave ML notice that he was underpaying child support. Child support is the right of the children, and ML failed to take steps to determine his Guideline Income with any degree of accuracy prior to formal notice being given to him in June 2020. As such, I am prepared to recalculate child support between **April 1, 2018 and June 1, 2020 and to recalculate interim child support paid between July 1, 2020 and January 1, 2025,** and to order that ML continue to pay child support thereafter.

[75] On February 28, 2020, AA swore a Statement of Income which was subsequently filed with the court on June 25, 2020. The Canada Revenue Agency documents attached to her Statement of Income indicated her reported line 150 income was as follows:

- 2016 $114,110
- 2017 $91,439
- 2018 $92,189
- 2019 $91,192
- 2020 $84,999.96 (Estimated income from Adesso Project Management as of February 28, 2020)

AA's reported line 150 income increased between 2015 ($48,394) and 2016 ($114,110) and remained relatively consistent after the parties' separation.

[76] On April 14, 2022, AA filed an unsworn Updated Statement of Income with attachments suggesting her income from Adesso Project Management was $92,141.52, with other income reported as follows:

- **2019 $99,382.26** (not $91,192)
- 2020: $97,274
- 2021: $91,896.57

In her pre-hearing brief filed in January 2024, AA claimed her post separation income was as follows:

- 2018: $92,190
- **2019: $99,382**
- 2020: $97,274
- 2021: $99,457 (DDL stopped paying AA a salary / considered child support)
- 2022: $103,946
- 2023: $103,946 (DDL resumed paying AA a salary / considered child support)
- 2024: $103,946

I accept AA's representations about her income as filed in her pre-hearing brief filed in January 2024.

[77] The salary paid by DDL to AA between November 2017 and January 2025 is considered child support and has been credited to ML as child support. Therefore AA's line 150 income, listed above should be reduced by the amount of "income" AA received from DDL each year (Nov 2017 onward). AA's adjusted

income would be used when recalculating any section 7 expenses based on both parties' incomes, for a proportionate sharing of section 7 expenses.

10.1 Need / Lifestyle

[78] ML argued that in September 2020, AA claimed her expenses were $6,210.00, with a deficit of ($807.00) and therefore AA did not require child support of $5000 or more from him. That based on AA's salary, she and the children did not need him to pay AA over $5,000 in child support per month. AA subsequently filed Statements of Expenses in April 2022, claiming expenses of $8,095 and a deficit of ($2,456); and she filed an Updated Statement of Expenses on December 18, 2023 indicating her expenses were $8,520.88 with a deficit of ($1007.97).

[79] The parties' previous lifestyle with their children is relevant when determining how much if any ML should be court ordered child support based on an income of over $150,000. Child support is determined according to a payor's yearly *Guideline* income – not according to what ML may feel are the children's basic needs after separation / or what the children's needs are after accounting for what the primary caregiver can afford – reference to s. 4 of the *Guidelines.* (*Cross v Batters*, 2016 SKCA 71, 81 RFL (7th) 55.)

[80] With a payor earning over $150,000, the court must look to evidence of the parties' lifestyle. In this case, the evidence of the parties' lifestyle prior to separation does not support a conclusion that the Guideline Income amount payable by ML should be reduced. ML's financial resources / revenue allowed him to confer numerous benefits on AA and directly or indirectly on the children including but not limited to the following:

1. Loan for the startup of AA's business (prior to cohabitation);
2. the luxury car(s) and / or other vehicle expenses covered by ML's company for AA's benefit ($1,400 car payment; $2,200 annual insurance; $400 annual permitting; and $650 monthly for tires and maintenance); use of the Cadillac and other vehicles, freeing up money for AA to spend on the children's activities/ programs/ daily needs, or other items / investments benefiting the family;
3. the transfer of approximately $2,000 per month in rental income from the parties' former residence tenants which ML used to assist AA in covering the family's additional day-to-day expenses, such as food and other expenses for AA and the children while ML was away and / or in residence and other mostly cash contributions to living expenses

ML made or gave to AA and the children, to support their lifestyle while living at the parties' former residence;

4. AA's having access to several of ML's credit cards which he paid off monthly;

5. ML underwriting vacations for the parties and for their children;

6. As of 2015 AA receiving a salary from DDL of $659.69 per month (taxable in her hands) until December 2021 and again after January 2023;

7. ML covering AA's and the children's medical expenses and / or childcare;

8. ML covering $35,000 in expenses for the parties' ceremonial wedding;

9. ML buying AA jewelry, including a ring he alleged was worth between $100,000 and $200,000 but later suggested sold for $7,000 / was appraised in 2004 at $51,000;

10. ML covering mortgage, some other utilities, expenses for childcare; home maintenance; and housekeeping.

[81] AA referenced *Francis* v. *Baker*, 1999 SCR 250 (holding there is a presumption in favour of the table amount); *T* (*DMC*) v *S* (*LK*), 2017 NSFC 22 (need for "clear and compelling" evidence to rebut the presumption in favour of the table amount"); *Breed* v. *Breed* 2012 NSSC 83; and *Woodford* v. *Horne*, 2015 NSSC 208; and *H (JE) v. H (PL)*, 2014 BCCA 310 (payors seeking to depart from the table amount, face a "formidable onus to establish that the children could not reasonably use the extra funds"), when she argued the burden to depart from the table amount was ML's to prove. AA took the position that ML had not met his burden.

[82] Another case often quoted by courts in reference to the interplay between sections 3 and 4 of the *Guidelines* is *Potzus* v. *Potzus,* 2017 SKCA 15. The court in *Potzus* stated at paragraph 117 that:

> [117] It is clear from *Francis* that there is an elastic range within which various amounts of child support are appropriate. 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**. A modest pre-separation lifestyle is justifiable reason to depart from the Table amounts, as *Cross* demonstrates, while less cautionary habits may push the generous ambit to its outer limits. **A family's lifestyle and pattern of expenditure are relevant and important considerations in determining appropriateness under s. 4 of the *Guidelines***: *R. v R.* (2002), 2002 CanLII 41875 (ON CA), 24 RFL (5th) 96 (Ont CA). (my emphasis)

[83] The court in *Potzus* (supra) also stated at paragraph 64:

> [64] generally speaking, the onus rests on the parent who is the shareholder, director or officer of the corporation to establish that pre-tax income of the corporation is not available for support purposes"

I find this matter to be more analogous to the case in *Francis* (supra), and not *Cross* (supra).

10.2 Special and / or Extraordinary Circumstances

[84] AA's yearly income for child support post separation is relevant when considering her claim for prospective special and / or extraordinary expenses for the benefit of the children.

[85] In her Parenting Statement and Statement of Special and / or Extraordinary Expenses both filed on **June 25, 2020**, AA suggested she was seeking a contribution, both retroactively to November 2017 and prospectively after June 2020 from ML, to the following special expenses:

1. After school childcare ($700 per month);
2. Holiday, including summer holiday childcare ($1,600 per month);
3. Reimbursement for a share of health-related expenses which exceed insurance reimbursement by at least $100 annually (ADHD treatment expected in the future); and

4. Contribution to extraordinary expenses ($125 per month) for extracurricular activities (gymnastics, soccer, swimming, tutoring etc.).

[86] On **April 14, 2022**, AA filed an Updated Statement of Special and / or Extraordinary Expenses, where she claimed the following:

1. $304.02 each for the Excel Program for both children September to June. I inquired about the after-tax cost.
2. $800 each for summer camps in July and August.
3. $64.08 per moth for gymnastics for both children. extraordinary per s.
4. $150.42 on average for the chiropractor for L.

On December 18, 2023, AA filed a further Statement of Special or Extraordinary Expenses prepared November 29, 2023. She was seeking contributions from ML pursuant to s. 7(a): childcare / after school expenses – Excel Program/ MAP, (c) health-related expenses (chiropractor) and (f) extraordinary expenses for extracurricular activities. All special expenses should be shared on a proportionate basis. For any requests to share "extraordinary expenses" I expect the person requesting the order to comment about why an expense might be extraordinary pursuant to 7(1)(1.1) of the *Guidelines*?

[87] ML raised the issue that AA had received and was still receiving childcare benefits and child tax credits for the children from the Canada Revenue Agency. AA disclosed that she is eligible to claim and / or she receives subsidies, benefits, or income tax deductions or credits of approximately $819 per month - related to various programs / services (Excel Program, Titans Gymnastics, Paddling, Chiropractor, MAP, St Andrew's Yoga) which she claimed she had accounted for when making her requests. AA has an obligation to always provide ML with the "net" cost of any special and / or extraordinary expense for either child before requesting the parties share any expense in proportion with their respective incomes.

[88] AA is seeking the following recalculations for contributions from ML to special or extraordinary expenses:

a. 2018: $532 x 12 = $6,384
b. 2019: $261 x 12 = $3,132
c. 2020: 100 x 12 = $1,200
d. 2021: $294 x 12 = $3,528
e. 2022: $381 x 12 = $4,572
f. 2023: $518 x 12 = $6,216
g. 2024: $518 x 12 = $6,216

A total of **$31,248** in recalculated section 7 expenses. ML has argued he owes nothing.

[89] I am not prepared to order ML to pay for expenses related to either child's enrolment in Titan's Gymnastics 2023, 2022, 2021, 2020, or 2019 and enrolment in St. Andrew's Yoga in 2019 as there is insufficient evidence to prove these were extraordinary expenses per s. 7(1)(1.1) of the *Guidelines*.

[90] I am prepared to order ML contribute proportionately to the net cost of enrolment in paddling camp 2023, 2022, 2021 – as I feel there is sufficient evidence to find the camps were most likely required because both parents were working and / or unavailable.

[91] Special expenses such as childcare (before and after school care / holidays – if the parents were working); health care (chiropractor / uninsured treatment for ADHD or autism or other); and tutoring required by either child based on a professional referral, shall be shared by the parties proportionately both on a retroactive basis between January 1, 2018 and June 1, 2020 and prospectively from July 1, 2020 onward.

[92] AA filed her Notice of Application in June 2020 and I find on balance of probabilities that AA gave notice to ML about the children's need for increased financial support by the end of March 2018. In *A.M.G. v. C.J.K.*, 2024 NSCA 62, Bourgeois J.A stated in part:

> [121] The framework for addressing a claim of retroactive child support was re-affirmed by the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24. There, Justice Martin set out the following analytical steps: …
>
> This case does not involve a variation of child support but rather a recalculation based on a determination of date of notice and a payor's Guideline Income for child support in the first instance. The relevant period of inquiry starts after the parties' separation in November 2017.

[93] The court's comments in *M.G.* (supra) are relevant to this application for child support in the first instance:

> [110] Full and complete disclosure is required to quantify the appropriate amount of support for the period of retroactivity, just as it would be when quantifying prospective support (*Brown*,[24] at para. 20). The onus is on the payor to show the extent to which their income decreased during the period of retroactivity (*Templeton*,[25] at para. 65). If the payor fails to provide all relevant evidence required for the court to fully appreciate their true income during any part of the period of retroactivity, the court may draw an adverse inference against the payor (*Templeton*, at para. 67).
>
> …
>
> [125] ... Discretion to vary from the "table amount" must find its foundation in the *Guidelines*.

There is no evidence that ML disclosed any relevant financial information to AA prior to AA filing her Notice of Application in June 2020.

[94] Between November 2017 and June 2020, AA had no way of knowing what ML's Guideline Income was to determine a fair monthly payment of child support. The evidence indicates that following the parties' separation in November 2017 and the end of March 2018, AA and the children continued to reside in the home owned by ML – with ML paying the mortgage and continuing to provide the family with other financial benefits – which I find to have been a payment in lieu

of child support. That "notice" from AA to ML for a need for a change in the method of payment of child support was given in early March 2018 for April 1, 2018.

[95] On March 4, 2018, AA notified ML that she and the children would require financial support provided differently as it was her intent to leave the parties' former residence with the children. There is no evidence that, prior to AA filing her Notice of Application in June 2020, ML made any effort to determine his Guideline Income and / or what financial support he should be providing for his children. As of April 1, 2018, effective notice was given by AA to ML that ML was underpaying child support, which she confirmed again in June 2018.

11 ML's Yearly Income for Child Support

[96] In both her briefs, filed in January 2024 and in January 2025, AA asked that I attribute and / or impute an income of $444,000.00 to ML for the period between January 1, 2018 to January 2024 @ $66,192 per year or $5,516 per month for a total of $402,688 in retroactive child support (January 1, 2018 to June 1, 2020) and prospective child support (July 1, 2020 to January 1, 2025), owed by ML over a period of six years and one month.

[97] Accounting for third party child support payments made by ML to AA in lieu of child support, either as salary from DDL and / or ML ($39,731.13); and / or paid in lieu as vehicle expenses (Mercedes) covered by CSH and / or ML of ($62,038.50 - she paid $4,200). AA argued that as of January 2024, ML owed her outstanding child support of $305,098.37 for the period between January 1, 2018 and January 1, 2024. Based on AA's updated calculations filed in January 2025, AA argued that ML owed her child support of **$353,266.13** for the period between January 2018 and filing her final submissions in January 2025.

[98] In his reply brief filed at that end of January 2025 ML suggested he should be ordered to pay **$1,872 in child support per month and there should be no recalculation of child support**. At one point during the proceeding, ML had suggested a reasonable amount of child support would be $400 per child and 50 percent of special and extraordinary expenses. As previously noted, in March 2018, ML responded to AA's proposal by suggesting to AA that he would be prepared to pay child support to AA of:

- $1,100 for the kids which is almost double the normal amount.

[99] In his initial written submissions, ML argued that no child support was owed and that he should pay **ongoing** child support based on a yearly income for child

support of $140,000. He suggested that his ongoing child support obligation should be set at $1,872 as **of February 1, 2024**.

[100] Despite the children's right to child support, after being notified by AA, prior to June 2020 ML failed to take steps to determine what his Guideline Income was and / or to negotiate with AA in good faith to determine a fair monthly payment of child support based on his Guideline Income. It was not until after AA filed a court application in June 2020 seeking disclosure of ML's corporate financial information that he agreed to the preparation of a joint Guideline Income Report and the expert, DJ CPA, CA, CBV, CF and Partner with BDO was retained.

[101] I accept the expert's representation of ML's line 150 income:

Year	M.L's representations	Expert DJ's Report
2018	$85,389.62 in 2018	T1 $85,390.00 26.9%
2019	$85,389.62 in 2018	T1 $89,057.00 27%
2020	$93,520.00 in 2020 (includes CERB of $6000);	T1 $87,520 + RRSP income of $6,000 - $93,520.00 (27.2%)
2021	$86,334.24 in 2021	T1 $87,520.00
2022	$93,579.62 in 2022	

[102] In or around September 2022, DJ (DJ) CPA, CA, CBV, CF and Partner with BDO provided the parties with a "draft" Guideline Income Report. Based on his analysis, he suggested ML's available Guideline Income was:

1. $395,000 in 2018;
2. $476,000 in 2019;
3. $565,000 in 2020; and
4. $348,000 in 2021.

The expert, DJ, provided the parties with an opportunity to make suggestions, to challenge his findings, and / or to ask questions.

[103] ML argued that the Guideline Income Report prepared by the expert, DJ, was flawed due to:

> mischaracterized analysis, incorrect calculations and formulas, unfounded assumptions despite available data, overlooked relevant evidence, and misapplication of rules to conclusions."

As noted above, deadlines were provided by me and by another judge and adjusted once again to allow both parties an opportunity to challenge DJ's findings and / or to ask questions of DJ prior to the expert report being entered as evidence at trial, while also of course acknowledging both parties' right to ask the expert questions at trial.

[104] The *Provincial Child Support Guidelines* state in part:

> 3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.

11.1 The Expert Report

[105] The overall objective of ss. 16-20 in the *Guidelines* is to find an amount that fully and fairly reflects the income available for payment of support. As noted, the parties' joint expert prepared a Guideline Income Report to determine ML's available yearly Guideline Income for child support, submitted to the parties in or around September 2022.

[106] At trial in 2024, the parties both consented to the expert, DJ, CPA, CA, CBV, CF and Partner with BDO being qualified as a "forensic accountant qualified to give evidence on the determination of guideline income from business owner spouses in matrimonial matters." I found D.J. to be a qualified expert as stated above.

11.1.1 Joint Retainer

[107] At the outset of his testimony the expert, DJ, commented in part as follows:

> **MR. JENNINGS:** For experts, a joint retainer means both parties are our clients. And over time, our profession has developed some guidelines around how to deal

with information disclosure during a joint retainer, but it's essentially around making sure that all parties participate in all steps of the process, including the production of draft reports and, and providing comment and, and rebuttal comments. But a joint 5 retainer is fundamentally about we are engaged by both parties, meaning we can't subsequently be engaged by one of the parties.

…

A. So, ML is …, a 50 percent shareholder in the Dominion Diving Limited, an offshore diving operation business that he co-owns 50/50 with his brother RL. MLs also owns a company called Canadian Subsea Hydraulics Limited. CSH is what's been the acronym for it in my report. ML is 100 percent shareholder of that company.

…

A. As is common in, in these kinds of matters, when a business owner goes through a marital break-up, the determination of his or her income for spousal and child support purposes is much more complex than if its an employee. So, the guidelines refer to the Court **may wish to consider all or part of the income from companies, corporations in which the spouse is a shareholder** in, and that's the role, typically of, as 5 in this case, typically of an expert is **assisting the Court in determining what the all or 6 part of the income might be.** And the critical part in, in that, that, that we made clear in our engagement letter, **the definition of guideline income for this, in the circumstances, is available to the spouse**. **So, what the spouse has taken as salary or dividends from his or her companies is often not relevant**. It's the determine of, what, **determination of what's available to the spouse.**

…

A. …I'm required to list all of the documents that we considered and relied upon in our analysis and our conclusions.

…

A. There were numerous email correspondence with ML's external accountant, Corporate Controllers Inc, asking for question, asking questions or clarifications and/or documents that were not part of the initial batch of disclosure and this is very common in these types of analysis that you can't determine the guideline income for a business owner's spouse using just financial statements.

…

MR. JENNINGS: Very common in these types of analysis that you require detailed accounting records and access to external accountants to clarify certain items and questions. **So, starting with the financial statements is, is, sorry, the financial statements are the just the beginning, the start of the guideline income analysis. So, there were numerous email correspondence with the external accountants, CCI, in this case**.

…

MR. JENNINGS: We had, as a recall, two discussions with ML, as we did with, with your client, AA as well, asking their view on certain information. **We also provided each party with a copy of our draft report and then listened to each parties' comments on, on that draft report and then considered whether or not we 8 needed to make changes, changes in our analysis.**

…

A. Well, as you said, it's an executive summary. **My role is as an independent expert to, is to assist the Court in understanding complex financial matters**. And in my experience, an executive summary is, is a good way to do that. So, in paragraph 10, there's a five-line table that shows the primary components of our determination of ML's guideline income. And in paragraph 11, we show the Court different ways to consider the trends over the four-year period, such as averages or weighted average that, in my experience, the Courts have sometime considered in determining or making the, the decision on guideline income.

Q. So, in paragraph 10, the, the box, the summary of guideline income analysis, the numbers at the bottom, **395, 476(sic),** 565,000, 348,000, those, that's what you concluded was ML's guideline income for the years listed above it. 2018, 2019, 2020, and 2021?

A. Yes. His available guideline income.

Q. Yep. Now, I note in your report that you indicate that, and this is in paragraph 18 where you talk about 2021 being a challenging year for DDL... in F?

A. Yes.

Q. And y-y-you talk about that later in your report as well. Were there any significant, anything else of significance that happened in 2021 for that company?

A. T-to clarify, DDL is the Dominion Diving business that ML co-owns with his brother RL. ML represented a, …so February, when I refer to 2021, that means the year ended February 2021. Which, of course, is almost exactly coincident with the pandemic, the first year of the pandemic. And so, ML represented that the pandemic was particularly challenging for the Dominion Diving business, many 8 projects put on hold, et cetera. And the **company accessed the federal wage subsidy information from, from the federal government, which is, you have to experience a revenue loss to access those wage subsidies**. And so that is why I describe that year as challenging. The same time in that year, **DDL also purchased two vessels for approximately 1.4 million dollars each, which were debt financed by additional long-term debt over 2 million dollars**. I, I point that out because it's, it's always relevant for the Court to consider.

…

MR. JENNINGS: Over 2 million in total. And the reason I point that out to the Court is in my experience in prior files, the Court is always being asked to consider

does, does this guideline income represent at a point in time or does it represent the future. And so, businesses are particularly challenged with that issue, because businesses have up and down years. They have good years; they have bad years. **And so, in 21, in my analysis you'll see that we did not attribute any of the corporate income from DDL to ML that year because it had this challenging year, it lost money**. But on a go forward basis, the Court may wish to consider that ML and his brother were making **investments in that business that year that presumably, they're making the investments to pay off in the future. I don't know if they did or not, but it is in, in my view it's an important consideration when thinking about the guideline income analysis at a point**, which in this case is the year end in February of 2021. Obviously, **the first full year of the pandemic, practically. That, that challenging year in 21 may not represent the future of the business**. It is some important information for the Court to consider—

…

MS. CAMPBELL: And the, the calculation and the opinion that is contained in your report, Mr. Jennings, were those done, formulated pursuant to the federal child support guidelines?

MR. JENNINGS: Yes. The guidelines and, and my experience in these matters and, and jurisprudence that has built over time in determining the available guideline income for business owner spouses, yes.

12 Attributing Income

[108] Ss. 16, 17 and 18(1) of the *Guidelines* state:

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.

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. …

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; …

[109] In Nova Scotia, a series of recent Court of Appeal cases: *Ward* v. *Murphy*, 2022 NSCA 20; *Ward* v. *Murphy*, 2023 NSSC 370; and released on January 21, 2025 the case of *Ward* v. *Murphy* 2025 NSCA 5, provide guidance to judges in Nova Scotia when they are asked to analyze pre-tax corporate income. In this case there is no evidence to suggest the expert was alerted to the new guidance provided by the Nova Scotia Court of Appeal in ***Ward* v. *Murphy* 2022 NSCA 20**, which was decided in March 2022. The parties did not reference the above noted cases in their final submissions filed in December 2024 and January 2025 respectively.

[110] In *Ward v Murphy,* 2022 NSCA 20, the Court of Appeal suggested at paragraph 17:

> {17} …a number of sequential steps: (1) determine the pre-tax income of the company before adjustments; (2) decide whether it is appropriate to "add back" any amounts to the pre-tax income of the company under s. 18(2) of the Guidelines; (3) determine whether it is appropriate to "gross up" the "add back" amounts to account for the fact they were paid by the company and not personally with after tax dollars; (4) add the total adjustments (add backs plus any gross up) to the pre-tax income of the company; and (5) determine what portion of the adjusted pre-tax income should be attributed to the payor for child support purposes.
>
> …

[111] In *Ward v Murphy* 2022 NSCA 20, the Court of Appeal continued at paragraph 123:

> [123] After reviewing the expenses and determining some should be added back as corporate income, the judge never returned to complete the exercise by adding the adjusted expenses to the company's pre-tax income. **Instead of adding these expenses back to the corporate pre-tax income as she should have**, the judge

simply took the total sum of the grossed-up expenses for each of the subject years and directly imputed that value to Mr. Ward's personal income of $60,000.

[124] **In other words, she considered the add-back of the expenses in complete isolation of the company's actual pre-tax income**.

…

Shareholder, director or officer

18(1) Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's annual income as determined under Section 16 does not fairly reflect all the money available to the parent for the payment of child support, the court may consider the situations described in Section 17 **and determine the parent'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 parent 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 parent establishes that the payments were reasonable in the circumstances. [Emphasis added]

[112] And further at paragraphs 151- 152:

[151] Section 18 was implemented for the purpose of making some (or all depending on the circumstances) of a corporation's pre-tax income available for the purpose of calculating child support. **In my view, when the record is conducive, judges should prefer s. 18 and its rigorous analysis in situations where a court wants to add back expenses deducted from corporate income, which could conceivably fall under s. 18 or s. 19(1)(g)**. Otherwise, as this case makes clear, **in circumstances where a company has a legitimate pre-tax net loss before adding back any expenses, there is a valid fairness argument for using s. 18 versus s. 19 because the results may be materially different.**

[152] **In my view, s. 19 should be utilized in such circumstances where a payor is a controlling shareholder or operator of a corporation and there is insufficient evidence available to use s. 18** (which is not the case here). This approach gives meaning to the legislature's intent of differentiating s. 18 from s.

> 19. If trial judges default to use s. 19 in all circumstances, s. 18 would become meaningless. And as illustrated, the distinction on when to use s. 18 versus s. 19 becomes important when the amount attributed or imputed under each provision differs materially (as it does in this case).

[113] In his report, DJ suggested that:

> 45. …CSH **has personal / non-business expenses (thus creating operating losses),** or alternatively, the assets are not being utilized enough to earn revenue.
>
> …
>
> 47. …
>
> c. In addition it should be considered that the expenses of operating the assets in CSH are considerably more than the revenue being charged to a related party (DDL) i.e. CSH is unprofitable.
>
> …
>
> 49. In our view, some of the expenses and assets in CSH are personal in nature, or are not being fully utilized to generate income, …

[114] When analysing corporate income for CSH and DDL, I accept the expert's representations that it is appropriate to consider restrictions on available cashflow including, but not limited to, the following: working capital, capital reinvestment; debt service principal repayment; and debt covenant limitations. I also accept the expert's recommendations that it is necessary to add back to pre-tax corporate income for both companies: real property depreciation (CCA) and interest income and both must be grossed up.

[115] With respect to CSH only, I accept the identified percentage of expenses the expert has suggested should be treated as ML's personal expenses and grossed up. I accept that the expert's recommendations were based on interviews with both the

parties, the companies' accountant, and the expert's professional analysis. The expert suggested a certain percentage of ML's identified expenses were personal in nature: the Mercedes (100% in AA's possession); the Dodge (50% for private purpose); legal expenses for this matter (2021 $5,088); yacht expenses (90%) / depreciation (90%); building expenses, including insurance, wharfage, prop taxes, utilities, and building expenses not used to generate income (50%); building depreciation (50%); and travel and entertainment (50%), and I accept his numbers as reasonable in these circumstances.

[116] I am also prepared to accept the expert's recommendation that DDL be assigned $10,000 in notional personal expenses, with half attributable to ML given the lack of financial information available to the expert.

12.1.1 Disclosure

[117] AA repeatedly raised issues about the extent of the disclosure provided by ML and / or DDL to the expert DJ. On the other hand, ML raised questions and / or concerns related to whether the expert had received and/ or whether he had fully considered all the financial information which had been provided to the expert by ML's accountant and / or his previous lawyer, per the parties' initial agreement that the information be provided to the expert, DJ, only.

[118] The court file reflects that at the case management meeting held before another judge in October 2022, the parties' lawyers discussed issues related to disclosure / sufficient evidence in part as follows:

> **MS. PENNY:** ...interest has a controlling interest or not. I mean, if, if ML doesn't have a controlling interest, nobody does. This has been an issue for some time, and I do know we have significant disclosure with respect to Dominion Diving already from 2016 up until 2019, so I'm not sure why the issue with respect to the more recent disclosure. We have financial statements, income tax returns for those years, so I'm not sure why now we're being kind of stone walled on the 2020, 2021 information. And certainly, it's highly relevant to ML's income, ability to pay child support. So, if that's still being refused to be provided, **perhaps a motion for production may be necessary**.
>
> …
>
> **MS. PENNY:** Well, so, my Lady, I have only been retained on this matter for a few months. ML did have different counsel previously and my client has been saying to me **that he understood that none of the Dominion Diving financials were to be disclosed other than through Dan Jennings**. So, he wasn't aware that they were simply given for the purposes of review in this matter, the Dominion Diving ones in particular. So, I, I'm not entirely sure why those older ones were given. My understanding was that RL had not agreed to them being disclosed. So, I'm not sure, but the instruct, well, not even instructions because I certainly don't represent RL, **but my understanding from him is that he is not in agreement with them being disclosed**. So, that's something that I can look into a bit further, but I, I, I didn't realize that they had been provided by consent—
>
> …
>
> **THE COURT:** Okay? So, could we, could we say that within 30 days, you'll have instructions, Ms. Penny, on what your client's position will be so that you can notify Ms. Pierce if it's going to be necessary for her to bring a motion?
>
> **MS. PENNY:** Yes. 30 days is sufficient.
>
> **THE COURT:** Okay. And that'll give you a chance to talk to ...(inaudible)... and brother. Okay. So, number two, we dealt with some of that A, A, B, C are all captured under the appraisals that are being done. D – disclosure of all assets and debt held at or acquired since the date of separation.
>
> **MS. PENNY:** Yes, that shouldn't be an issue. I've been working with my client on trying to update his Statement of Property as I've realized that—
>
> …

MS. PENNY: ...**the one that was previously filed was not complete**. I can, I can advise I spoke with my client about D(i) that he did not inherit anything following his father's death. His father basically died with nothing. So, there's nothing that he…

…

THE COURT: Okay. Ms. Pierce, what do you have with respect to Dominion Diving?

MS. PIERCE: In my folder, I have 2016 tax returns and Notices of Assessment, I have 2017 tax returns, Notices of Assessment, I have 2018, 2019, and then I also have the financial statement for Dominion Diving for year end February 28, 2019. And actually, I'm also realizing I have the financial statements for February 29, 2020 as well. So, that's actually the ...(inaudible)... that we seem to already have. So, up to February 2020, we do have that disclosure. So, there's nothing that he received under that, but with respect to D(2), that's some additional information that we can gather as well to provide—

...

MS. PENNY: Basically, all of that to say, to include a lot of this information in a draft, in a sworn Statement of Property and then any additional information to be provided as well.

MS. PENNY: I think we're number three, updated Statement of Expenses, is the same thing. We, we need to update those two documents.

…

MS. PENNY: Could we say 45 days?

…

MS. PENNY: Again, this falls under the Dominion Diving financials.

…

MS. PENNY: This information, some of this information was provided to Mr. Jennings, and that's clear from the report that he has this information. But—

…

MS. PENNY: ...the loan, but, like, this is a corporate, these are loan documents for a corporate asset, **so my client is certainly in agreement with that information being provided at this stage. It was, you know, Mr. Jennings has considered this information part of the report**. **I don't think it needs to be disclosed, and if, if my friend wants this information, she can make a motion.**

THE COURT: Ms. Pierce, what do you say to the fact that this information was made available to Mr. Jennings, and I don't have his report, but any response to that?

MS. PIERCE: I mean, yeah. I mean, we understand **Mr. Jennings was retained on the basis that information for Dominion Diving would not be shared with us.**

THE COURT: Yes.

MS. PIERCE: I understand that's part of the terms of the retainer. **It's everything else that Mr. Jennings has considered we are looking for.** That's another item on this list. This particular request came up because we learned in one of Mr. Jenning's presentations that this loan happened, and when you have somebody who's alleging impecunity and saying they can't afford to pay child support, but yet their company has managed to get this type of a loan, it certainly raises questions about the credibility of that allegation. I mean, **we understand the limits or at least the position that ML is taking on disclosure around Dominion Diving, and this is probably something we're gonna have to consider in our motion for production as well. That would be tied into our request for the other Dominion Diving documents.**

THE COURT: Okay, well, you do have in a... well this one's more tough, it's tougher because there was the agreement on the information that would be provided only to Mr. Jennings and not disclosed with the parties. I'm gonna have to leave that with you. Oh, go ahead.

MS. PIERCE: I was just gonna say as well, my Lady, to be clear, this is not just a corporate loan. This is a loan to buy two brand new boats.

…

MS. PIERCE: So, it's a loan attached to two very significant assets.

[119] ML's legal counsel asked the expert about his assumption:

Q Yeah. And in your report, you don't relate that $10,000 assumption of personal expenses in DDL to the shareholders to any expense line in DDL, correct?

MR. JENNINGS: No. It's a **general assumption based on my experience that practically all business owners have some element of these personal or nonbusiness expenses**. Justice, I was one, I was once asked in court in, in, in another jurisdiction in Nova Scotia, how many businesses have I encountered in 26 years that don't have these items, and it's one. And so, in my experience, when I ask the business owner are there any personal or nonbusiness expenses, almost all business owners say no. But, if, if we dig deeper, in almost all cases, I've found more. **And so I've developed in, over time, this assumption of roughly $10,000 that without knowing the specifics of, of what personal expenses might be, that in my experience, that's a reasonable assumption of personal or nonbusiness expenses** going through an operating company.

…

> **MR. CONRAD:**..You, you attribute travel, business expenses, yacht expenses, legal fees, cars, all to ML coming out of Canadian Subsea, correct?
>
> **MR. JENNINGS: Yes. But the $10,000 assumption that you asked about applies to DDL only. In that case, ML's brother would not provide the detail access, hence I used the assumption based on my experience**. But in CSH case, I had access to the accounting, the accountants, the external accountants to ask questions and I accessed the internal accounting records to determine specific line items that, that in my view were either personal or non-business.
>
> **…**
>
> **A. In my view, schedule 10 is very clear that it separates the analysis on personal expenses CSH from that of DDL**. The sub, there's a subtotal for total personal CSH that totals our determination of the personal expenses in CSH that's separate from the assumption for DDL.
>
> **…**
>
> **Q.** It's not schedule 9, though. Tt's schedule 10, though, correct?
>
> **A. That is correct. It's a typo. It should say schedule 10**.
>
> …

I am satisfied it was appropriate for the expert to use a general assumption about personal expenses in the absence of access to more specific information with respect to DDL. I am also satisfied that the typo identified above did not have any substantive effect on the expert's findings.

[120] In *Ward v Murphy (*supra) 2022 NSCA 20, the Court of Appeal stated at paragraph 153:

> [153] … Here are some general, non-exhaustive, considerations that may assist in deciding whether income should be attributed under s. 18:
>
> • Attribution of pre-tax corporate income to a payor pursuant to s. 18(1)(a) is a factual exercise, undertaken by a judge on a case-by-case basis.
>
> • **A judge is not required to add any pre-tax corporate income to a payor's income.** The Guidelines merely allow for a judge to do so.

> • The **reasonableness of a deduction is a discretionary determination**; however, the objective is to ensure the allocation of pre-tax corporate income between business and family purposes is fair. At the end of the day, one should not interfere with reasonable economic decisions needed to meet corporate sustainability.
>
> • **The onus rests on the shareholder parent to establish that pre-tax income of the corporation is not available for support purposes**. This means the parent, who is typically the payor, must lead evidence that the pre-tax corporate **income is not available for support purposes because it will jeopardize the capacity of the corporation to meet its financial obligations**.

The parties took different views about whether ML and / or his brother disclosed all necessary information at the relevant times and / or whether the expert considered all available information.

[121] The Court of Appeal in *Ward v Murphy* (supra) 2022 NSCA 20, provided a non-exhaustive list of issues for the court to consider when deciding the amount, if any, of pre-tax corporate income to attribute to a payor, including but not limited to:

> • What is the nature of the business?
>
> • Is there a business reason for retaining earnings?
>
> • What is the historical practice for retaining earnings? Along with the associated costs award.
>
> • **What degree of corporate control does the payor exercise?**
>
> • **Is there only one principal shareholder or other bona fide arm's-length shareholders involved?**
>
> • Depreciation;
>
> • Possible economic downturns;
>
> • Return on invested capital; and

> • If the corporation, after adding back expenses to the pre-tax corporate income, **has an overall negative pre-tax income** (also known as a loss), **no amount of pre-tax corporate income can be attributed to the payor's income.** (As illustrated above, this was not relevant in this case.) See Merrifield v. Merrifield, 2021 SKCA 85 at paras. 32, 35, 47–48; Walker, at para. 39; M.C. c. J.O., at para. 16; Potzus v. Potzus, 2017 SKCA 15 at para. 64; Mason v. Mason, 2016 ONCA 725 at para. 163; Chekowski v. Howland, 2013 ABCA 299 at paras. 13-14; Goett, at para. 21; Kowalewich v. Kowalewich, 2001 BCCA 450 at paras. 54, 58–59.12

The expert identified much of the relevant information related to the above-noted issues and / or he identified what information he believed was lacking when he completed his report. In particular, the expert commented about additional information which could have been provided from a related company, DDL – a company ML has a one-half ownership interest in with his brother, RL.

[122] The court in *Potzus* (supra) stated at paragraph 66 and 69:

> [66] There is no definition of "arm's-length" within the Guidelines. Section 2(2) of the Guidelines provides that terms used in ss. 15-21 that are not defined in the Guidelines will take their meaning from the Income Tax Act. Accordingly, reference must be made to the provisions 2017 SKCA 15 (CanLII) Page 20 of the Income Tax Act and, in particular, s. 251: see Boser v Boser, 2003 SKQB 477, 47 RFL (5th) 259. Section 251(1)(a) of the Income Tax Act **provides that related persons are deemed not to deal with each other at arm's-length.** Sections 251(2)(b) and (c) of the Income Tax Act set out the statutory rules for determining when a corporation and another person (including another corporation) will be considered to be related persons. Accordingly**, related corporations are included in the definition of "persons" by virtue of s. 251(2)(c).**
>
> …
>
> [69] Section 18(2) not only permits but requires the inclusion of non-arm's-length payments made without value for the company: Kowalewich v Kowalewich, 2001 BCCA 450 at para 48, 19 RFL (5th) 330 [Kowalewich]. **Non-arm's-length transactions without corresponding value to the company**, and **any other unjustified diversions of corporate income, can have potentially serious 2017 SKCA 15 (CanLII) Page 21 implications for support claimants, given the relatively fluid ease with which monies can be shuffled between related entities**.

[123] In *Potzus* (supra), the court commented about the case of *Goett v Goett*, 2013 ABCA 216, 33 RFL (7th) 301, at paragraph 47:

> [47] …where the Alberta Court of Appeal held, at para 16, that the Guidelines allow the courts to **pierce the corporate veil in order to address the fundamental unfairness that arises if a parent can divert, manipulate or shelter income through the use of a corporate structure to avoid the payment of adequate child support**. In a later decision (Knudson v Knudson, 2015 ABCA 398 at para 22), it went on to state that in enacting s. 18 of the Guidelines, Parliament had chosen to limit the concept of a corporation's separate legal personality as considered in Salomon v Salomon & Co Ltd, [1896] UKHL 1, [1897] AC 22.
>
> [48] As observed in Goett, at para 13, when the corporate veil is lifted in the corporate law context, the relevant factors are "**whether the individual exercises complete control of finances, policy, and business practices of the company**, whether the control has been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights, and whether the misconduct … is the reason for the loss." The Alberta Court of Appeal commented that in the family law context these factors still remain relevant but are applied less stringently…
>
> [49] The Income Tax Act, RSC 1985, c 1 (5th Supp), by virtue of s. 256(5.1), also deals with the concept of de facto control. It speaks of "direct or indirect influence that, if exercised, would result in control in fact of the corporation … ." As noted in McGillivray Restaurant Ltd. v Canada, 2016 FCA 99, 483 NR 23**, to find de facto control a person must have the clear right and ability to effect a significant change in the directorship of the company "or to influence in a very direct way the shareholders who would otherwise have the ability to elect the board of directors"** (emphasis added).

I am satisfied ML had 100% control over CSH, and he had significant influence and / or control of DDL (as a 50% shareholder). I am satisfied it is appropriate to consider the circumstances of both CSH and DDL when considering attributing income to ML.

[124] At times in this proceeding, ML has suggested that his line 150 income was a good representation of his income (between $85,000 and $94,000 during the relevant period). AA's counsel commented about ML's evidence:

> … that in 2012 he was working in "one of the most dangerous industries in the world". That he flew in helicopters all the time and AA was afraid he may die. ML **suggested his income was around $140,000 when the expert DJ was completing the Guideline Income Report** and the only extra benefit from his ownership interests in his corporation(s) was payment of his cellular telephone expenses.

The parties agreed to request a Guideline Income Report in 2021.

[125] At trial in 2024, ML stated that changes to the offshore industry of which he was a part of and changes to his career due to Covid had affected his income. ML claimed he had not been working offshore for five years. He suggested his "potential income was actually much lower and closer to $95,000.00."

[126] AA pointed out that by 2023, despite the above-noted changes observed by ML, that ML had taken no steps to file any reliable and credible evidence to support his position. AA argued that if ML disagreed with the Guideline Income Report, then he had the burden of proving the expert's Guideline Income Report should be adjusted and / or the burden of proving how changes in his career in the offshore industry in or around 2019 / 2020 had impacted his available Guideline Income from DDL and / or CSH; and / or arguably to also show what efforts he

had made to put himself in a position to continue to financially support the children's previous lifestyle.

[127] ML has received a benefit by paying for his personal expenses through CSH. In addition, there is evidence ML has taken out loans against his assets, resulting in ML having no (or limited) income but considerable debt which is not taxed. The loans used to finance both his business and his personal needs, are debt / not income making it difficult to determine ML's Guideline Income.

12.2 Prospective Child Support

[128] ML argued that the expert "only extrapolated 2020 financial records to 2021" and that his report did not provide a section 17 analysis for 2022, 2023, and 2024, and it did not cover the "last three years."

[129] The court in *Potzus* (supra) commented about the case of *Bear* v. *Thompson*, 2014 SKCA 111, 378 DLR (4th) 649 stating that *Bear* explained the purpose behind s. 18(1) of the Guidelines… stating at paragraph 16:

> [16] Notably, Thompson recognizes that s. 18(1)(a) of the Guidelines permits an analysis of the historical earning pattern of a corporation, an examination of the kind undertaken in R.E.G. **An historical analysis assists in determining how much of the corporation's pre-tax income for the most recent tax year should be attributed (para 74).** In this respect, historical information can serve as circumstantial or confirmatory evidence in relation to the determination of appropriate quantum.

However, the court in *Potzus* (supra) went on to say:

> [78] … What Thompson held, at para 66, is that **s. 17 of the Guidelines does not entitle a court to include the pre-tax income of a corporation as a source of funds when calculating a payor's adjusted average income during the preceding three years, on a stand-alone basis**. (emphasis mine)

At paragraph 130 in *Ward* (supra) 2022 NSCA 20, the Court of Appeal appeared to suggest a court could attribute income to a payor prospectively based on **the last year's determination of income level**, but a court should only do so **if there were no good reasons not to do so.**

[130] I understand I may use the "historical analysis" to assist me "in determining how much of the corporation's pre-tax income **for the most recent tax year should be attributed**" and that reliable "historical information can serve as circumstantial or confirmatory evidence" in relation to the determination of and "appropriate quantum" to be attributed.

[131] The expert stated in part:

> …
>
> **A**. ML represented that the pandemic was particularly challenging for the Dominion Diving business, many projects put on hold, et cetera. And the company accessed the federal wage subsidy information from, from the federal government, which is, you have to experience a revenue loss to access those wage subsidies. And so that is why I describe that year as challenging. The same time in that year, **DDL also purchased two vessels for approximately 1.4 million dollars each, which were debt financed by additional long-term debt over 2 million dollars.** I, I point that out because it's, it's always relevant for the Court to consider…
>
> …
>
> They have good years; they have bad years. And so, in 21, in my analysis you'll see that **we did not attribute any of the corporate income from DDL to ML**

> that year because it had this challenging year, it lost money. But on a go forward basis, the Court may wish to consider that **ML and his brother were making investments in that business that year that presumably, they're making the investments to pay off in the future**. I don't know if they did or not, but it is in, in my view it's an important consideration when thinking about the guideline income analysis at a point, which in this case is the year end in February of 2021.
>
> …

I am satisfied that the expert, DJ, considered ML's comments and his and his companies' circumstances, and that based on a thorough review of the companies' financial information, the expert did not agree with ML's representations about the effect Covid would have on his available Guideline Income going forward.

[132] It is clear from the evidence that a determination of ML's yearly Guideline Income for child support must involve a far more complicated analysis than just looking at ML's line 150 income. That merely adding back personal telephone expenses to his personal income would not move his income from $95,000 to $140,000. I find that a determination under s. 16 would not be a fair representation of ML's available yearly income for child support.

[133] As the court did in *Potzus* (supra), I find it useful to recall the comments made in *REG v TWJG,* 2011 SKQB 269 by Ryan-Froslie J. (as she then was) regarding the effect of an order attributing income under s. 18. At para 190, she stated:

> [190] **Attribution of income pursuant to s. 18 of the Guidelines does not require that the corporation pay out the pre-tax income attributed to a shareholder parent. It does not "strip" the corporation of its income**. The pre-tax income will remain in the corporation and will be available for all purposes cited by [the husband]. **The pre-tax income of a corporation is only used pursuant to s. 18(1)(a) to provide a "fair measure" of a shareholder parent's income for child support purposes**. The only money that a shareholder parent might need to withdraw from the company as a result of attribution pursuant to that section is a sum sufficient to cover his additional child support obligations and the income tax associated with that withdrawal. … (emphasis mine)

12.2.1 Non-cash assets

[134] According to *Potzus* (supra), the companies' non-cash assets (boats / real estate) can be the focus of an analysis under s.19 of the *Guidelines*, where imputation of income is the primary focus. In addition, the "retained earnings" in this case can be a barometer of "corporate health and economic resilience" for companies like CSH and DDL, to show their financial viability.

[135] The court in *Potzus* (supra) clarified at paragraph 92:

> [92] **Retained earnings constitute equity, as opposed to an income source for provision of support**. Retained earnings are the accumulated profits of the corporation after tax **and may include capital, non-cash assets**: R.E.G. at para 154, Thompson at para 30. As such, **retained earnings are not directly implicated in any s. 18 Guidelines analysis although they can, in appropriate circumstances, be the focus of an analysis under s. 19 of the Guidelines where imputation of income, rather than attribution of income, is the primary focus**. This might be the case where, for example, there is a determination that **the corporation's retained earnings as an asset are not being properly used to generate income**. Nonetheless, retained earnings are a barometer of corporate health and economic resilience. This was explicitly recognized in Thompson, at para 30, where it is noted that **retained earnings are a significant factor in determining the financial viability of the corporation**. (emphasis mine)

In this case, the expert identified the issue of assets "retained earnings" not being properly used to generate income.

12.2.2 Section 19 of the Guidelines

[136] ML argued that "Mr. Jennings referred to schedule III adjustments at paragraph 23, page 9, of his Report when he intended to reference section 19 of the Guidelines." DJ acknowledged he had referenced Schedule III in error. DJ stated in part:

> You're correct. Schedule three doesn't address personal expenses. **Section 19(1) of the guidelines, paragraphs E and F are relevant clauses in this issue**. So, **E says the spouses property is not reasonably utilized to generate income.**
>
> …
>
> Section E, the **spouse's property is not reasonably utilized to generate income**, which is potentially the, the issue as in ML's case. As well, **paragraph G says the spouse unreasonably deducts expenses from income.**
>
> …
>
> Q. So, in your report, there are no schedule three adjustments to apply to ML's personal income, correct?
>
> **A. Correct. Taxable or dividends, capital gains, and ...(inaudible)... charges don't apply to ML.**.
>
> **Q.** Right. So, every adjustment you've made in this report is under section 17, 18, and 19 of the guidelines, correct?
>
> **A.** Yes.
>
> …

[137] The expert, DJ, stated:

> **MR. JENNINGS:** … the challenge in ML's case is CSH owns a collection of 30 or 40 assets, including what appears to be three buildings. But the accounting records don't separate the expenses by asset. So, for example, there, in the accounting records, there's a line that says the cost of a warehouse. What appears

to be warehouse is a Quonset hut, a personal residence, and it's unclear whether or not it includes all of a garage. And the, the challenge was how much of the expenses might relate to either assets that are being underutilized or they are personal in nature. And frankly, Justice, I'm not sure of the answer in this case, but **when I see a company that does not make money and all of its revenue comes from a related party, 100 percent, and it doesn't make money, it raises the question of either they are personal expenses operating personal assets, or they're not being fully utilized to generate the income that comes from the related party**. And so, in this line item, because we don't have the breakdown by asset, but in my view **there is sufficient evidence that there is some element of personal and/or underutilized assets, I made an assumption of 50 percent**.

Again, going back to the point that the accounting records say capital as, in capital assets, **there's a warehouse for roughly a million dollars**. It doesn't have any other breakdown other than that, and the same applies to the expenses. And so I had to make an assumption based on, as I just said, **either there was a personal element, or these assets are not being fully utilized to generate income because all of CHS (sic) revenue comes from the related party**, DDL.

MR. CONRAD: But nowhere else in that schedule 10 do you talk about expenses not used to generate income, correct?

MR. JENNINGS: Nowhere else in that schedule. No, it is, it is discussed throughout the report, as I just testified. **That's the fundamental issue here of CSH.**

…

MR. JENNINGS: So, this, this table, Justice, is, elaborates on my point. There's $1.15 million of assets in CSH. It generates or it has billed DDL for $379,000, but it costs, the direct cost and the administration costs against that revenue were $504,000 that year. So, **the operating loss in that one year is $124,920**. Which goes back to my point that, **that to me, when you, when you consider that all of the revenue comes from a related party, it raises the two possibilities: either they are personal assets and personal expenses related to them, or the assets are not being fully utilized to generate revenue**. And in my view, either of those scenarios or possibilities allow the Court to impute income to ML..

…

And so that 1151759 in 2018, that comes from the balance sheet of the company at the end of 2018. **That's the net book value of all of the property and equipment, including the three buildings that you just identified and all of the excavators and vehicles, et cetera, after depreciation**. That's what NP, NBV means, net book value. So, that number ties into the balance sheet for schedule of CSH in 2018.

…

Q. But you don't define in your report what an underutilized asset is, correct?

> **A.** No. I'm raising it in that table of page 15 the concept that **underutilized means there's an operating loss every year on these assets.**
>
> **…**
>
> **MR. JENNINGS:** An operating loss every year—
>
> **…**
>
> **MR. JENNINGS:** ...on these assets. …the **4 years were looking at, CSH never had a profit on these assets. That, in my view, allows the Court to consider the possibility that the assets are not being fully utilized to generate income when you, sorry, I have to add, when you consider that all of CSH's revenue comes from a related party**.
>
> **…**
>
> **MR. JENNINGS:** That **raises the possibility that either or, and/or the assets are not being fully utilized to generate income or there's an element of personal nature to the assets and the related expenses**.
>
> **…**
>
> **MR. JENNINGS:** When you consider that the related party is where the revenue is coming from for all of these assets.
>
> **…**
>
> **MR. JENNINGS: That are capitalized inside the company. And I, I didn't say it earlier, my Lady, but it includes the boats that are in this company. It's all of the capital assets in CSH. Now a large element of it is arguably the properties but there's a long list in, on my capital asset working paper of other assets, including excavators, vehicles, boats, a long list**.
>
> **…**
>
> **MR. JENNINGS:** The accounting records, as I said, are not broken down by asset, which is very common in a small business like this. In larger businesses, they, they track expenses by asset. We didn't have that information here.
>
> **…**
>
> **A. No. The million dollars that you're referring to on the capital asset working paper is the original cost that capitalized for what's called the warehouse. But this line item is after depreciation. It's net book value.** So, I can't recall what the net book value of just the, just the warehouse line is. If you have the capital asset working paper, I can, I can look at it and determine it, but it's not a million dollars. A million dollars, slightly over a million dollars is the original cost.

I am satisfied the expert applied commonly used accounting practices and the financial information provided to him to interpret the significance and / or value of

the assets owned by CSH and DDL, and that I may rely on the numbers calculated by the expert when completing an analysis pursuant to ss 17, 18 or 19 of the *Guidelines* or when considering the continued viability of both CSH and / or DDL.

12.2.3 Fair Market Value for Services / Arm's length

> **Q.** And again, you mention that you're not sure as between DDL and CSH whether they were charging fair market value to each other, correct?
>
> **A.** I don't believe it's to each other, I believe **it's rental and services being charged from CSH to DDL.** I—
>
> **…**
>
> **A.** ...as I, as I said, **I don't know if it's being charged, what's called being charged at market as if they weren't unrelated parties**.
>
> **…**
>
> **Q.** So, what you're saying there is CSH is charging DDL for services, correct?
>
> **A.** Yes.
>
> **Q.** And you're not sure whether or not the price they're charging is market rate as if it was to, let's say, a, a third party, correct? 7
>
> **A.** Correct.
>
> **Q.** You don't know whether it's too high or too low, correct?
>
> **A.** I don't know. **The, the operating loss in CHS (sic) implies that it could be too low, but I, I don't know**.

The onus was on ML to prove his case. As noted above, between October 2022 and arguably December 2023, ML was given opportunities to question and / or to challenge the expert's report's suggestion that the services of CSH to DDL were not likely being charged at market value. ML could have filed additional evidence up to December 2023. He did not provide evidence to disprove the expert's hypotheses / findings.

12.2.4 Depreciation and cash outflow

[138] ML's counsel asked the expert questions about depreciation and cash outflow:

> …
>
> **MR. CONRAD:** And, and of those nonbusiness expenses, building depreciation and yacht depreciation are not cash outflows, correct?
>
> **MR. JENNINGS:** Correct**. But, but not being cash is not the only consideration of depreciation.**
>
> **MR. CONRAD:** No, but what I, what I'm trying to say is that Canadian Subsea didn't actually pay, let's say $8,228 for the yacht to get that number, correct?
>
> **MR. JENNINGS:** In theory, it did pay it, originally when it, when it paid for the vessel. Depreciation is an allocation of that original cost—
>
> **Q.** Yeah.
>
> **A.** ...over time.
>
> **Q.** Right, but we're talking about a cashflow. There's no, the question was, there's not, it's not a cash outflow in the year that it's being expensed, correct?
>
> **A. No. No.**
>
> **Q.** And same thing with the building depreciation, correct?
>
> **A.** Correct.
>
> **Q.** …, the total cash, cash outflow on personal expenses would be the total personal expenses less the yacht depreciation, less the building depreciation, correct?
>
> **A. Yes, it's cash outflow, but—**
>
> **Q.** Yeah.
>
> **A.** ... **there is a presumption that deprecation represents an allocation of a, of a real expense. Technically speaking, from a financial point of view, you're supposed to do an analysis of the useful life of those assets and allocate them over the useful life. That's very difficult to do in small businesses, so it's very common in these types of guideline income analysis that parties assume that, that the spend on capital assets called CapEx, C-A-P-E-X, CapEx, that that approximate, is approximated by the depreciation expense. And so, I, I regularly see counsel raising this issue about it being noncash, and I, I have to point out to the court that just because it's noncash, that expense doesn't mean it shouldn't be considered in guideline income.**

Q. Right. U-usually the depreciation is added to the guideline income, because it's not a cash outflow in the year and it represents, it doesn't represent the true cash available to, in this case, the shareholder, correct?

A. Well, it's, it's a little more complicated than that. So, the guidelines say to not deduct real property depreciation, or, sorry, CCA, it's called CCA, which is taxed depreciation. Can be slightly different than accounting depreciation. And so, the guidelines say that and over time experts and courts have considered that that's because while the building part may be noncash and **buildings don't usually decline in values. But that only applies to the real property, so other types of assets you have consider does the depreciation expense, even though it's noncash, does it represent a proxy for capital spending, the CapEx**.

Q. Right, but in this particular example, CSH did not pay $8,288 in 2018 for the yacht.

A. It did not for that expense but it did buy that yacht originally and that's where the $8,208, $28—

Q. Right,

A. ....comes from.

…

MR. CONRAD... at the end of the day, he may disagree with me as an accountant or whatever, but I'm simply just asking, in order to, from a cash outflow, they did not actually spend this money in this year. You, you may say it doesn't matter because the Court says it depreciates and they add that the guideline income—

…

…

MR. JENNINGS: **It did not. What is missing from your analysis is whether or not anything was spent in cash on the yacht that year.**

MR. CONRAD: Right, but I'm saying well, if it was spent in cash, that would show up somewhere, wouldn't it?

MR. JENNINGS: Yeah. It wouldn't show up in the expenses. That's, that's my point, Justice, is CapEx is a real cost, it's just not an expense perse, because it's capitalized for accounting purposes and for tax purposes. So, to use a hypothetical, let's say in 2018, the yacht needs a new engine and it costs $20,000. Some CRA and accounting folks believe that that should be capitalized, added to the capital cost of the yacht, and depreciated over time. So, if that was the case, then **Mr. Conrad's question is right in terms of a cashflow before considering CapEx, but if that engine had been replaced in 2018, that's, that's a cashflow item.** That potentially should be considered. It is not considered in the definition of income because of this issue of does depreciation represent a proxy for that capital spent.

…

A. And, and my Lady**, I know it's a complex subject, but it's one that I commonly see that people say depreciation noncash, you don't consider it. Well, it can be a proxy for a real cash expenditure**. And we don't know from, from Mr. Conrad's analysis. **Maybe there were not real capital expenditures in any of these four years. I don't know. But if there were, then this cashflow spent on personal expenses is missing some element of capital spent.**

…

Q. Okay. And what I'm saying is that depreciation, it's not cash out the door, it's, it's, it's basically the accounting the method for what you're, exactly what you're saying. At some point in time, they spent actual cash on this yacht, and over time they amortize it down and allocate across the life of the, the, the yacht, right?

A. Yes.

Q. Yeah, but—

A. But what it ignores is when that capital spend is going to happen. Did it happen last year? Is it going to happen next year? That's why you, you have to be careful about adding back depreciation and calling it noncash. Because fundamental, the *jurisprudence* and in my experience in, in these reports is usually for small businesses, we're making an assumption that depreciation is a proxy for that capital spent, and that's why we don't adjust for it, except for the building part because the guidelines tell us to adjust for that.

…

Q. Yeah. You don't adjust for CapEx on the yacht, correct?

A. No, because this is not determining income. This is determining the personal expenses or nonbusiness expenses that were attributing to ML. It's a different, a different analysis than determining guideline income by itself for the company. This is saying there's a personal element to these assets, such as the yacht, that the fact that the company is writing off depreciation is some of that personal element.

Q. Okay. What I'm saying is, in terms of cashflow, it's just if, I understand you may think what my analysis is, but in terms of cashflow out the door, in 2018, 19, 20, 21, the yacht depreciation amount that you have does not represent an actual cash expenditure, correct?

A. Correct, the depreciation—

…

MR. JENNINGS: ...what is missing is perhaps an additional line for capital spending only.

MR. CONRAD: Which would then reduce, what would that, okay, so, what you're saying—

MR. JENNINGS: In your table, it would reduce.

Q. Well, it's, it's, it's your table from schedule 10, right? So, in your schedule 10, you don't have any figures in there that they went out and spent more money on the yacht for CapEx, correct?

A. No, because, as I said, we make the assumptions very common in these small businesses that we assume that depreciation is a proxy for capital spending, CapEx.

…

A. What your analysis is, is pretend that yacht depreciation doesn't exist.

Q. I'm not pretending it doesn't exist. I'm saying in terms of the cashflow, what you're saying, though, is that if we, if they actually went and bought the motor, I'd have to factor that into my analysis, right?

A. Yes.

Q. Yeah. But the, the schedule eight for each of these tax shares was available to you, correct?

A. Yes.

Q. So, you could have went to the schedule eight and say how much did they spend on the yacht, correct?

A. Yes, but the reason we don't do that in short time period is because longer lie, life assets, the capital spend is what's called lumpy. It might be once every 10 years. So, you have to be careful. Again, this is why it's very common, people, experts will, will assume that the depreciation is a proxy for this capital spend.

Q. Okay. But in terms of a cashflow statement, can you just focus on cashflow for sec, in terms of cashflow statement, right, you would add back the depreciation, right, to the net income.

A. And you would deduct the capital spending.

Q. And you would deduct the capital expense, correct?

A. Capital spend is not, it's not an expense.

Q. So, what you're saying is in my analysis doesn't include capital spend on the yacht depreciation?

A. Potentially yes.

…

MR. JENNINGS: For two reasons: one, these small businesses aren't able to do an extensive capital asset analysis that says each assets going to last X number of years and that divided by the number of years is what they estimate in capital spent or projecting out which years it's going to be. And it's very

common, in my experience, that experts will, because you can't do that in small businesses, will assume that the depreciation is a proxy for that spend. And so, while the depreciation by itself is noncash, the proxy that it is assumed to represent or, or be equivalent to is not noncash.

…

MR. JENNINGS: The second reason is that's why it's very common for experts to make that assumption.

…

MR. CONRAD: Right. But in a particular year, you looking at a cashflow statement, you can see what they actually spent in CapEx.

MR. JENNINGS: Yes.

MR. CONRAD: And so, that tells you what the actual cashflow was in that year.

MR. JENNINGS: Yes.

Q. Right. And all I'm trying to get at is in these years, right, and you say that... Right, so in these years, if you were to look at Canadian Subsea's schedule eight, it would actually tell you whether or not they spent any money on the yacht for CapEx, correct?

A. Yes.

Q. And that would tell you your actual cashflow for the year.

A. Yes.

Q. Right. But now withstanding that, just based on this schedule, and accepting that there may be adjustments in terms of the amount allocated to buildings, the cashflow out is essentially the personal CSH minus the yacht depreciation, minus the building depreciation, in terms of your numbers, correct?

A. Ignoring the capital spending part, yes.

…

MR. CONRAD: …column 3 tells you what the actual CapEx is, correct? Per, per 11 item.

THE COURT: It's cost of acquisition, right?

MR. JENNINGS: Right. Like, it, this is if the company has treated items, capital spending as capital for accounting and tax purposes, this is where it shows up, in that column three, cost of acquisitions during the year, there would be an amount. Now, this is the corporate tax return of CHS (sic) for 2000, fiscal 2021. And the class, sorry, the column one is class number.

…

MR. JENNINGS: And I, I can't recall what the class number is for a, a vessel, but if you look at column three for this particular year, there's only one number in

acquisition, that column three. And that's class one, which is generally buildings. So, **what that says is that CSH capitalized an addition to its building that year of $23,407.**

…

MR. JENNINGS: Or the it's called column 2 is $848,643, the next column 3 is the addition for the year, that's $23,407.

…

MR. JENNINGS: Yeah. And in answer to Mr. Conrad's question, it doesn't appear to be this year any capital additions for the boats that year.

MR. CONRAD: Right, so, if we were to go back and look at the thing that I gave you, essentially, what we'd have to do is add back the capital, the CapEx, the column three for each year, and divide it by the same percentages that you used to see what the actual cashflow was for total personal benefits in CSH for ML, correct?

MR. JENNINGS: Yes. But, sorry, except for the consideration of maybe four years is not a long enough time period to capture additions. So, for example, if you put a new engine the yacht, you don't do that every year. And so, you need to look at enough years to be able to see, that that's what's called lumpy. It happens every 5 years or every 6 years, or every 10 years, and the capital spend is, if I could use an analogy, it's like a sinking ...(inaudible)... You're setting aside money because you know you're going to have to replace that engine, that's a capital amount you're gonna have to spend. You don't do it every year, but you might set aside some money every year to pay for it. That's an analogy that some people use to, to, to reflect this cashflow impact of the capital spend.

Q. Okay, so, and you're say there's not, like, quite sure of a period of time, but are you not more so talking about how much money has to be held back to plan for that as opposed to a cashflow statement itself?

A. Possibly, but it's also a timing issue. So, if you're looking at four years and you've been lucky you don't have to make any additions for the boat that, those four years, but you know based on the number of hours of usage that in the fifth year, you have to do a big engine overhaul, you gotta redo the hull, it costs $100,000, say. Well, the timing of when that fifth year is is relevant to the guideline income determination, right? If, if that's next year, then that's more relevant than if it's 10 years out.

…

I am not persuaded the expert erred in any way in his analysis regarding CapEX.

12.2.5 Financing the Company / Credit Cards

Q. But in terms of the fact that CSH was paying this money, I would suggest to you that they pay $403,000 plus $401,000 plus whatever CapEx was for those 4 years. They're actually paying that money out in cash. But you don't comment on whether, like, how the company actually pays that cash, correct? 2

A. Not directly, but indirectly it's clear that ML is financing the company using, using a number of credit cards and lines of credit that are personal but treated as a due to director on the balance sheet. You look at schedule seven of my report, my Lady...

…

A. …, but it's a little more complex than that. A large element of that $561,000 in 2021 are personal credit cards and lines of credit that the company, **at ML's direction, records as if they were due to directors. But they are personal, but they're recording as if they were, these were liabilities in the company to ML.**

Q. Right, because in terms of the separation between a corporation and an individual, ML was using personal debt facilities, correct?

A. Yes.

…

MR. JENNINGS: Thank you, my Lady. So, is, it's more complex, because these are a collection of, I believe, six or seven visas or lines of credit that are all in ML's personal name. Some of these expenditures or some of the items put on these credit cards are, appear to be legitimate business purchases. Some of it is personal, and some of it is payments, are payments to the other credit cards. **But how they record it inside the company is as if the whole thing was a loan from ML.** So, I guess, technically, the—

…

MR. JENNINGS: So, they, they record all of these transactions on these credit cards, and they're all flowing through this series of credit cards and lines of credit but on the financial statements, they call it due directors. **So, they're essentially missing the step which is he's borrowing the money personally, on credit cards and lines of credit, and he's lending it to the company**. They skip that step and just put it all inside the company, which I, I don't think there's any nefarious reason to that, it's just that's how it's recorded. So, I, in answer to Mr. Conrad's question is**, I have to be careful saying it's $500,000 owing to ML because they recorded it as if it's a large element of that is owing to various banks and lines of credit and credit cards that are in ML's name**.

MR. CONRAD: Doesn't that make perfect sense, though? I mean, the credit facility is in ML's name, it's his line of credit. So, he has a $100,000 line of credit, let's say, okay? He uses that line of credit on expenses for Canadian Subsea, right?

Canadian Subsea records it as being due to ML and ML then owes the line of credit, right? In a simplistic model?

MR. JENNINGS: That's the simplistic view of it, but— 1

…

MR. JENNINGS: So in the d, the general ledger accounting records, these are all recording as individual due to credit card, due to lines of credit, and they're all, and the balances, are all then grouped on the financial statements as due to director. And as I said, I, I don't think there's anything nefarious to this, **but there is a little bit of a complication in that these credit cards and lines of credit are not solely used for the business**. Every month, ML gives direction to his accountants to say these transactions are business and these ones are personal, and they, they charge his director account for the ones that are personal, which that's legitimate. **It's just that the way that they report it as that it's due to ML where technically, it's due to these lines of credit and credit cards that are in his personal name**.

MR. CONRAD: Right.

MR. JENNINGS: And if they were all 100 percent business transactions, it, it, there, it might be okay with that, but it gets more complicated because there are personal transactions in there as well.

…

MR. JENNINGS: And there are payments to the other credit cards in there. It 10 is a—

…

MR. JENNINGS: So, this is we attempted to summarize all of the activity in all of these personal credit cards and lines of credit. You can see there's a wide variety of different types of transactions. So, the first line item is what ML has designated as per business expenses. That's, that's the first line item. The second are, are, there are personal items, which they are, the accountants are legitimately charging to him, but they're on this, on these credit cards**. Then there are transfers from another shareholder credit card, and then there are withdrawals to this shareholder, then there are payments on some of these cards, his payroll account is automatically put into these accounts, there are some other miscellaneous, there's some interest, and then there's something recorded as shareholder contribution**, **appears to ML putting money, which I'm not sure where it comes from, but it's him, that's how it's recorded**. So, there are a lot of transactions going on here. And the net result is showing it as due to director. It's a, it's a little more complicated than that**. It is due all these credit cards and lines of credit that are in his personal name**. That, that's just what I wanted to clarify.

…

12.2.6 Personal Benefit / Debt Recorded within Company

Q. Yeah, so from May 31st, 2017 until May 31st, 2021, it's ML has either by credit card or some other contribution, put in $608,000 into the company more than has been taken out. He may have taken it out of his bank account or he may owe an debt on it. I don't know which one it is. It doesn't really matter. At the end of the day, he's put in $608,000 more than he's received in terms of his shareholder loan, correct? In terms of what they've allocated as, as personal.

A. Yes.

Q. Correct? And then, what you've done in your report is you've said, well, after their calculation of what's personal expenses, I have determined that he has also received an additional $503,000 in personal benefits from the company, correct? In that same period of time.

A. **The total of, of the personal expenses over the four years is $503,000, yes.**

…

MR. JENNINGS: Some of the transactions are personal on this credit card and they get recorded as due from the shareholder and due to the shareholder. They're in and out. **Some of the transactions are payments on the other cards and those are also recorded as due to the shareholder, due from the shareholder**. And this happens every month. Lots and lots of transactions. But, as, as you said, Mr. Conrad, in, in the end, it ends up the company owes him $500,000 **because he has contributed either assets or he has contributed what he owes as personal debt**. But the net result is they recorded it as due to director.

MR. CONRAD: So, if he contributes $608,000—

MR. JENNINGS: Yes.

MR. CONRAD: ...in order to receive $503,000, right?

THE COURT: He's, he's said that he's **contributing the debt to the company**, is what I'm hearing you say.

MR. JENNINGS: Yes.

…

12.2.7 Benefit to the Payor?

Q. Okay. But does it seem fair to you that I have a line of credit, I borrowed $25,000 from the line of credit, I put it into this company that doesn't earn any revenue, and then I have to pay child support based on $48,000?

A. Presumably there's a reason that you did that, from a business point of view, and the result for guideline income purposes is if you unreasonably deduct expenses, then those can be included in your income.

Q. But in that scenario, what is the benefit I'm receiving?

A. I don't know.

Q. On, on, in terms of pure numbers, what is the benefit that I'm receiving? What's the monetary benefit I'm...

A. In that hypothetical, I can't think of any benefit.

Q. Okay. And if there's no benefit to doing that is it fair to count that as income available for child support?

A. But, but that was my, my point is presumably you did it for a reason.

Q. I understand, but you just said you cannot monetarily see what the benefit is and I'm just saying—

A. <u>That's, that's not the test under the guidelines. There's no, there's no test as to whether or not it's a monetary benefit for the spouse</u>.

…

Q. What if the person was just wrong? Received bad accounting advice. Would you penalize him for that? 2

A<u>. I, I don't see it as penalizing. You have to follow the guidelines</u>. <u>The guidelines say if the, was the expense reasonably incurred to earn the income. That's the test under the guidelines.</u>

Q. But what income did it earn?

A. Well, in your hypothetical there's no income, therefore it's not a reasonable expense.

…

MR. JENNINGS: It's not my role to determine whether or not they are personal expenses. **<u>A financial expert reviews the material to determine whether or not there are indications that the Court may wish to consider expenses being personal, or in this case not reasonably incurred to earn income because of underutilization</u>**.

…

<u>I reviewed the information discussed with both ML and his external accountant, also asked AA, and made an assumption as to the degree of personal or nonbusiness expenses, which in, in my view, my role is to assess whether or not that's a reasonable assumption</u>.

…

12.2.8 Personal credit cards

A. It is a combination of contributions from ML into the company or it's withdrawals up above from other credit cards that are credit to some of the other credit cards or lines of credit, and the accountants recorded then because,

remember, **all of these accounts are personal, so the transactions ultimately are recorded as an impact to shareholder**. So, it is unclear how much of that line, shareholder contribution, is actual cash coming from ML in that year. Some of it appears to be withdrawals on one of the other credit cards as a payment on, on a credit card, and they, because they're personal, they're recorded as a shareholder contribution.

…

A. It's not double counting, but it is complex because, remember, we're talking about approximately six or seven credit cards and lines of credit that are all in ML's personal name. So, there's a line up above called shareholder withdrawals. In 2018, the amount is 115,724.99. So, that is a, in some cases, an actual cash advance on a credit card that ML would tell the accountants that's, that's me taking money out. **But in some cases, it's him taking money out and putting it as a payment on one of the other credit cards**, and that payment on the credit card is then recorded as a shareholder contribution, because while these are all recorded in, in the general ledger as individual credit cards, in total, it's recorded in the financial statements as due to director, because they're all personal, personally owned by ML.

…

A. And so in some cases, I, I, don't know the answer, but to clarify, **some of that shareholder contribution line appears to be cash withdrawals on some of the other credit cards all grouped together as shareholder**, but it is also possible that some of that shareholder contribution is actual cash being put in from, by ML.

…

A. Remember, this is a combination of all of these six or seven credit cards and lines of credit. The net change is essentially by, by the brackets mean it increases. That's what's recorded as due to director. Due to ML **And so, the number is a negative every year in the net change. That means the total liability on those credit cards is growing each of these four years.**

…

12.2.9 Shareholder Loan credit Card transactions / Loan Account

MR. JENNINGS: … The total of the four years net change is **$609,066.85…**

…

MR. JENNINGS: That doesn't tie in exactly to the change on the balance sheet, which is schedule 7 of my report, as the change in the due to director line, because there are some other shareholder loan accounts other than these credit cards but it is the, the majority of it.

…

A. …this table on page 18, even though, admittedly…, the title **says summary of CSH shareholder loan activity, it should read including the credit cards**. So, my understanding is there is another shareholder loan account in the general ledger.

Q. Okay. **And did you review that shareholder loan account**?

A. No, because the purpose of this analysis was addressing this issue of the interest on the credit cards which would not be relevant to shareholder loan, another shareholder loan account that isn't a credit card.

…

MR. CONRAD …is that true that you, you understood from Mr. Fluellen that all the transactions in the various credit cards were being reported in the ledgers?

MR. JENNINGS: Yes, that was my understanding. I have to rely on the external accountant for the company. My, my rule is not to do the accounting or the bookkeeping for the company, so I ask those kinds of questions of Mr. Fluellen who is I understand to be an accredited accountant, and so I relied on his representation.

…

MR. JENNINGS: The, the purpose of the, of a draft report is to elicit commentary and questions and new information sometimes from both parties because this was a joint retainer. **I, I didn't direct both parties to look at particular assumptions and say whether or not they agreed with those or not. I provided the draft report in total and it's my role to listen to all commentary, all responses, all new information, whether it's valid or whether it's relevant or not.** I, I believe the parties had opportunity to comment on the draft report.

…

MR. JENNINGS: It's generally accepted in all expert reports that we have to rely on the foundational accounting records and financial statements prepared by the company. As part of my diligence in an expert report, I assess whether or not they appear to be reasonable. For example, I, I know Mr. Fluellen and he is an accredited professional, and I took some comfort that when he produced financial statements that they are accurate. **And therefore it's not my role to redo the bookkeeping of the company unless it were pointed out to me that the records were in error, in which case we'd be having a different conversation about how do we produce an expert report from inaccurate financial statements**.

…

Q. Okay. And **if we simply review your report, the draft that's circulated**, and I read that report front to back, can you point to me in that report where I would be able to understand that you assumed that all the transactions from the credit card were captured in the general ledger?

A. I didn't, as I've testified, I didn't assume. I asked Mr. Fluellen as to how they recorded them.

…

A. But no, in answer to your question, there is no statement in the report that, in my view, that is part of the, the work effort that an expert undertakes to assess the diligence or, I'm sorry, assess the reasonableness of the information that we're relying on.

…

12.2.10 Exhibit 21 / Correction

A. …, **I misspoke earlier. I apologize, my Lady. But this table summarizes all of the shareholder loan transactions**. I, I originally said it was only for the credit cards and line of credits, but in paragraph 57 of the report, it's below, the table below summarizes the many transactions that are recorded as shareholder loans in CSH including the above credit cards. **So, it includes the credit cards, the line of credit, 8 and the separate general ledger account for shareholder loan**.

…

MR. CONRAD: Yeah. $346,139.59. That number includes the increase or decrease of the eight credit cards and lines of credit, plus the increase or decrease to the due from shareholder, due to shareholders account, correct?

MR. JENNINGS: Yes.

MR. CONRAD: And for 2021, the net change, the, the, is 346,139.59.

…

MR. CONRAD: So, to answer my question, you had said earlier that that number 346,139.59 was all an increase in credit cards and lines of credit. You've acknowledged now that there's also one other account and that account is 2680 due from shareholders and I'm saying to you that of that 346,139.59, the actual increase in credit cards and lines of credit was $117,169, 169.39 give or take a dollar or two. Is that correct?

…

MR. JENNINGS: 2-6-8-0 account is the shareholder account. A net change in it is $228,989.81. 2-2-8-9-8-9.8-1.

…

MR. CONRAD: And, and so if we, we focus on that due to director, the due from director's account, when that account has more credits in terms of quantum to the tune of $228,989.81, that is ML transferring that much more money than he took out in that account, correct?

MR. JENNINGS: Yes. **Except that some of the transactions in that shareholder account come from withdrawals on the credit cards and the lines of credit. I don't know how much, but I can clearly see entries that relate to the other eight accounts. The net impact, the way it's recorded, is that the amount owing to the shareholder, ML, increased by $228,989.81**.

…

MR. JENNINGS: So, it's possible that we're looking at a $4,600 credit in ML's shareholder loan account that matches a $4,600 debit in one of the credit cards and lines of credit. But this, this level of bookkeeping detail, we'd have to talk to Mr. Fluellen about the specifics of it.

MR. CONRAD: And is that something that you had asked of Mr. Fluellen?

MR. JENNINGS: Not the specific detail. As I testified, **once we saw all these general ledger accounts, we had either an email conversation or discussion inquiry or, or a phone conversation with Mr. Fluellen as to how these credit card transactions are being recorded.**

…

MR. JENNINGS: So, all accounting is double entry. There is no such thing as a one-sided transaction. It is impossible. Never. So, if, in your hypothetical**, ML had put money into the company, now that's being recorded as a credit to the shareholder loan, a debit is to a bank account where the money went**. There is always a debit for every credit and they're all, they're either totaled up to be the same dollar, they don't, they're not unbalanced. So, what we don't know **but I presume some of these entries they say transfer from shareholder, that there is a bank debit and you don't have the general ledger for the detail for the banking. Neither did I, because I didn't need to look at that.** But, presumably, that means ML put $5,000 in, in the bank account and there's a credit to his shareholder loan for $5,000. The company now owes him $5,000.

…

MR. JENNINGS: And so, if there's a credit in the shareholder loan that says a contribution from a shareholder, and it's not one of these lines of credit or personal credit cards that we're talking about, then presumably that means there's a debit in the bank account of the company to reflect that transaction.

…

A. Or money. Now, to be clear, there are many other ways that shareholder credit transactions can be recorded, but the, the, **the first place to start is we would ask Mr. Fluellen is this a cash contribution that ML did and where's the debit in the bank.** And he might say, for example, it wasn't cash. ML owned a vehicle and he turned that vehicle over to the company. He contributed the vehicle. That's an example of you would get the same shareholder credit, but it wouldn't be a cash transaction. It would, the debit then is to capital assets.

Q. Right.

A. So, there are multiple ways that shareholder loan transactions can result from transactions.

…

MR. CONRAD: Yeah so, there's, and, and, and thank you, my Lady. I may have, I may have misspoken. So, there's ML pays for business expenses using either money or a credit facility that's not one of the eight in the shareholder's loans. There's ML being, actually putting cash in the company from a source other than those eight lines of credit, there's payroll, and then the fourth one is a transfer of assets into the company, correct?

…

MR. CONRAD: Okay. And the distinction between those four is that the, although the credit shows up in the same place, the debit shows up in a different place, correct?

MR. JENNINGS: Yeah. Yes.

MR. CONRAD: For example, payroll is gonna be a debit in payroll in the income statement.

MR. JENNINGS: Debit to some type of expense, salaries, or wages, yes.

…

MR. CONRAD: Thank you. So, if in 2018, Mr. Fluellen said the business of expenses that we allocate in 2018, I'm allocating $152,080 as personal expenses paid by the company for ML. That would debit his shareholder's loan, correct?

MR. JENNINGS: So, you're, you're posing a hypothetical that if instead of the way that Mr. Fluellen and ML accounted for these expenses, so right now they're expensed in the company, instead Mr. Fluellen at ML's direction said no, they are not expenses, they are personal, and we're going to charge them to the shareholder loan.

…

MR. JENNINGS: That's the total over the four years of what we have determined based on our review and assumptions that our personal expenses in C, personal or nonbusiness expenses in CSH, even though we don't look at it in total. We are looking at an annual guideline income.

Q. Yeah. So, if Mr. Fluellen in each of those years had instead expensed those personal expenses to ML's shareholder's loan, what would be the due to director's account be at the end of 2021?

…

A. Sorry. Decrease, yes. Because you're instead, **you're saying if Mr. Fluellen had changed ML's shareholder loan for these personal expenses, yes, it would decrease his shareholder loan by 503,727.**

…

Q. Which means that in the aggregate, ML has still provided the company with either more, he either has more bank, depending on where they allocate it to the, to the various accounts that make the 9 accounts, ML either continues to either have an increase in bank debt of $47,724 or he has otherwise contributed 1 of those 4 items to the tune of 7, 47,724 with some combination thereof, correct?

A. No... Your hypothetical is assuming that ML agrees that these are personal expenses and could have gone back in time and instead charged them to his shareholder loan, but he didn't know this number of 503,727 until we produced our report. So, the fact that the 503,727 is covered by the shareholder loan is, they're just 2 different numbers all together**. There are other things going on in the company that ML is funding, which, admittedly, he is funding CSH. It's operating losses, a loan to DDL, buying equipment, all kinds of things, including lots of expenses going through the company.**

…

MR. JENNINGS: I don't see the connection between the total amount of the personal expenses and this concept that ML has a shareholder loan of $500,000 approximately funding that. He's funding all of the operations of the company, not just personal or nonbusiness expenses. He's funding the fact that CSH lent DDL $170,000 that year. He's funding that as well. **So, to take one of the numbers, i.e. $503,727 of personal expenses and take it out of, notionally take it out of the shareholder loan, in my view, is misleading if that's, that's just looking at one number out of many that he's funding.**

…

12.2.11 Account number 2681 CSSH Visa OO21

Q. And at the end of 2021, instead of having a negative cash balance of $21,729, they would have a negative cash balance of $672 and, $672,619, correct?

A. Yes.

Q. So, yesterday and the day before, you'll recall discussions about credit card statements and whether or not all of the credit card transactions were inside of the general ledgers for Canadian Subsea, correct? You recall that conversation?

A. Yes.

Q. And you had said that when I asked you how would I know that you made that assumption, you said that it was implied inside the report, correct?

A. I, I believe my testimony is it's, **we assume that the financial statements are accurate, and Mr. Fluellen said that that's how they recorded the shareholder**

loan transactions, and therefore you can, it's implied that that's, that's the case.

Q. That's, that accords with my memory. Do you recall receiving... do you recall sending Mr. Fluellen an email on July 27th, 2022 at 11:03 am, asking him, among other things, there are various visa interest payments included in the CSH interest and bank charges expense line. **I assume these visa balances are sitting CSH trade payables line on the balance sheet or are these shareholder visa balances? Do you recall asking that question?**

A. I don't recall the specific email or the date, but I, I do recall asking generally that question of Mr. Fluellen, yes.

Q. Okay. And you recall in response to that, **Mr. Fluellen specifically stated: with the exception of account number 2681 CSSH visa 0021,** we do not record any personal purchases to these accounts? You recall that?

A. I don't, I don't recall that, no.

…

Q. So, the understanding that you spoke about yesterday about what Mr. Fluellen told you, according to this email, is incorrect, correct?

A. It, it appears to be except for the visa 0021.

Q. Right. So, the question I have for you sir is when you prepared your report, did you repair, did you prepare your report based on what Mr. Fluellen told you in this email or based on what you testified to?

A. Based on what is recorded in the general ledger. **At, at this point, we didn't have all of the general ledger details, for example, that's why I was asking about the shareholder transactions. We didn't have all of those general ledger documents that we talked about yesterday for the various credit cards**. So, in our analysis in the end is based on what's recorded in the general ledger.

Q. No. Mister, Mr. Jennings, I'm being very specific here, we know that you did your analysis based on the general ledgers. I understand that. That's not the question. **What you testified to was that your understanding based on what Mr. Fluellen told you was that all of the transactions, personal and not personal, for these eight credit cards and lines of credit were included in those general ledgers you analyzed.** That's what you told the Court yesterday, maybe even the day before, correct?

A. Yes.

Q. Okay. So the, and you would agree with me that that is not what Mr. Fluellen told you, correct?

A. Correct.

Q. Okay.

A. Other, other than the visa 0021, he saying we did not record personal purchases.

…

A. ...**which the summary that I had must mean the line that has personal purchases must be only that account, visa 0021.**

…

MR. JENNINGS: …in the summary table in my report where we summarized the shareholder loan transactions, there's a line called personal purchases or personal expenses**. I, I represent to the Court that I thought that was personal purchases on all of the credit cards, and now this email, I, I am, was wrong. Is that, that line of personal purchases only applied to visa 0021.** Otherwise, there would have been no line on, on that table summary. So, there were personal ones recorded, but they're, **I, I was mistaken. They weren't for the other credit cards. It's just visa 0021.**

MR. CONRAD: So, again, my question, however, is when you prepared your report, did you do it on the basis that you thought that all of the transactions in those eight credit cards and lines of credit were included in the general ledgers, personal and non personal, like you told the Court yesterday, or did you do your report based on Mr. Fluellen's direction in this email to you?

MR. JENNINGS: Did the report based on Mr. Fluellen's direction because—

…

MR. JENNINGS: Because if the personal expenses on the other seven credit cards and lines of credit had been recorded by Mr. Fluellen, they would all be recorded as personal as well, presumably. And then wouldn't have impacted our personal expenses analysis because they were charged to the shareholder. **As long as what Mr. Fluellen said they did for visa 0021 was applied to the other credit cards, it wouldn't make any difference to what's recorded as an expense in the company because it would be personal expenses would be charged to ML, not charged as an expense inside the company**.

…

MR. JENNINGS: Yes. I, I can say it again, my Lady, without replaying it. I did it based on what Mr. Fluellen said this is how we recorded it. I may have I was **mistaken yesterday when I testified that I thought Mr. Fluellen had said they recorded the personal expenses on all the credit cards. I, I was mistaken in that statement. But if 11 Mr. Fluellen had recorded them all, he still would have recorded the personal ones as charged to the shareholder and not**—

…

MR. CONRAD: So, when you stated that Mr. Fluellen told you that all the credit cards, **that all the general ledgers included all the credit card charges, you now acknowledge that that was incorrect.**

MR. JENNINGS: Yes.

I accept the expert's testimony, that applying Mr. Fluellen's representation to the seven credit cards as initially represented and / or applying it to CSSH Visa 0021 alone, would have the same effect. I accept that the expert did not feel compelled to adjust his findings or representations after considering the questions posed by ML.

12.2.12 Grossing up / Corporate Attribution

> **MR. JENNINGS:** So, the personal expense part is saying there's a cost that ML is avoiding paying personally because the company is paying, and that's why we gross it up for tax purposes, because it's not being paid with his personal tax dollars, but it's a cost of his, if it's personal, it's a cost of his that he's avoiding paying because his company's paying. **That's not the same as Mr. Conrad's analogy of if we're determining guideline income, do we assume that depreciation represents a proxy for that annual or some annual proxy for capital ex, capital, CapEx spending.** So, they're, they're related, but they're not the same analysis.
>
> …
>
> **MR. CONRAD:** Okay. Thank you. Okay. Mr. Jennings, you gross up personal expenses, correct? In your report?
>
> **MR. JENNINGS:** For taxes, yes.
>
> **MR. CONRAD:** Yeah. And is the logic behind that gross up that the business was able to deduct it from what would have been his, his net income?
>
> **…**
>
> **MR. JENNINGS:** In some cases, some experts in some courts describe it as personal expenses paid in the company need to be grossed up because they've been deducted in the company.
>
> **MR. CONRAD:** Okay.
>
> **MR. JENNINGS:** There is another theory or, or argument that many people use is that the concept **is if the spouse had the money to pay those personal expenses and had to take it, had to take income out of the company to have the after tax funds to pay those expenses, that's why it needs to be grossed up**. Because

if, if the business owner spouse needed $20,000, the need to take more than $20,000 out of the company because of income taxes. So, both of those arguments are used to justify or to rationalize why personal expenses paid by the company need to be grossed up for, for an income tax impact.

Q. Or it could have been credited to the shareholder's account.

A. If it's credit, **if it's debited to the shareholder's account, it doesn't need to be grossed up. It's not, it's a personal expense already accounted for inside the company and charged to the director.**

…

MR. JENNINGS: Personal expenses that are charged to the shareholder inside the company don't need to be grossed up because they're, they're already put to the shareholder account. They're, they are already assumed in effect that they've been paid personally. Not paid by the company.

MR. CONRAD: Right. But in, in, in the situation where you're saying that this is a personal expense, you said that the logic is that the owner would have had to take out the cash from the business in order to pay, as income in order to pay that spouse, correct?

MR. JENNINGS: Yes.

Q. Okay. But, the other option would have been not to take it out as, as cash as income, **but instead to credit it to the shareholder's account or debit it to the shareholder's account, correct**?

A. Yes.

Q. And it's true that corporate attribution under section 18, the court, can be used by the court to increase the line 150 income or decrease the line 150 income, correct?

…

MR. JENNINGS: Section 18(1) is where the shareholder, where the spouse is a shareholder, director, or officer of a company, and allows the court to include all or part of the income of that company. **I, in my, in my experience, that's not in, interpreted to mean you can reduce the spouse's income, and that would be adding to the spouse's income.**

MR. CONRAD: And when you say it's not in your experience, are you referring to *jurisprudence*?

MR. JENNINGS: My understanding of *jurisprudence* and as an expert is it says all or part of the pretax income of the corporation, if the corporation, for example, had a loss, **we don't attribute losses because the guidelines don't refer to the word losses. It refers to income**.

MR. CONRAD: So, your understanding is that section 18 is only to increase someone line 150 income.

MR. JENNINGS: 18(1).

Q. That, so .(inaudible, cough). upward calculation towards someone's line 150 income only, correct? Doesn't work the other way around. Is that what you're saying?

A. Yes.

Q. And that's based on your review of the *jurisprudence* and your experience as an expert, correct?

A. Yes. **And in 18(2), it's referring to adjustments to the corporation's pretax income. Again, it's saying must be added back to the income. I don't, I don't see a reference to reducing the income.**

Q. Okay. And, and does that mean that when you were looking at the negative net income of both Canadian Subsea and Dominion Diving Limited, you did not even consider that you could reduce ML's income based on those losses, correct?

A. Yes. In, in some cases, some of the years, either or both of the companies report losses, and it is my experience, my view, and my firm view that the **guidelines say all or part of the pretax income, a loss is the opposite of income, so, it's not considered a, a loss is not considered for attribution.**

Okay. And just to be specific, you did not consider it either, correct?

A. No.

Q. And did you consider under either section 18 or 17 that you could reduce ML's line 150 income based on the losses, the corporation, the available funds in the corporation?

A. No, because the guidelines refer to income, attributing income, all or part of the income.

…

[139] At trial Mr. Conrad asked the expert to review a British Columbia Court of Appeal Case, *de la Fuente v. Breen,* 2022 BCCA 424 dated December 14, 2022. The expert responded as follows:

MR. JENNINGS: I'm not a legal expert, as you know, my Lady. I'm not here to interpret a case, **but this case is talking about line 150 income**. **That's the personal tax return of the spouse. That's different than what we're talking about in ML's case. The question earlier from Mr. Conrad was referring to in section 18(1) where the Court can attribute all or part of the pretax income of the corporation, that's the corporation's income, not what is on his personal tax return**. Line 150 in this case is the personal tax return. I, I'm, I'm

> not going to debate the legal application of this *jurisprudence* or not, but I will point out **that this case is referring to line 150 persona tax return**. **The case we're talking about in Mister, from ML is whether or not you should attribute some of the income or losses of the corporation.** They're not on, they're not in line 150 of his personal tax return. I believe that's a relevant distinction here.
>
> …

In that case, the Court of Appeal found at paragraph 23 and 26:

> [23] The judge recognized that, under s. 18 of the *Guidelines*, a payor's line 150 income can be adjusted both upward or downward: *S.A.B* v. *J.R.B*., 2003 BCSC 490 at para. 34-35. But she concluded that it **would not be fair to adjust the appellant's income downward because of debt repayments the appellant chose to make to his own company for funds he had earlier borrowed and from which he had benefitted** at paras. 42-43.
>
> …
>
> [26] Section 18 of the Guidelines is intended to ensure that a payor's income fairly reflects the money available to him for the payment of child support…

The *de la Fuente* case (supra) was released after the Nova Scotia Court of Appeal case of *Ward* (supra) 2022 NSCA 20, wherein at paragraph 127, our Court of Appeal directed the lower courts to consider / adjust for corporate losses before attributing income to the payor.

12.2.13 Corporate Re-investment

[140] ML's counsel asked questions about capital re-investment and depreciation:

> **MR. CONRAD:** And at paragraph 33 of page 11, you state that you consider whether all of the adjusted income is truly available to be withdrawn by its owners, correct? 33, first line.
>
> **A.** ...but to, to be clear**, the discussion of attributing corporate income begins at paragraph 24, page 9 of my report**. The paragraphs beginning at page 30 are specific for DDL and then later for CSH.
>
> **Q.** Okay. But in paragraph 33, you said that you consider whether all of the adjusted income is truly available to be withdrawn by its owners, correct?

A. Yes.

Q. Okay. And to determine what corporate pretax income that can be added to ML's income, you must determine what portion of the adjusted pretax income could be withdrawn by its owners, correct?

A. Yes. **The guidelines refer to the word available, and that's the, that's the exercise that we have to undertake is showing the Court whether or not that corporate income is available to the spouse**. **It, it, it's a complex analysis sometimes, and whether or not the spouse has taken the income is often irrelevant.** The Court has the discretion to consider all or part of the income and available is the, in my view, the generally accepted standard.

Q. And you analyze this under 33, you point out A, B, and C, but there's, there's real considerations that you hear, and that's **working capital, capital reinvestment, debt service principal and repayment, and the fourth one being a debt covenant limitations, correct?**

…

A. Correct, but it is very common that these types of analysis are spread over time because those requirements fluctuate in business. Hence why it's very common to see experts **show a period of time and show the Court the averages or simple averages, weighted averages because of fluctuations like that.**

…

Q. And in this particular case, you didn't provide any calculations related to the actual capital expenditures, did you?

A. No. As I testified, **we made an assumption that depreciation was a proxy for capital spending on an annual basis**.

…

MR. JENNINGS: My Lady, yes, if, if you take the premise that in that one year you're going to use actual capital spending .(inaudible, cough)... depreciation, that would be the calculation. But what I, what I'm not agreeing to is why that says there's no income to attribute in DDL.

…

MR. CONRAD: What I'm asking in this, would you agree that if you applied the capital, actual capital reinvestment and backed out the financing or other cash sources they may have had available to finance those capital reinvestment, if you do that, you would end up with negative numbers for every single year of available adjusted corporate pretax income.

…

MR. JENNINGS: Yes, but may I explain why –

…

MR. JENNINGS: There were, there are many considerations in, in analyzing a corporate income such as …, DDL, ML is a 50 percent shareholder in, whether or not there is corporate pretax income available to be attributed under guideline, under the guidelines section 19, the court can consider all or part of the pretax income. So, experts like me go through this analysis to determine what's available, and... schedule two of my report does that analysis using the **assumption that capital reinvestment is equal to depreciation, which as I've testified is relatively common because we don't have the capital, and, debt, capital spending analysis to be able to match it up over many years. But it does consider over time this issue of availability**. So, in ML's schedule, **the primary difference between that calculation and mine is this issue of does depreciation represent a proxy, an annual proxy for capital spending.**

So, instead, which is what the assumption that I did, I used, instead **this analysis adjusts for the actual capital spending in the year which we can see in some, in these 4 years, the company is spending considerable amounts of money on, on capital additions to its property, plant, and equipment. Over $3 million dollars in 2021.** But that's a one-time expenditure, generally speaking,which the company used financing to come up with that fund or those, those funds for those additions. And so, it can be misleading or **in my view it is misleading to use this analysis which strictly deducts the capital reinvestment because they are not annual requirements**. They are periodic, as I've referred to lumpy, requirements in the business. But they're not required every year, and so, it's very common that without a detailed analysis of capital spending required in the business**, we make the assumption that depreciation is a proxy for that spend.**

Finally, I, I should point out **that in my schedule two, two of the four years, I've already identified, there is no income from DDL available to be attributed to ML**. So, on my schedule 2, if you look at 2018 and 21, I have identified that the available adjusted corporate pretax income line on the bottom is negative. **And as I've testified, in my view, section 19 of the, of the guidelines don't allow the court to attribute those losses. So, in my analysis, in 2018 and 21, I haven't attributed any income to ML from DDL**. I, I believe this analysis from Mr. Conrad is showing that there shouldn't be any attributed, attribution in any of the years. **But to be clear, 2018 and 21, 1 I haven't attributed any either. There isn't any available because of this issue of debt and the capital spend of the company or how it's financing the capital spend. And in addition, in 2019 and 2020, I have reduced the amount of the available … because of this issue of the amount of debt that the company has taken on to fund these capital additions**. So, in schedule two of my report, notes sixes, six and seven reduce the corporate available income for principal payments on his debt and debt covenant restrictions that I assume are typically applied to a company that borrows of this, this magnitude. **So, I've reduced by view of the available income for these issues.**

So, I, I believe it's relevant for the court to consider that even if the court wished to, to undertake the analysis on, on this basis, it doesn't, we're not talking about

all of the years in the first place. **My report is already saying in 2018 and 21 there is no DDL income to attribute and it's restricted, reduced in 2019 and 2020**.

…

12.2.14 Debt Service Capital

[141] ML's counsel asked questions related to debt servicing and available corporate income.

Q. … the number that you have is in schedule two, debt service principal and note six, and it runs across there, correct?

A. Yes. Schedule two, debt service principal. **These are reductions to the available corporate income of DDL that in my view was, are not available income to be attributed to ML because they are commitments to, for the company to repay its bank debt.** The, the concept being if the company has committed to repay its bank debt, the business owner spouse can't also take that same amount of money out as income. Can't have it both ways. You have to, if you're going to commit to repaying Royal Bank or whichever bank it is, you can't also, or you shouldn't also attribute that same income to the business owner, in my view.

…

Q. Yeah. And, in fact, in this case for 2019, 2020, 2021, each of those years **they paid more money on their current portion of their long-term debt in the fiscal year than was projected on the balance sheet for the fiscal**, for the previous fiscal year, correct?

A. Yes, but you need to consider how the increase in long-term debt was utilized.

…

MR. JENNINGS: ...I've deducted $320,986 because that was the scheduled committed—

…

MR. JENNINGS: ...long-term debt repayment—

…

MR. JENNINGS: ...at the beginning of that year.

…

Q. … the actual cash that went out the door for... okay, use the same numbers, for repayment of long-term debt is found on the cashflow statements, correct?

A. Yes.

Q. And the repayment of long-term debt is, from a cashflow statement point of view, the same item that we're talking about on the balance sheet in terms of the current portion of long-term debt, correct?

…

A. So, in some cases, the com, actual is different from the commitment. Company decides to pay extra on a—

…

MR. JENNINGS: **In this case, it's also complicated by they appear to have gotten a new loan during that next year so that, and they started repaying it during the year, and that increased the actual repay, long-term debt commit**, or long-term debt repayment that wasn't known at the beginning of the year for the commitment.

…

MR. JENNINGS: So, I, as I've said, I**, I do these analysis on a regular basis, and I use the commitment, the current portion that's stated at the end of the prior year because that's what the company has committed to**. As, as Mr. Conrad's pointed out, **sometimes the actual is different. Sometimes it's because they borrow more money and so you may need to consider what they use that money for**. Sometimes it's discretionary, like repaying more, but the next line on my schedule two analysis, the debt covenant restriction essentially covers that off because what that analysis does is says even if the company repaid that committed portion, and when you compare its total debt, the actual debt on the, on each year end, sometimes not all the income is available and that's what schedule two **identifies in 2019 and 2020 that even with the committed amount of debt repayment, not all that income is available**. So, you see, in 2020, I deducting $206,000 over and above the debt repayment because I'm saying if ML had taken out all of the income above that, that I identified as being available, his, he would be offside of his bank debt covenants. His banker would—

…

MR. JENNINGS: Yes. So, whenever the company borrows money, there are covenants put in place that say the company must meet the minimum requirements often in terms of cashflow. The implication being if they're offside in the covenants, bad things can happen. The company calls its loan and it restricts his future spending, all those types of things. **In, in this case, we asked for the banking documents for DDL and they, as I understand it, ML's' brother wouldn't agree to provide them because he's a 50 percent shareholder, so we made an assumption as to debt covenants that we typically see in these kinds of borrowings**. And so, the analysis that we undertook which is on... on page, on schedule 10, oh sorry, schedule 11...

…

> **MR. JENNINGS:** The table that Mr. Conrad represented shows a difference between a committed portion of current, current portion of long-term debt that I used in determining the **available income to be attributed to ML** versus the actual principal repayment, which sometimes there are some differences. The, the implication**, I perhaps wrongly assumed that that's showing an error in my report. I, I wanted to clarify that the next line item in my schedule two analysis, even if the current portion number was wrong and, and I was mistaken in using that number, it adjusts for that because it compares the actual debt and its borrowing ability to that available income**, and in my view, even if there is a difference in any of the numbers up above, that's **the overriding analysis that picks up any other differences, because I'm saying in 2020 on schedule 2, I'm deducting $206,000 of the above $867,000 saying that's not available to ML because of the actual debt position at the end of fiscal 2020.**
>
> **…**

I am satisfied with the expert's explanation(s).

12.2.15 Request to View Existing Debt Agreements

[142] ML's counsel asked questions related to the expert's knowledge about existing debt covenants:

> **MR. CONRAD:** Well, Mr. Jennings, gave a discussion about debt covenants and you made comment of that in your report, I believe it was at page of that report... and sorry, it's page 12, subsection D, subsection 2 of your report. You state that **DDL shareholders refused our request to view the company's existing debt agreements**.
>
> **MR. JENNINGS:** Yes.
>
> **MR. CONRAD:** Do you recall asking ML on **February 10th of 2022** at 9:31 am in an email: we previously asked for the current annual banking document, sometimes called a time, term sheet for DDL. For our purposes, the key element is whether your banker has set covenants that restrict DDL's ability to remove cash, such as a minimum debt service covenant, commonly 1.25 or minimum current ratio, commonly 1.
>
> **MR. CONRAD:** Thank you. **It said we have made assumptions about such covenants, but it would be preferable to have the actuals**. **Your brother previously directed your accountant not to provide us with this document, and I'm asking you discuss this position with RL**. Do you recall sending that email to ML?

MR. JENNINGS: I don't recall the specific date, but I do recall the email discussion, yes.

Q. And do you recall that on **February 22nd, 2022** at 2:05 Atlantic Standard Time, ML's then counsel, Alex Embree, wrote an email to you in response to your February 10th, 2022 9:31 am email stating: **Dan, please the see the attached. One, PDFs X three regarding the ...(inaudible)... two, BNS, Bank of Nova Scotia commitment letter, and three, Damon Shipyards loan agreements. Please let you know, please let me know if you have any questions or require further documents.** Do you recall that?

A. I don't recall that email, no.

Q. And it's true that Mr. Embree sent you that email, correct?

A. Yes.

…

MR. JENNINGS: But obviously I received the email. It's addressed to me and my proper email address, **but I don't recall the attachments**.

…

MS. CAMPBELL: The other comment I would like to make, because the argument that's going to come, my Lady, you can see the top of this email, it says subject, ML, further documents, date, May 22nd, 2024, from ML to Matt Conrad, and yes, that email shows that there are attachments, what was sent to Mr. Conrad **on May 22nd, 2024. But on the email below from Alex Embree to Dan Jennings, there is no indication that there was anything attached to that email.**

…

THE COURT: Alright, so, and the witness has clearly stated he doesn't recall ever receiving these documents.

MR. JENNINGS: I, I don't recall seeing these, seeing these documents. I, I may be mistaken, but I, I don't recall them.

MR. CONRAD: Okay. And, so if you don't recall seeing them, it's fair to say that you did not consider them in your report?

MR. JENNINGS: If I didn't see them, I did not consider them, correct.

…

MR. CONRAD: Do you recall asking Alex Embree any follow-up questions in related to the email he sent you purporting to attach these documents?

MR. JENNINGS: No. It's possible. I don't, I don't recall these documents, **but it's possible that I received them, and they didn't have reference to covenants, and therefore I made an assumption that, to use the standard covenants in my experience.**

> **Q.** Right. But what you say, though, on paragraph 12 is that DDL shareholders refused our request to view the company's existing debt agreements. Are those debt agreements?
>
> **A.** They appear to be, yes. **They don't, they don't address the issue of covenants, but they appear to be lending agreements, yes.**
>
> **Q.** Right. Which is what is provided to you, or at least Mr. Embree has said in his email he provided to you, correct?
>
> **A.** Yes.
>
> **Q.** Okay. He wasn't refusing to provide it. He was attempting to provide it, correct?
>
> **A.** Yes. That appears to be the case.
>
> **…**
>
> **A.** It, as I've said**, it's possible that I, I received these documents and they don't say anything about covenants and therefore I assumed that that was all the information that they had and I used the assumption based on my experience, which, to be clear, the assumption reduces the income available to, for attribution to ML**
>
> **…**

There is insufficient evidence confirming that in February 2012 the expert received banking documents with relevant covenants attached. Either way, I am satisfied with the expert's use of the standard covenants to address the lack of information known to him.

12.2.16 Debt Service Analysis / Ratio

[143] ML's lawyer inquired about the expert's position on the debt service analysis ratio:

> **MR. JENNINGS:** The title on this, this schedule is effects of attribution of corporate pretax income DDL. **So, the purpose of this analysis is to consider on schedule two, I say, I say there's X amount of available income. What this analysis does is says what would the balance sheet impact be and the impact on debt covenants if ML had taken that income out. And the reason we do this is it's another way to test is the income really available to the business**

owner. **And in this case, the conclusion was in, in 2019 and 2020, no, not all of the income is available**. It would put, as I said earlier, as I testified earlier, it would put the company offside on certain debt covenants. In, in some reports this is referred to as a debt covenant analysis. **Though the point it is, is considering the financial impact on the company's debt position of attributing all of the income.**

…

Q. They're taking out more money, you're telling the Court to take out more money than your debt covenant allow, analysis allows, correct?

A. No.

Q. Okay.

A. I, I misspoke earlier. The, the analysis on schedule 11 is working backwards to what's the restriction on what's not available. That's what's determining the 160 and the 206 that's then deducted on schedule 2.

Q. Well, with all due respect, sir, what you say on schedule 11 is if withdrawn, if you take it out, correct?

A. Yes, and, and I agree, it's mischaracterized as the analysis is working backwards to say how much could be, how much could, should not be taken out and still be on side with that current ratio of 1.0.

…

MR. JENNINGS: It's mischaracterized in, my Lady, in the language of with, if withdrawn. It's not actually if withdrawn. It's—

…

MR. JENNINGS: It should say, it shouldn't say withdrawn, it should say the maximum of the restricted amount not available. The, the purpose of this analysis is saying well how much, what would it look like if certain amounts were taken out. So, it's working backwards to a current ratio of one.

MR. CONRAD: Right. Exactly. You're saying what would it look like if they took this amount of money out of the company, correct?

MR. JENNINGS: No. It, it's working backwards to an analysis to show the amount that's not available.

…

Q. But that's your analysis. You're saying in that statement that he cannot take out more than $366,000 without putting them offside, that's correct, isn't it?

A. It's a test applying the income withdrawn to the balance sheet, yes.

…

Q. They're taking out more money, you're telling the Court to take out more money than your debt covenant allow, analysis allows, correct?

A. No.

Q. Okay.

A. I, I misspoke earlier. The, the analysis on schedule 11 is working backwards to what's the restriction on what's not available. That's what's determining the 160 and the 206 that's then deducted on schedule 2.

Q. Well, with all due respect, sir, what you say on schedule 11 is if withdrawn, if you take it out, correct?

A. Yes, and, and I agree**, it's mischaracterized as the analysis is working backwards to say how much could be, how much could, should not be taken out and still be on side with that current ratio of 1.0**.

…

MR. JENNINGS: **It's mischaracterized in, my Lady, in the language of with, if withdrawn. It's not actually if withdrawn. It's**—

…

MR. JENNINGS: The line that says less adjusted corporate pretax income—

...(inaudible, crosstalk)...

THE COURT: Yes, and it says if withdrawn. What should it say there?

MR. JENNINGS: It should say, it shouldn't say withdrawn, it should say the maximum of the restricted amount not available. The, the purpose of this analysis is saying well how much, what would it look like if certain amounts were taken out. So, it's working backwards to a current ratio of one.

MR. CONRAD: Right. Exactly. You're saying what would it look like if they took this amount of money out of the company, correct?

MR. JENNINGS: No. It, it's working backwards to an analysis to show the amount that's not available.

…

MR. JENNINGS: The, my schedule 11 works backwards to get to the restricted amount, but Mr. Conrad's schedule is saying if you just deduct the amount that's attributed, I, I'd need some time to understand the differences between them, whether or not the logic still works.

…

MR. JENNINGS: I'm, I need to understand the logic of this methodology versus the, the presentation, my presentation on schedule 11.

…

> **MR. JENNINGS: <u>The schedule 11, my schedule 11 analysis is attempting to work backwards to a restricted amount. I believe Mr. Conrad's table is deducting the, the attri, the attributed income. I'm not, I'm not sure the logic holds that you get to the same place. I, I need some, some time to look at that</u>**.
>
> **…**

[144] As in *Potzus* (supra), ML has not discharged his burden:

> [108] Working capital ratios and debt-to-equity ratios are overt restrictions on distribution of net pre-tax corporate income when the corporation is contractually obligated to third parties to maintain them in explicit proportion. As to the working capital ratios required by PPRM's bonding company, there was evidence suggesting PPRM may not have been in strict compliance 2017 SKCA 15 (CanLII) Page 32 for some time. This appears to have had no adverse effect on its relations with its bonding company. **<u>There was no evidence the bonding company had raised complaint</u>**. <u>Absent any suggestion of negative repercussions, the Chambers judge reasonably concluded that income attribution would not jeopardize PPRM's relationship with its bonding company</u>. (my emphasis)

ML did not discharge his burden. I accept the expert's evidence on this point.

12.2.17 Is The Disputed Property Inhabitable?

[145] The expert answered questions related to the use or lack thereof of the disputed property by CSH or by ML:

> **Q.** You don't mention in your report that the property has been under construction since 2010, correct?
>
> **A. No.**
>
> **Q.** You don't mention in your report that it has been subject to disputes between MLand ...(inaudible)... Windows and Central Building Supplies in Windsor, correct?
>
> **A. No.**
>
> **…**
>
> **MR. CONRAD:** So, you don't put any of those things in your report, correct?
>
> **MR. JENNINGS:** No, **it, it is all part of the uncertainty as to what properties are included in this capital asset line in CSH.**

Q. But you do put in AA's comment about the report, that it's a vacant personal residence, correct?

A. Yes.

Q. But you don't talk about ML's comments respecting this property in the report, correct?

A. No.

Q. You don't even consider anywhere in your report that this property is under construction, correct?

A. I believe there was uncertainty about the properties and whether it's personal residence or not—

Q. You keep saying, but that, I'm asking if in your report you considered anywhere in your report, in the writing, that the property was under construction, that it was uninhabitable?

A. The uncertainty of the use of the property is why I used 50 percent. I didn't, why I didn't say that all the expenses should be (inaudible, vehicle revving).

…

A. It's 50 percent is because of the uncertainty.

Q. Right. But if the property was under construction and uninhabitable, then it's not capable of being used to generate revenue, correct?

A. Possibly. I'd need more information.

Q. What's that?

A. I'd need more information.

It was ML's burden to provide sufficient information for the expert to work with and / or to submit alternate expert evidence. I am satisfied with the expert's analysis based on the information provided to the expert by both parties, and by CSH's and DDL's accountant, and based on the expert's review of the relevant and available financial information while relying on commonly used accounting practices when the expert deemed it was necessary and / or advisable.

12.3 Redirect

[146] In redirect, AA's legal counsel presented the expert, DJ, with certain exhibits to reconsider,

> **MS. CAMPBELL..**. So, Mr. Jennings, these were various scenarios or different wants (sic) to calculate things that my friend has put to you and asked you to comment on. Do you recall that?
>
> **MR. JENNINGS:** Yes.
>
> **Q.** Have any of the information that he's provided to you in any of these exhibits cause you to change your opinions outlined in your report that's submitted to this Court?
>
> **A. No.**
>
> **Q.** And do you stand by the opinions and the methodologies that are contained within your report? 7
>
> **A.** Yes.
>
> **Q.** And the numbers you used and relied on?
>
> **A.** Yes.
>
> **…**
>
> **A. <u>The accounting records, the capital asset working paper refers to three lines, warehouse, dock, and garage. It is unclear exactly how many structures are owned by the company.</u>**
>
> **Q.** And I believe, what I understood you to say, that in relation to the warehouse, at least, you, there was some confusion surrounding that as to what building that was.
>
> **A.** Yes.
>
> **Q.** And because I think you talked about seeing receipts from the disputed property and Montague Road.
>
> **A.** Yes.
>
> **…**
>
> **Q.** And this is getting to the heart of my question, you, what I wrote down you said that was because of the confusion about the use of the property, you used a 50 percent figure.
>
> **A. <u>Yes. Given the representations of both parties, the uncertainty about the accounting records as to which properties are included, the fact that some of the invoices that we looked at referred to Montague Road versus Post Office</u>**

Road and given the fact that the expenses in the company are not broken down by asset. In, in my view, in absence of better information, there was, it was a, it's a **reasonable assumption that 50 percent of the expenses, of those expenses were either personal, nonbusiness, or because the asset is underutilized**.

Q. And is that why, it was the confusion about whether any of those assets were residences that you used 50 percent and not 100 percent?

A. That's, that's part of it. The, it goes back to the point that we looked earlier at the **capital asset working paper, the majority of what's recorded as building is on a line called warehouse, but it's, there is information, conflicting information, as to exactly how many buildings that is.**

Q. Let me ask you this question, Mr. Jennings, if either or one of those buildings were residences, would you have used a number different that 50 percent?

A. **AA represented that one of the buildings is a, a residence. It, it, that appears possible, and given the uncertainty, I did not feel we had any information to be able to choose anything other than a 50 percent assumption.**

Q. But if you did have more certainty and the certainty was that it was being used or was a personal residence, would that change how you would have did your calculation?

A. That would be difficult because, as I said, the expenses in the company are not recorded by asset. So, on that table on the top of page 17, there, what's, there's a line called the repairs and maintenance, that's all buildings. How much would be a personal residence, don't know. I'm not sure if, **I'm not sure how we would determine the specific number even if we knew definitively that one of the buildings was a personal residence. I'm not sure how we would even support using something other than a 50 percent assumption**.

Q. And that would be because of the lack of clarity of specificity in the records?

A. Yes, it is**. It's impossible to say of that $79,659 of repairs and maintenance, how much would relate to this alleged personal residence versus the garage versus the dock, versus the, the Quonset hut, Post Office Road versus Montague Road**, it is just, it is not clear.

…

12.3.1 Level of Financial Report

THE COURT: I just wondered if you could tell me for my edification, and you may have touched on this and I might have missed it, but there are different types of financial reports, correct? There are different types of financial reports, right?

…

A. Very rarely are private companies like these audited. The, the middle level of corroboration, assurance from accountants is called a review engagement, and the

lowest level is called a notice to reader, now, in new accounting language, called a compilation.

Q. A compilation.

A. That's the lowest level.

[147] Referencing exhibit 12, tab 16, page 9-8-8, the expert witness, DJ, stated:

MR. JENNINGS: So, this is what's, this is DDL's financial statements and it's a report called a review engagement report expressed by the external accountants, CCI. As I said, the review engagement is the middle of the three categories of assurance, and, and reporting type from external accountants. In, in theory, you can say well, it's not the highest level of assurance, but it's not the lowest level either. **It's not that uncommon to see private companies with a significant amount of debt like DDL to have this type of review engagement**. Most private companies are not required by their bankers, for example, to have audited financials. So, we, we can take some degree of comfort from the external accountants putting this review engagement report on the financial statements of DDL.

A. The company CSH is the lowest level of financial statement reporting called a notice to reader, now called a compilation. **Again, it's very common in, for private companies to, unless they have a bank telling them they need to have review engagement financial statements, they will go with that lowest level**.

…

A. In, in my experience, my Lady, is, is not that we can't rely on these financial statements, because they are still prepared by external accredited professionals. Mr. Fluellen's team are CPAs and we can take some comfort from them, but technically speaking, **they're, they're not the same level of assurance as the DDL financial statements**.

…

Q. Okay. Alright. And you have no concerns that the generally accepted accounting principles were followed when you reviewed these reports?

A. No. It's, it's not my role to produce these financial records, but certainly as an expert I, I undertake diligence to indicate whether or not they are reasonable and can be relied upon, hence, that's part of the reason all the documentation and the inquiries of Mr. Fluellen, et cetera, is to give us some comfort that, that the financial statements are reasonably prepared and can be relied upon and I have not seen anything that would indicate otherwise.

…

A. So, in this case, they follow an accounting standard called ASPE, which is accounting standard for private enterprises. Very common in Canada that that's what private companies follow. Larger public companies can follow other—

…

A. You, you will rarely see a private company in Canada following other standards unless they sometimes down produce formal financial statements, and they just follow the tax rules. You will sometimes see small companies do that, but in this case they followed the, the generally accepted standard for private companies in Canada.

…

A. Oh, oh. I'm sorry. To clarify, my Lady, **we examined the expenses, not, not the personal ones that are charged to the shareholder loan, we examined the expenses or, or reviewed the expenses that are expensed in the company that are not termed personal**. It's, it's our analysis saying the investigation and assumption as to how many of them may be personal.

…

A. Again, my Lady, we have to rely on accredited accountants producing financial statements, and that's the foundation of these expert reports on guideline income. If we saw information that indicated these financial statements were not accurate or grossly misrepresented, we'd have a much different discussion, because then we can't rely on the financial statements to start the guideline income analysis, and so I did not see any of those red flags, if you will, that would indicate we couldn't rely on these financials.

…

A. Well, as you know, my Lady, these kinds of reports, when it's a business owner, have a degree of complexity. Otherwise, you don't need an expert.

…

A. And my role is to assist you independently and objectively with, with the information for you to make the determination. In, in my view, I've done that. **Acknowledging that there are some assumptions because of either incomplete or, or not totally clear information and, and it's up to you to determine whether or not you agree those assumptions are reasonable in the context. I believe they are.**

Q. You've been working in, as a, as an accountant for how long?

A. I've been a CPA since 1990.

…

A. Is that 34 years?

…

A. And 26 of those years I have worked on these types of matters: guideline income expert reports, expert reports for other purposes, business valuations, buying and selling of businesses, because they all fundamentally rely on a very similar type of analysis.

Q. And similar type of analysis. Did you, this one wasn't very much different from any of the others?

A. Every file I have—

Q. Is, has its own unique qualities.

A. ...has complexities, otherwise, they don't need me.

Q. Right. Okay. I'm just putting it out there. Was this anything different from you or anything that I should know about or be alerted to or be aware of? That's all.

A. I don't, I don't recall anything specific other than the challenges we, we've discussed in this report. **Is, it goes back to the point, my Lady, that for a business owner, the income that's on their personal tax return, line 150 that the guideline refers to, it is almost never, almost never, in my experience, the available guideline income.**

A. There needs to be an analysis because what's available is often very different than what they take out of their companies.

Q. Sure. And to ask a very, I suppose, basic question, if somebody chooses to put all their money in, **you said at one point you didn't know where the money was coming from to be invested**, what did you, you said you didn't know if it was coming from, or, and I believe Mr. Conard asked you questions or alluded, I shouldn't say alluded to, but he asked questions that seemed to raise the possibility that there are other bank accounts out there that you'd not seen.

A. And that may be possible. **There, clearly ML is financing the operations of CHS (sic), for example. And the records show that he has contributed significant amounts of money to, to do that. Where he gets it, I, I, don't know.** That's not part of the scope, in my view, as determining guideline income. The income that's available to him doesn't address where he gets it from. It's the guidelines**, in my view, set out this is the type of considerations the Court can look at all or part of the pretax income of the corporation**.

…

A. So, it's my understanding that the guidelines allow the Court to impute income to a spouse. **So, in, in, in theory, as, as you've said, if, if somebody was putting all of their funds in a company and not reporting anything, then that could be a scenario in which the Court could impute income**. I, I, I have heard counsel in other files talk about that if a business owner spouse has X amount of dollars of living expenses, he or she can't claim, then, to not have any income. He **has to fund the lifestyle somehow.**

…

A. ...here's one of the challenges in, in, in ML's case is CSH has on the top line—

…

A. The top line on over to the right for 2021 is revenue. **So, this is CSH charging DDL for the use of its assets and some amount for ML**–

...(inaudible, crosstalk)..

…

A. So, remember that all of that revenue comes from DDL. This is however CSH and ML and his brother determining, this, this is what it charged that year. And then the next line are direct costs, which there's another schedule summarizing what makes up direct costs. **But direct costs to operate the business were $162,049. 1-2 6-2-0-4-9.** And then three more lines down, there's a collection of expenses called general and administrative expenses.

…

A. And this is, and the total, there's a sub, a subtotal down below, a total GNA expenses of $296,652 in 2021. So, in 2021, CSH **spent $162,049 in direct costs, and $296,652 in general and administrative costs**. And so, when you compare that to the **revenue up above of 259**, that's a shortfall, a loss from the income before taxes line of 199,642. This, this is why I have raised in the report, I'm not sure what the answer is**, but there is a challenge here that CSH doesn't make any money. And it's not that we don't see unprofitable companies all of the time, it's just that all of the revenue of this company comes from a related party.** And so, you have to raise the question, **are they charging a fair market rate for it, or is it that these assets are not being utilized and they're not charging DDL for them**, or are they personal assets and therefore personal expenses, and that's why they don't have more revenue.

…

A. So, DDL is in, is an offshore diving and remote operated vehicle service business.

…

A. ...et cetera, hire them to dive and look at under ships and pipes, et cetera. It's a capital-intensive business. It requires lots of capital and vehicles and vessels, rather, vessels to, to do that, and lots of people. CSH owns some assets that, as I understand it, are used by DDL in that business. **And CSH rents based on the usage some of the equipment.** There's something like, something like 30 or 40 pieces of equipment in CSH: excavators, dump trucks, some vessels, a large, long list of cre, so**... It's part of CSH's role is to support DDL**. CSH has a couple of employees, including ML, and so CSH also charges DDL some amount for time representing of ML and, and another employee working on the DDL business. And as far I can determine, there are no other customers of CSH. **It is the related entities that ML and his brother own that it works for.**

All emphasis throughout the expert's testimony is mine. I find the expert's testimony to be credible and reliable with respect to his accounting practices. In *Potzus* (supra), the court concluded at paragraphs 65 – 69:

> [65] A non-arm's-length payment or benefit to a related corporation notionally forms part of PPRM's pre-tax income by virtue of s.18(2) of the *Guidelines*, unless it is established that the payment was reasonable. Section 18(2) of the *Guidelines* states:
>
> **18(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.
>
> [Emphasis added]
>
> [66] There is no definition of "arm's-length" within the *Guidelines*. Section 2(2) of the *Guidelines* provides that terms used in ss. 15-21 that are not defined in the *Guidelines* will take their meaning from the *Income Tax Act*. Accordingly, reference must be made to the provisions of the *Income Tax Act* and, in particular, s. 251: see *Boser v Boser*, 2003 SKQB 477, 47 RFL (5th) 259. Section 251(1)(a) of the *Income Tax Act* provides that related persons are deemed not to deal with each other at arm's-length. Sections 251(2)(b) and (c) of the ***Income Tax Act*** **set out the statutory rules for determining when a corporation and another person (including another corporation) will be considered to be related persons. Accordingly, related corporations are included in the definition of "persons" by virtue of s. 251(2)(c).**
>
> [67] In relation to PPRM, Truck Saver is a "person[s] with whom the corporation does not deal at arm's length" for purposes of s. 18(2) of the *Guidelines*. The inter-corporate loan received by Truck Saver, a related corporation, is *prima facie* a non-arm's length payment or benefit caught by the provisions of s. 18(2). **Thus, it was incumbent on the husband to provide proof** that the $6.5 million loan was reasonable in the circumstances. The husband bore the burden of establishing reasonableness by clear and cogent evidence. He could have provided evidence that there was commercial value to PPRM in making the loan or demonstrated that the transaction did not constitute a "benefit" to Truck Saver in any sense of the word. The circumstances, however, went unexplained. A transaction of this magnitude merited more than one line in the Wightman critique.
>
> [68] **Where a sizeable loan or advance has been made to a related corporation on favorable terms, s. 18(2) of the *Guidelines* requires satisfactory proof**

> **either that the transaction does not constitute a payment or benefit within the meaning of the section or that the payment or benefit was a reasonable one in the circumstances.**
>
> [69] Section 18(2) not only permits *but requires* the inclusion of non-arm's-length payments made without value for the company: *Kowalewich v Kowalewich*, 2001 BCCA 450 at para 48, 19 RFL (5th) 330 [*Kowalewich*]. **Non-arm's-length transactions without corresponding value to the company, and any other unjustified diversions of corporate income, can have potentially serious implications for support claimants, given the relatively fluid ease with which monies can be shuffled between related entities.**
>
> …
>
> [71] As noted in *Goett*, while active misconduct obviously remains a relevant factor, the "less stringent analysis" applied in the family law context is such that a court need not make a finding of bad faith or fraud when applying s. 18 of the *Guidelines*. See also: *Kowalewich* at para 40. **The focal concern is, and remains always, the reasonableness of the transaction in the commercial sense.** (emphasis mine)

As found in *Potzus* (supra), the reasonableness of the transaction in the commercial sense is an issue and the burden is the payor's to prove reasonableness. It was not for the expert to guess or assume anything about the reasonableness. It was up to ML to provide financial evidence to the expert and prove his argument to the court.

[148] As indicated in *Potzus* (supra):

> [98] …When analyzing how much pre-tax corporate income can be removed without endangering the financial capacity of a corporation, one relevant and offsetting consideration is the "non-cash" expense carried on the books for amortization (depreciation). Because this is not a cash outlay but, rather, a reserve set up for replacement of capital equipment, it is taken into consideration when analyzing a company's capitalization requirements.
>
> …
>
> [101] At the time of the hearing before the Chambers judge, **the husband's position regarding PPRM's capital requirements could not be verified by his expert, who had insufficient time to undertake the analysis**…

> [102] **Given the unsettled state of the evidence, the husband did not discharge the burden of proof upon him**. Further, the unexplained extraction of $6.5 million, money that would have been otherwise available to PPRM, did much to discredit the husband's arguments regarding the urgency of other calls on the corporation's income… (emphasis mine)

ML was given opportunities to file additional financial information and / or affidavits from his bookkeeper and accountant and / or questions in advance of trial for the expert to consider. ML did not displace his burden.

12.4 Chart Pre-tax Income of CSH and DDL

Year	Revenue and direct costs	CSH Available adjusted Pre-Tax Corporate Income Prior to Adding Back:	Expenses	Calculations
2018	**CSH Revenue** $379,669 – (direct costs of $182,072 and admin expenses) = ($504,589) (retained earnings end of year $869,144)	CSH (**$124,920)** pre-tax corporate income / loss + ($74,199 CCA real property depreciation) = adjusted corporate pre-tax income of ($50,721) + ($53,259) net working capital) + ($23,325) debt service = **($127,305)** available adjusted for (other) corporate pre-tax income	($127,305 loss) add back $3,931 + $3,629 + (**$157, 080 + $144,997)** = $309,637 $309,637 - ($127,305 loss) = **$182,332**	**CSH $182,332**
2018	**DDL Revenue** $6,759,517 – direct costs of $4,860,283	DDL $168,226 pre-tax corporate income + (CCA depreciation real property$29,115 + adjust related party salaries	DDL $($143,340)	DDL **($138,340)** loss / 2 = M.L's share ($69,170) loss.

	(retained earnings end of year $5,207,171	income $15,228 = **$212,569** adjusted corporate pre-tax income. $212,569 - ($179,778 net working capital - $176,131) debt service = **($143,340)**	(BDO assumed $10,000 non-business annually), $5000 M.L's share. ($143,340) + **$5,000** = ($138,340) / 2 = $69,170 loss	line 150 $85,390 + CSH $182,332 - DDL ($69,170.00) = **$198,552 taking into account losses per *Ward***
2019	CSH Revenue $266,234 – (direct costs of $113,021 and admin expense) = $356,025 (retained earnings end of year $723,156)	CSH **($89,791**) pre-tax corporate income / loss add back ($38,143 CCA real property depreciation) = for an adjusted corporate income of **$51,648** - 52,432 net working capital addition and ($23,843) debt service = **($23,059**) Available adjusted corporate pre-tax income	($23,059) – add back $11,692 + $10,793 + $115,478 + $106,595) = $244,558 – **($23,059 loss)** = **$221,502**	$221,502 BDO
2019	DDL Revenue $5,592,161 – (direct costs $3,631,254 and admin expenses) = (retained earnings end of year $5,505,827	DDL $358,736 pre-tax corporate income + $21,817 CCA real property depreciation + related party salaries at fair market value $16,146 = $396,699 $224,878 net working capital addition (reduction) ($176,131)	DDL ($285,446) (BDO assumed $10,000 non-business expenses annually) / 2 = $5000 = **$290,446 / 2 = 50% ownership interest**	**DDL $290,446, / 2 = $145,223** line 150 $89,057 CSH $221,592 DDL$145,223

		debt service principal =+ ($160,000)		**<u>$455,872 M.L's</u> Guideline Income**
2020	**CSH Revenue** $351,825 – (direct costs $70,298 and admin expenses) = $366,751 (retained earnings end of year $702,514)	CSH **($14,926**) pre-tax corporate income / loss + $37,490 CCA real property depreciation) = adjusted corporate income of $22,564 + ($51,292) net working capital + ($23,843) debt service = ($52,571)	CSH ($52,571 loss) Add back: ($19,453 + $17,957 + $130,934 + $120,862) = $289,206 – **<u>($52,571)</u>** = $236,635	CSH $236,635
2020	DDL Revenue $6,555,050 – direct costs $3,840,721 (retained earnings end of year $6,233,662)	DDL $830,257 add back CCA in respect of depreciable real property $20,459 and adjust related party salaries to fair market value $16,446 = $867,162 $25,267 net working capital addition – ($320,986) debt service – ($206,000) =	DDL $365,443 / 2 = $182,721.50 $10,000 expenses / 2 = **<u>$5000</u>** = $187,721.50	**DDL $365,000 / 2 = $182,500** line 150 $93,520 CSH $236,635 DDL $187,721.50 **<u>$517,876.50</u>** M.L's Guideline Income
2021	CSH Revenue $259,059 – (direct costs $162,049 and admin	CSH ($199,642) pre-tax corporate income / loss + ($37,074 CCA real property depreciation) =	CSH ($195,444) ($15,246 + 14,073 + **120,235 + 110,986)** = $140,317 – ($195,444) = ($55,126.77)	CSH ($55,126.77) not available for attribution

	expenses) = ($458,701) (retained earnings end of year $503,414)	adjusted corporate income of ($162,568) + ($21,178) net working capital + ($11,698) debt service = $195,444		
	DDL Revenue $3,693,642 – direct costs $2,396,608 (retained earnings end of year $5,657,603)	DDL ($666,084) pre-tax corporate income + CCA depreciation real property $19,627 + Adjust for related party salaries to fair market value $8,190 = ($638,267) + net working capital addition $89,373 – debt service principal ($345,931) = ($894,825)	($894,825) + DDL $5000 = $889,825 <u>Adjust section 19 - $87,520 M.L's / M.L stated his income was around $140,000 - Guideline Income – unable to use line 150 only</u>	**DDL ($889,825) = ($444,912.5)** loss + line 150 $87,520 CSH ($55,126.77) DDL ($444,912.50) ($412,519.27) – Line 150 $87,520 + 120,235 + 110,986 = **<u>$318,741</u>**

As reflected in the chart above, for 2021 I have determined ML's Guideline Income based on s. 19 and on my interpretation of *Ward* (supra) 2022 NSCA 20 and the Court of Appeal case in *Ward v Murphy,* 2025 NSCA 5 wherein the court found that the available pre-tax corporate income should be at least as much as the after-tax value of the expenses paid by the company which have a personal component – as set out in schedule 1 of the expert's report.

[149] As noted above, the expert forensic accountant, DJ, filed a Guideline Income Report in or around September 2022 and he found ML's income available for child support to be as follows:

1. $395,000 in 2018;
2. $476,000 in 2019;
3. $565,000 in 2020; and
4. $348,000 in 2021.

[150] After considering all the evidence and the recent Nova Scotia Court of Appeal cases, I find ML's Guideline Income to be:

1. **2018**: **$198,552** s. 18, taking into account losses per *Ward (supra)* 2022;
2. **2019: $455,872** s. 18, taking into account losses per *Ward (supra)* 2022;
3. **2020: $517,877** s. 18, taking into account losses per *Ward (supra)* 2022; and
4. **2021: $318,742 ($120,235 + $110,986 + $87,520) pursuant to section 19.**

[151] I had more difficulty applying what I believe to be the Nova Scotia Court of Appeal's guidance for analyzing corporate income pursuant to s. 18 when considering ML's income in 2021 and thereafter. After accounting for both companies' reported losses in 2021, it would appear the only income for me to consider would have been ML's line 150 income of $87,520. However, I do not accept that ML's line 150 income is a fair representation of income available to ML for a determination of Guideline Income and the quantum of child support. As noted above, ML had suggested, but I am not satisfied, his Guideline Income was about $140,000 "at the time the expert was completing his report in or around 2021 / 2022."

[152] Based on ML's representations and also considering the demonstrated viability of the companies despite their reported losses over the years, and in particular in 2021, I am inclined to use section 19. I find that the available pre-tax corporate income in 2021 must be at least as much as the after-tax value of the expenses paid by CSH which have a personal component, as set out in schedule 1 of the expert's report ($120,235 + $110,986) + ML's line 150 income of $87,520, and I have imputed an income of **$318,742 in 2021 pursuant to s. 19.**

12.5 Recalculated Child Support from April 1, 2018 to June 1, 2020

[153] I have attributed income to ML pursuant to s. 18 as of April 1, 2018 ($198,552); 2019 ($455,872); to June 1, 2020 ($517,877). Counsel shall recalculate child support owed by ML to AA based on the above noted Guideline incomes determinations for each year while accounting for payments ML made to AA in lieu of child support to determine the recalculated amount for that period.

12.6 Prospective Child Support July 1, 2020 – January 1, 2025

[154] For recalculation of prospective child support due between July 1, 2020 and thereafter, I must consider if there is evidence of "material variances year over year" that may complicate my determination. In *Ward* (supra), 2022 NSCA 20, the Court of Appeal at paragraph 141 referenced considerations such as, but not limited to:

> …patterns of income, one off or reoccurring losses / operating expenses – all of which, once properly considered, might lead to other adjustments… and feeds into other support calculations, such as the amount of retroactive and prospective child support.

The expert, DJ, considered patterns of income, one off or reoccurring, explaining how he accounted for the downturn in the economy due to Covid and other difficulties raised by ML.

[155] I have accepted the expert's findings and I have applied the direction in *Ward* (supra), 2022 NSCA 20. ML's available income from July 1, 2020 to the

end of December 2020 is (**$517,877**); and for 2021 it is ($**318,742**). Beginning on February 1, 2025 ML's income is imputed to **$318,742**.

[156] Should ML wish to revisit prospective child support after February 1, 2025, he must retain an expert to analyze both CSH's and DDL's corporate financial information, and he must provide the financial documents and a final report to AA and to the court.

12.7 Recalculated Special and Extraordinary Expenses

[157] Central to any analysis of the issue of special or extraordinary expenses are the circumstances of the parties and the children. I considered the circumstances of the parties, in particular AA's income and ML's income. As noted in part at paragraphs 85 – 92 of this decision:

> AA is seeking the following recalculations for contributions from ML to special or extraordinary expenses:
>
> a. 2018: $532 x 12 = $6,384
> b. 2019: $261 x 12 = $3,132
> c. 2020: 100 x 12 = $1,200
> d. 2021: $294 x 12 = $3,528
> e. 2022: $381 x 12 = $4,572
> f. 2023: $518 x 12 = $6,216
> g. 2024: $518 x 12 = $6,216
>
> A total of **$31,248** in recalculated section 7 expenses. ML has argued he owes nothing.
>
> I am not prepared to order ML to pay for expenses related to either child's enrolment in Titan's Gymnastics 2023, 2022, 2021, 2020, or 2019 and enrolment

> in St. Andrew's Yoga in 2019 as there is insufficient evidence to prove these were extraordinary expenses per s. 7(1)(1.1) of the *Guidelines*.
>
> I am prepared to order ML contribute proportionately to the net cost of enrolment in paddling camp 2023, 2022, 2021 – as I feel there is sufficient evidence to find the camps were most likely required because both parents were working and / or unavailable.
>
> Special expenses such as childcare (before and after school care / holidays – if the parents were working); health care (chiropractor / uninsured treatment for ADHD or autism or other); and tutoring required by either child based on a professional referral, shall be shared by the parties proportionately both on a retroactive basis between January 1, 2018 and June 1, 2020 and prospectively from July 1, 2020 onward.

Counsel shall recalculate the amount of special or extraordinary expenses owed by ML based on the above-noted determinations and based on ML's yearly Guideline income as determined above: 2018 ($198,552); 2019 ($455,872); 2020 ($517,877) and 2021 ($318,742) and **$318,742 as of February 1, 2025.**

[158] In addition, in her final arguments, AA claimed reimbursement for half the cost of the children's monthly health insurance of $510.24 / $255 for the period November 1, 2022 through January 31, 2025 – 27 months – for a total of $6,885.00. ML argued that AA did not provide evidence of the expense associated with adding the children to her medical plan. In addition, that counsel for ML had confirmed with counsel for AA that there was no need for AA to obtain her own health and dental plans while AA and the children were covered by ML's plan. Based on my review of the evidence, including the Statements of Special or Extraordinary Expenses filed by AA, I am **not prepared to grant this request**.

13 Common Law Claim for Interest in Property

[159] I have been asked to resolve the issue of AA's claim for an interest / compensation for contributions AA claims she made to the real property situated at the disputed property. AA advances a claim under the common law principle of Unjust Enrichment. AA must prove on a balance of probabilities that ML was enriched by her efforts or actions; that she was deprived due to the efforts or actions that enriched ML; and there is no juristic reason for ML's enrichment and /or her deprivation. A lack of juristic reason would indicate an enrichment is unjust.

[160] In advance of trial, AA requested appraisals of property owned by ML, which she claimed she had contributed to during the parties' relationship, including: the home where the parties resided with their children at the parties' former residence; the "dream" home the parties were building together at the disputed property; and RL's property with the Quonset Hut, used for entertainment purposes and for storage, which was situated adjacent to the parties' "dream home".

13.1 Property Appraised

13.2 RL's property with Quonset Hut, Porter's Lake Nova Scotia (PID 41057019):

[161] AA anticipated a valuation / appraisal of approximately $100,000.00 for the Quonset Hut. She claimed she had "invested her time, labour and some of her own money (approximately $50,000)" in the purchase and build of the Quonset Hut and she suggested the Quonset Hut was not an asset of CSH.

[162] AA stated that the Quonset Hut was installed at RL's property with Quonset Hut and was located directly adjacent to the disputed property, the parties' dream home, and that the parties had intended to use the Hut as a "party loft." AA stated that her father, BA, had helped with the assembly of the Quonset Hut and the Hut included a custom bar, a full bathroom with a full shower, a large loft with access to a patio and to a hot tub overlooking a lake.

[163] AA indicated that the building was used to host social events and to store materials. In her final submissions following trial, AA did not request compensation for her claimed monetary contribution to the Quonset Hut.

[164] In 2023, ML stated to this court that he would value the Quonset Hut he claimed he had purchased in 1999 and he had placed on his brother's, RL's, land at $40,000.00. ML claimed the Quonset Hut was purchased by him through

Canadian Sub Sea Hydraulics (CSH) while his mother, PL, still owned both properties at the disputed property and RL's property with Quonset Hut. He initially stated he was a 50/50 owner of the Quonset Hut, and he believed the building was installed on his brother's land in 2009. In his final submissions, he suggested the Quonset Hut belonged to his brother, RL, who was not a party to the proceeding.

[165] ML claimed, "the Quonset Hut had no value to anyone but the owner, RL." ML's expert, Steve Horswill, AACI. P. APP Accredited Appraiser, NSREAA #301033, offered the opinion that it was not possible to "develop a market value estimate for this structure only." He explained that ML "apparently paid for its construction but he has essentially gifted the building to his brother by building it on his property. He found the only value the Quonset Hut has is to the owner of RL's property with Quonset Hut, which currently is ML's brother. Mr. Horswill stated that "to develop an estimate of market value for the structure only, an appraiser would fail the test of a reasonable appraiser." Defined as: A member providing professional services within an acceptable standard of care and based on rational assumptions.

[166] The Quonset Hut is situated at RL's property with Quonset Hut and / or located on land owned by his ML's brother, RL, and / or at one time his mother,

PL. ML suggested that his brother added to the value of the building over the years. ML claimed AA had not contributed to the Quonset Hut or to the property where the building was situated. The Quonset Hut was installed some distance from ML's brother's, RL's, private residence and had its own private driveway.

[167] I accept that AA likely contributed some time, labour, and some money to the construction and / or development of the Quonset Hut. I also accept that AA's father also contributed time and labour. However, AA's and her father's choice to contribute to the development of the Quonset Hut does not necessarily result in a finding of unjust enrichment or satisfy any other claim.

[168] In this case, the Quonset Hut was installed on someone else's property, and AA had no ownership interest in the land or the structure. Without some sort of prior agreement between the parties, there would be policy reasons / and there could be no reasonable expectation of compensation for AA and / or her father voluntarily contributing their time, labour and / or money to help ML or RL improve the structure they likely all had an opportunity to enjoy. However, AA's contributions could conceivably be considered generally / globally, when considering what is fair and / or whether to find there was a joint family venture.

13.3 Parties' former residence, Lake Loon Nova Scotia including adjacent lot #11

[169] Mr. Paul Young, expert appraiser, determined that as of December 14, 2023, a fair market value for the parties' former residence, a 2-bedroom, 1.5-bathroom unit / house was $550,000.00. ML has suggested he owes $406,000.00 on the property.

[170] ML stated that he purchased the parties' former residence in 1999, he built the structure, he maintained it, and he did not know he could expose himself to having to share his entitlement to full ownership of the property with AA. ML denied he had considered the house / property to be both his and hers. He stated that he paid the mortgage and the utilities for the home.

[171] ML claimed the house was appraised at $250,000 when he and AA moved in together in or around 2011, and the home was appraised at $300,000 when AA and the children moved out of the home at the end of March 2018. He suggested the change in value was attributable to nothing other than market forces.

[172] There were two other residential units at that address and a large multi vehicle heated garage adjacent to the home. AA stated that she purchased a washer, a dryer, and a fridge for the home. Following separation in 2017, AA stayed in the home until March of 2018. Neither party continued to reside at that address after

March 2018. At trial, I understood the parties negotiated the division of the contents of the home, including the children's furniture and other personal assets and / or belongings to the parties' mutual satisfaction. I agree with ML, that no claim was made before or at trial in relation to the moped owned by ML but in AA's possession. I decline to grant any claim for the Fino Moped.

[173] AA claimed she paid certain expenses which may have included telephone, cable, internet and power bills at that address. ML claimed he continued to pay the mortgage for the home and the utilities. In her final submissions, AA did not claim a specific interest in the parties' former residence or specific compensation related to contributions she had made to the upkeep of the property, except as those contributions during the parties' relationship may relate to a finding of a joint family venture and her claim to compensation for monetary contributions she made to the construction of the party's home, at the disputed property.

13.4 The Disputed Property "Porter's Lake"

[174] ML stated that his mother, PL, gifted him the land at the disputed property in 2010. He claimed that her gift allowed him to negotiate a mortgage, and in or around 2010 and / or 2011, he paid his mother approximately $80,000 for the land.

[175] ML suggested he obtained a building permit in or around May 2010 to begin construction at the disputed property. At another time, he claimed he started to build the home in 2009. He indicated that funds to build the home were run through his company, CSH, and he initially borrowed approximately $400,000.00 or more to build the home. ML stated that the outside shell of the house was completed in 2011. At trial, ML suggested very little construction was completed between 2012 and 2017 because "there were water issues with the windows."

[176] ML claimed the disputed property and his other assets were owned by CSH. At trial, ML suggested he had always intended to use the disputed property for a commercial purpose. He indicated he entered into lease agreements with some venders in 2021, 2022, and in 2023, and that the leases for the disputed property were generating sufficient income to sustain the disputed property as an investment for CSH. I do not accept that ML's initial intention was to use the disputed property for a commercial purpose. Based on the totality of the evidence, I find the structure at the disputed property was intended to be the parties "dream home." That they had planned to live in the home together with their children or at least they represented as much to each other.

13.4.1 Mr. Horswill's report presented by ML

[177] ML relied on Mr. Horswill's report for the disputed property, claiming the property was valued at **$215,000 in May 2010** and near separation it was valued at **$550,000.00** (site value of $250,000 and building value $300,000). I understand that ML negotiated a **mortgage of $677,710** on the property on April 6, 2023, approximately 6 years after the parties separated.

13.4.2 Mr. Young's report

[178] The structure built at the disputed property has been described in Mr. Young's report as a single-family dwelling owned by Canadian Subsea Hydraulics (CSH). Paul Young, an expert appraiser, offered the opinion that the "fair market value" for the property was **$1,000,000.00 as of December 7, 2023.**

[179] AA has accused ML of unreasonably encumbering family property post separation with a $677,710 mortgage on the disputed property and a $406,000 mortgage on the parties' former residence.

13.5 Law of Unjust Enrichment

[180] ML argued that AA had not pled resulting trust or constructive trust.

[181] The law of unjust enrichment still applies to common law property division, According to *Kerr* v. *Baranow*, 2011 SCC 10 (CanLII), [2011] 1 SCR 269:

…

The law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances". To be entitled to a monetary remedy on a value-survived basis, the claimant must show both that there was a joint family venture and a link between his or her contributions and the accumulation of wealth.

…

[3] …As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust…

…

[23] …The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Pettkus v. Becker* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

…

[50] … *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can **demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour** (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

…

[55] As noted earlier, remedies for unjust enrichment may either be proprietary (normally a remedial constructive trust) or **personal (normally a money remedy).** Once the choice has been made to award a monetary rather than a proprietary remedy, the question of how to quantify that monetary remedy arises. **Some courts have held that monetary relief must always be calculated based on a value received or *quantum meruit* basis (*Bell*), while others have held that monetary relief may also be based on a value survived (i.e. by reference to the value of property) approach**

> (*Wilson*; *Pickelein*; *Harrison*; *MacFarlane*; *Shannon*). If, as some courts have held, a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or order a monetary remedy calculated on a *quantum meruit* basis. One scholar has referred to this approach as the false dichotomy between constructive trust and *quantum meruit* (McCamus, at pp. 375-76). Scholars have also noted this area of uncertainty in the case law, and have suggested that an *in personam* remedy using the value survived measure is a plausible alternative to the constructive trust (McCamus, at p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), at pp. 394-95). As I will explain below, *Peter* is said to have established this dichotomy of remedial choice. However, in my view, the focus in *Peter* was on the availability of the constructive trust remedy, and **that case should not be taken as limiting the calculation of monetary relief for unjust enrichment to a *quantum meruit* basis. In appropriate circumstances, monetary relief may be assessed on a value survived basis.**
>
> …
>
> [62] Unlike much matrimonial property legislation, the **law of unjust enrichment does not mandate a presumption of equal sharing**. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

I interpret the above noted passages from *Kerr* (supra) to suggest that there is no presumption of equal sharing of all assets and /or debts / or the value of those assets and / or debts and therefore, depending on the circumstances in each case, no requirement to calculate overall wealth of each party to determine "value survived".

[182] The Court in Kerr (supra) went on to say:

> …
>
> [68] The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive

compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

[69] Relationships of this nature are common in our life experience. For many domestic relationships, the couple's venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis. Of course, **this is a relationship-specific issue; there can be no presumption one way or the other**. **However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship**.

…

[72] Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "**retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience"**. Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed **requires, recourse to a number of different sorts of remedies depending on the circumstances:** see *Peter*, at p. 987; *Sorochan*, at p. 47.

[73] Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. This means that **a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or the other of the two remedial options into which some have tried to force them.**

…

[78] …In my view, this reasoning is persuasive whether the joint effort has led to the accumulation of specific property, in which case a **remedial constructive trust may be appropriate according to the well-settled principles in that area**

of trust law, or where the joint effort has led to an accumulation of assets generally. In the latter instance, when appropriate, there is no reason in principle why a monetary remedy cannot be fashioned to reflect this basis of the enrichment and corresponding deprivation. What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in *Peter*, between the **"value received" and the "value surviving**". Where that link exists, and a **proprietary remedy is either inappropriate or unnecessary**, the **monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation**.

[79] …To my way of thinking, Professor Fridman was right to say that "**where a claim for unjust enrichment has been made out by the plaintiff, the court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled,** regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398).

…

[83] … it is "precisely where an injustice arises without a legal remedy that equity finds a role": p. 994.

…

[88] … The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well grounded in the evidence. The **emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.**

…

[101] As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact **that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other**: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415…

…

[102] … While determining the proportionate contributions of the parties is not an exact science, **it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.**

…

[104] In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that **mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9)**. This approach is consistent with the authorities from this Court,and provides a straightforward and just method of ensuring that **mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis**. …

…

[114] … *Garland* established that **claimants must show that there is no juristic reason falling within any of the established categories**, such as whether the benefit was a gift or pursuant to a legal obligation. **If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.**

[115] The fact that the parties have conferred benefits on each other may provide **relevant evidence of their reasonable expectations**, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

[120] The law's traditional reluctance to provide a remedy for claims where no request was made was based on the tenet that a person should generally not be required, in effect, to pay for services that he or she did not request,and perhaps did not want. However, this concern carries much less weight when the person receiving the services knew that they were being provided, **had no reasonable belief that they were a gift, and yet continued to freely accept them**: see P. Birks, *Unjust Enrichment* (2nd ed. 2005), at pp. 56-57.

[121] …*Garland*, as noted, mandated a two-step approach to the juristic reason analysis. The first step requires the claimant to show that the benefit was not conferred for any existing category of juristic reasons. Significantly, the fact that the defendant also provided services to the claimant is not one of the existing categories…

…

[122] However, different considerations arise at the second step. Following *Peter* and *Garland*, the parties' **reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical**. As Iacobucci J. put it in *Garland*, this introduces a category of residual situations in which "courts can look to all of

> the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.
>
> [123] …It seems to me that, in light of *Garland*, where a "bargain" which does not constitute a binding contract is alleged, the issue will be considered at the stage when the defendant seeks to show that there is a juristic reason for the enrichment that does not fall within any of the existing categories; the claim is that the "bargain" represents the parties' reasonable expectations, and evidence about their reasonable expectations would be relevant evidence of the existence (or not) of such a bargain.
>
> My emphasis throughout.

13.6 The principled approach

[183] Courts have been encouraged to use a principled approach in their unjust enrichment analysis: was one party enriched? If yes, was the other party deprived? If yes, is there an absence of juristic reason (cohabitation agreement, gift, reasonable expectation, public policy)? If no, then unjust enrichment is proven.

[184] Once unjust enrichment is proven, the court moves on to determine the remedy. If there is a link between the contributions and the accumulated wealth, the court moves on to the remedy stage. It there is no link, then was there a joint family venture (mutual effort, economic integration, actual intent, priority of family)? If yes, then the court determines the appropriate remedy.

13.7 Joint Family Venture

13.7.1 Has ML Been Enriched?

[185] The parties disagreed with respect to: AA's contributions to the construction and ongoing renovations at the disputed property; AA's contributions to

maintaining the home at the parties' former residence; and the extent of AA's contributions to the upkeep of the home / family / and / or contributions to the care of the party's children. ML minimized AA's contributions although ML acknowledged that while the parties had resided together, he was away from the home approximately four to six months each year.

[186] AA has suggested she made significant contributions to the family and also to the construction costs related to the disputed property. That specifically between 2010 and 2017, she invested $254,367.00 into the construction of the home at the disputed property. AA has suggested ML was enriched by her efforts and actions including: her personal involvement in and financial contribution to the construction of the parties' "dream home" at the disputed property; her assistance with the two rental units at the parties' former residence (liaising with tenants, ensuring the rental units were cleaned, collecting rent); her assistance in their own unit at Montague; and because she cared for the parties' children solely while he was away four to six months per year and she continued to care for the children primarily when ML was home.

[187] Without AA parenting the children, the responsibility or more responsibility would have fallen to ML, and he would not have been able to work internationally and / or complete the projects he did complete without AA's work within the

home, especially in relation to the care of the party's children. ML was enriched by AA's unpaid care / labour, and I find he was also enriched by AA's monetary contributions to the disputed property.

[188] ML stated that AA was the reason he was not always substantially involved in the children's lives. However, ML was away for four to six months of the year, and during the parties' relationship, ML was free to work and travel extensively for work and for leisure.

[189] The evidence supports a finding that the parties agreed that at least for a period AA would reduce her work outside the home to be able to care for / manage the parties' children's schedules during ML's absences. That AA also agreed to help with the rental units as needed. That AA also helped with the management of construction of the disputed property as needed.

[190] ML acknowledged that while the parties had resided together, he was away four to six months of each year, and at times AA did sign off on purchases for materials and / or services for the construction of the home and may have paid personally for materials or services. However, he argued that he had reimbursed AA any money she had spent / credit she had secured to buy supplies and / or pay for services for the construction of the home at the disputed property.

[191] In the alternative, he argued that if he did not pay AA back directly for materials and or services she paid for personally, that AA must have used his cash to pay for materials and / or services which she was now trying to claim she had paid for herself. He suggested the money / funding really came from him.

[192] ML argued that AA had never had $254,367.00 to invest in the home. He claimed that instead of using her own funds, AA must have used portions of the large sum of cash, hundreds of thousands of dollars, including approximately $500,000.00 he borrowed in or around 2011, with varying amounts left in his safe at their home until 2014, with "lesser amounts as the home got nearer to completion." ML argued that AA may have paid with her own credit cards and / or paid for supplies and / or services on her line of credit, but he believed she then paid herself with his cash, and she was now claiming these payments as her own. He noted that she would also "get the points."

[193] ML suggested that after the initial money he borrowed to build the house was depleted, he usually kept at least $50,000.00 in cash in his safe at the party's home and for other expenses, but he suggested the cash was to help to cover the family's daily expenses while he was away four to six months of the year. He claimed that AA had access to the safe where he kept the cash (or his contribution to household expenses) and he suggested AA would ask him and then take cash

from his safe to reimburse herself for purchasing construction materials, paying contractors, paying for the children's necessities, for food, and / or for her own needs. ML stated that at times the cash he had left behind for AA and the children ran out as he was gone for extended periods of time and AA would "cover" the expenses, but he suggested he reimbursed her later.

[194] AA argued that ML did not have any documentary evidence proving he had paid her back for the $254,367.00 in contributions she made to the disputed property. At trial, ML acknowledged that in a text exchange on January 5, 2019, he had stated to AA that he would reimburse her for "most" of the money she put into "Porter's Lake."

[195] ML also suggested that he had loaned money to AA to expand her business (Concierge) in or around 2007, $30,000 in the Spring and $25,000 in the Fall. ML claimed that in or around 2009 when he started to build the house at the disputed property he had asked AA to reimburse him the funds he had loaned her for her business.

[196] ML suggested he was unclear which payments AA may have made to him as repayments of the loan he had given her for Concierge, for her portion for family vacations, or for his helping her when her car was damaged. At times during his

testimony, ML claimed he had filed documents with the court which would prove his claims, however, when I adjourned the matter to allow him to locate the documents he believed existed he was unable to locate the relevant documents. At one point ML stated “it’s in the documents... I don’t do documents. You guys do documents. It’s in the documents”.

[197] AA provided documentary evidence related to financial products she claimed allowed her to fund her contributions to the construction of the disputed property. The documents included: a TD Visa with a limit of $36,000; a TD Line of Credit with a limit of $14,000; an RBC Visa with a limit of $16,000; a secured Scotiabank Line of Credit with a limit of $20,000; an unsecured Scotiabank Line of Credit with a limit of $21,500; and a Shaw Brick Account with a limit of $60,000.

[198] AA stated that while construction of the disputed property was ongoing, ML purchased two boats – the Water Lilly for $50,000 while L was a baby, and another boat was purchased in Thailand for $150,000, the Seanna, both of which he has retained in his company CSH. AA suggested the Seanna had been assessed at $1,397,300.00. ML claimed the real property as noted above and other assets are owned by CSH.

[199] ML claimed that:

> The provision of funds for construction does not, in itself, constitute enrichment. If, as AA claims, that was a joint venture to construct their dream home, she terminated her involvement upon departure, leaving ML with significant debt and an incomplete project (citing *King* v. *Raftus*, 2023 NSSC 160).

ML suggested that the increase in the value of the property was not due to AA's contributions.

[200] ML raised a concern about AA "targeting specific assets" and not considering the overall wealth of the parties at the end of their relationship. He pointed out that AA did not provide evidence of her financial situation at the start of their relationship (including information about her company) which would allow the court to consider her financial position at the end of their relationship.

[201] AA argued that the intent of the parties in relation to the disputed property could be reasonably ascertained by considering the draft cohabitation agreement which was proposed by ML to AA and was admitted as evidence at trial. A **draft cohabitation agreement AA claimed ML presented to her in 2012 which states in part that AA would receive $160,000.00 as "reimbursement" toward her contribution to the "Porter's Lake" property (the disputed property),** and she would receive additional cash amounts based on the length of the relationship. AA

had claimed she **contributed $164,057 between May 20, 2010 and October 17, 2012,** and contributed the remainder, for a total of $254,367 thereafter.

[202] The draft agreement strongly suggests ML was enriched by AA's monetary contributions and the parties' expectation was that ML would reimburse AA for her monetary contributions to the disputed property. As noted above, at the end of the trial, I adjourned to a future date to allow ML to call his previous lawyer as a witness to prove, that as he suggested the draft cohabitation agreement was not drafted by ML's lawyer for AA's review. He did not call further evidence, and I accept the draft agreement reflects the parties' intentions in 2012.

[203] AA claimed there was a link between the contribution she made to the disputed property and the value of the property today (accumulated wealth / and or value of the property.) That AA made a tangible contribution to the construction of the disputed property and ML accepted it knowing it was not a gift / pursuant to contract. That ML and / or ML's company has sole ownership of the disputed property, benefited from AA's contributions, and she must be repaid **$254,367.00** + 6% (interest between January 1, 2018 and January 31, 2024) or $361,201.00.

[204] **ML argued that the additional claim for interest on the alleged contributions was not pled by AA and should not be considered by this court. I agree and I will not be considering AA's claim for interest of 6%.**

[205] I accept that ML contributed more financially to: the parties' overall household expenses; to their leisure activities; and to the expenses related to the construction of the disputed property. Given the choices the parties made and the discrepancy between the parties' financial resources / income, it was not possible for AA to contribute to the parties' mutual expenses or financial growth (the disputed property) in the same proportion as ML. However, I am satisfied that between 2010 – 2017 ML was enriched by AA's financial contributions to the disputed property and other family expenses and by her contributions as a wife, as a mother, and as a partner in the construction and maintenance of certain real properties.

13.8 Has AA been deprived?

[206] In addition to ML not reimbursing AA for her stated contributions of **$254,367 to the disputed property,** AA also claimed she was deprived in other ways.

[207] AA has claimed she was primarily responsible for paying for the children's childcare, and she paid for food for the family. As noted above, ML claimed he contributed to those expenses in addition to housekeeping / maintenance, for instance by paying either directly or indirectly: AA was in receipt of $2000 per month in rental income from his rental properties at the parties' former residence; that in 2015 she began receiving a salary from DDL; that CSH paid for most of her car expenses; and he was paying the mortgage and most all other household expenses at the parties' former residence and at the disputed property. ML claimed AA was never in charge of their unit at the parties' former residence, and that her role with the rental units was limited to providing keys and the wifi password to tenants and collecting rent from the tenants.

[208] ML stated that AA had worked full-time until they had children, with their first child born in 2012 and their second child born in 2014. He suggested she easily returned to work after a short leave. He agreed he had worked hard to try to "build a future for his family" and, as noted above, he had travelled extensively for work.

[209] AA did leave full-time work to care for the parties' children for a period, and she also looked after the parties' household / to some extent the rentals units, and she did some work related to the construction of the disputed property. In

particular, the birth of the children and ML's absence for four to six months each year left AA solely responsible for the children which involves more than what a daycare and / or babysitter provided in this case.

[210] As previously noted, ML is 100% owner of Canadian Subsea Hydraulics Limited (CSH) and is the only employee. He also owns 50% of Dominion Diving Limited (DDL) with his brother, RL, which they took over from their father in 2004. DDL owns offshore equipment for remote operated vehicles – for instance seven multipurpose vessels, cranes, forklifts, vehicles, and an adaptive tugboat. DDL and / or CSH are involved in marine construction, offshore energy, marine shipping, and international garbage handling. He was the primary income earner.

[211] During the relevant period between 2011, the parties' separation in November 2017 and then for a period afterward separation until Covid began, ML was away from home on average four to six months each year, often travelling to Thailand for a mix of business and pleasure. That he would also travel to Singapore, Dubai, Malasia, and Japan to meet with clients and to acquire supplies on behalf of DDL.

[212] Although ML acknowledged being out of the country for extended periods (2-3 weeks at a time) even after the parties separated including in 2019 and 2020.

He then suggested that after travel restrictions were in place due to Covid related concerns between June 2020 and January 2021, he had care of the children approximately every second weekend or so, Friday to Sunday afternoon. Between 2011 and November 2017 ML benefited from AA's contributions as a wife maintaining the parties' home and at other times their other interests including contributing to the disputed property and the Quonset Hut, and as a mother caring for the parties' two children while ML was away for extended periods.

[213] I do not accept ML's suggestion that because he hired people to complete certain tasks including but not limited to cleaning the home; caring for their children; and maintaining the properties at Montague Road, that AA's contributions were negligeable. AA was responsible for the bulk of managing the house at the parties' former residence and caring for the children in ML's absence and when he was home, whereas ML contributed more financial resources to the family. They were in a relationship / partnership with specific roles.

[214] ML's lengthy absences from home contributed significantly to his inability to fully participate in the children's regular routines while he was away, and perhaps to his inability to integrate into their routines upon his return. He left most of the parenting responsibility to AA, and due to AA's responsibilities in the home,

she had far less freedom to pursue her own interests / goals – financial or otherwise.

13.9 Juristic Reason

[215] I must consider if there is a juristic reason for the inequity. I must determine whether a juristic reason exists for ML's enrichment and AA's deprivation.

[216] At paragraphs 34 and 35 of *MacPherson v. Williams,* 2019 NSSC 17, Justice Jollimore writes:

> [34] There are two stages in considering whether there is a juristic reason to deny recovery. The first stage is determining **whether there is an established category that provides a reason for the deprivation and enrichment. Established categories include contract, disposition of law, donative intent, and obligations found in the common law, equity or statute.** Ms. MacPherson has the burden of proving there is no established category that provides a reason to deny her recovery. If she shows the established categories do not apply, a *prima facie* case under this stage is made out: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paragraph 44.
>
> [35] The second stage is determining whether there is a reason - beyond the established categories - to deny recovery. At this stage, Mr. Williams may rebut the *prima facie* case by proving there is some other reason to deny recovery. Mr. Williams has the burden of showing why he should retain the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paragraph 45.

13.9.1 AA *Prima Facie* case

[217] In lieu of the extreme freedom ML experienced to advance his own career, AA contributed to the parties' accumulation of wealth by being available to assist with the parties' children; their home; and with the construction of the disputed property. The real property known as the disputed property was purchased by ML,

is owned by ML and / or his company it was not gifted to ML, there was no donative intent. The law should not shield the property which I find was intended to be used as the parties' "dream home" despite the property being paid for and owned by CSH, a company in which ML has 100% ownership.

13.10 Has ML Established a Reason to Deny AA's Recovery

[218] ML suggested that "if he was enriched at AA's expense, the benefits AA received" from the relationship with him "justified the enrichment." He argued that he had provided more benefits to AA during their relationship than she had provided to him and there was no basis for a remedy.

[219] M.L counterclaimed suggesting he had made "very significant contributions" to AA's "welfare and his counterclaim cannot simply be dismissed", per Kerr (supra). ML took the position that everything he gave AA over the course of their relationship should be considered when determining AA's unjust enrichment claim.

[220] Earlier in the proceeding ML suggested that upon separation, the parties' were "square" – and / or if AA "kept the diamond heart, other jewelry, rings, the value of the trips / vacations, then he might owe her $5,000 to $10,000," purportedly for her contributions to the disputed property and / or the Quonset Hut

/ and / or the care she provided to the home at the parties' former residence and / or to the parties' children while he was away?

[221] ML suggested that after the parties separated, every benefit he had given to AA – should be credited toward her claim for the return on the contribution of $254,367 in the disputed property + interest which is an asset solely owned by CSH. Including benefits AA had access to throughout the relationship such as: payments for her car through CSH (including $1,400 monthly payment; $2,200 in annual insurance; $400 "annual permitting"; and $650 monthly for tires and maintenance,); the salary she received from DDL of 659.59 gross per month; the repairs to the Cadillac; $4,000 for the Moped; the payments for their ceremonial wedding in Thailand ($35,000); the expensive jewelry he purchased for her including pearl necklaces he had purchased (and she did not reciprocate); the trips he had paid for her, including several overseas trips; the $2,000 in rent she received every month from the two additional units at Montague Road; the expenses he covered at Montague Road and at Porter's Lake; the child tax benefits and all tax credits for the children that she kept; the childcare he claimed to have contributed to; the heart shaped ring he valued at $100,000 - $200,000 (later provided documentation was appraised at $51,000 in 2004 sold for $7,000 in or around 2023); the credit cards AA used freely and he paid off monthly; and the

medical benefits he paid for AA and the children monthly, he argued is “evidence (that) shows ML provided more benefits to AA than he received from her.”

[222] He stated that AA did not intend to share her property with him, and he had no intention of sharing the Quonset Hut, the parties’ former residence, or his other business assets with her. He argued that the parties did not own joint assets and / or did not share debts during their relationship.

[223] ML argued that AA “continued her career, managed her business independently,”. He claimed she did not disclose the details to him, and she “kept her money and assets separate” from him. That “she did not combine or share her assets” with him. He suggested she did not contribute to their mutual expenses, and he stated that they did not “save” together. I find that on balance of probabilities AA did contribute to some of their mutual expenses.

[224] ML claimed that AA deposited her income into an account ML could not access; that her lines of credit and investments were separate from M.L; and she had one line of credit secured by her father. He further claimed that AA owned land separately, filed taxes as a single person, and she had her mail delivered to a P.O Box rather than to their home. ML pointed out that AA however, was involved in his finances.

[225] As noted earlier, the evidence supports a finding that the parties' upscale lifestyle was largely supported by ML's earnings and / or resources. Essentially, ML argued that he gave AA and their children a good life while the parties were together and they should be "even,". That AA should not be compensated for any monetary contribution she made to any real property solely owned by him or his company. That ML should be permitted to retain assets which were accumulated while the parties were together because they were his assets and /or they were in his and / or his business' name.

[226] As noted above, ML has also argued that any financial contribution AA claims to have made to the disputed property was made either due to her direct access to his financial resources (by taking cash from him) or indirectly through ML as AA was only able to contribute financially to the disputed property because she contributed far less to the parties' overall expenses while she also enjoyed the benefits of his "largesse" during their relationship.

[227] ML acknowledged that before the parties' ceremonial wedding took place in Thailand, several draft "cohabitation" agreements and / or documents were prepared by ML's lawyer for AA's consideration. A draft agreement (cohabitation agreement) was admitted as evidence at the trial in 2024. I accept AA's claim that ML presented the draft cohabitation agreement to her after the birth of their first

child and just days prior to the parties leaving for their “ceremonial” wedding in Thailand.

[228] As noted above, the draft cohabitation agreement presented by ML to AA in 2012 states in part that AA would receive $160,000.00 as “reimbursement” toward her contribution to the “Porter’s Lake” property (the disputed property), and she would receive additional amounts based on the length of the relationship. AA did not sign the draft document as she stated she believed the terms were unfair.

[229] ML suggested the cohabitation agreement was presented to AA not to compensate her for any contribution she made to the disputed property, but to provide her with some financial security if something happened to him. He suggested AA would not sign the agreement and / or agree with any of the cohabitation agreements he had presented to her from his lawyer (domestic agreement / prenup / Wills) and that was why they were married in Thailand, where the ceremonial wedding was not legally recognized.

[230] At trial, ML was often unable to identify documents to support his claims that he paid AA back for any monetary contributions she made to the construction of the disputed property. On the other hand, as noted above, AA did provide documentary evidence that she had obtained loans from various third-party sources

to financially assist and / or contribute to the construction of the disputed property On the other hand, AA did not keep records which conclusively prove she contributed $254,367.00 to the disputed property.

[231] Based on my review of the evidence, I find ML has been unjustly enriched by AA providing him with cash contributions to an asset owned by him / CSH solely: that the disputed property was acquired by ML and / or his company in or around 2010, and through the parties' joint efforts throughout 2011 – 2017, that the value of the property increased, and ML retained the full value of the property at the end of the relationship.

[232] AA claims she was deprived of her **$164,057 contribution between May 20, 2010 and October 17, 2012,** and the remainder of her contribution, for a total of $254,367 (+ interest which I have already indicated I am not prepared to consider as it was not pled). AA is not asking that the increase in the value of the property be shared between the parties but she is asking that her contribution to the property be returned to her in full with interest.

[233] Keeping in mind per Kerr (supra):

> **… reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical…**

I find there is no juristic reason for ML to retain all of AA's contribution to the value of an asset the parties understood they intended to share while AA is deprived of the asset and her contribution to that asset, which based on the draft "cohabitation" agreement I find she reasonably expected to be compensated for. However, I am persuaded to also consider ML's arguments regarding the significant benefits he extended to AA between 2011 – 2017, when I move to the remedy stage.

13.11 Remedy

[234] I find ML was enriched, AA was deprived and I must consider both AA's and ML's arguments about juristic reasons when determining what remedy is appropriate in this situation.

14 Joint Family Venture

[235] At paragraph 46 of *Kerr v. Baranow,* 2011 SCC 10, Justice Cromwell states:

> [46] Remedies for unjust enrichment are **restitutionary in nature**; that is, the object of the remedy is to require the **defendant to repay or reverse the unjustified enrichment**. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLii 34 (SCC), [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

[236] At paragraph 85 he further states:

> [85] I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic

> arrangements that are partnerships; the remedy in such cases should address the **disproportionate retention of assets acquired through joint efforts with another person**. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, **where wealth is accumulated as a result of joint effort**, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

AA has suggested the parties were engaged in a joint family venture throughout their relationship, and she is seeking a remedy reflective of her contributions to a specific asset and / or joint family venture in relation to the disputed property.

[237] In *J.A.* v. *J.H.*, *F.H.*, 2023 NSSC 243, Moreau J. stated that the Applicant sought a monetary award and that the Respondent "disputed that the parties engaged in a joint family venture":

> By way of his viva voce evidence and further expressed by Counsel during closing summations, the Respondent conceded that the Applicant did contribute to the construction/renovation projects and as indicated by Counsel is entitled "at best" to a monetary award in the range **of $15,000.00 to $20,000.00**.

As previously stated, AA is seeking a monetary award of $254,367 plus interest at a rate of 6% for the period January 1, 2018 through January 31, 2024 at $15,262 per year = $106,834 = **$361,201.00 in total**.

14.1 The Four Factors

[238] Justice Cromwell was clear that there is no presumption of a joint family venture: its existence must be well grounded in the evidence, with an emphasis on

"how the parties actually lived their lives," not on how they describe it after the fact or my view of how they ought to have lived their lives: *Kerr v. Baranow*, (supra). Justice Cromwell offered headings as a useful way to approach a global analysis of the evidence, and examples of relevant factors that may be taken into account in deciding whether there was a joint family venture, cautioning that these headings are not a checklist.

> To properly determine the appropriate remedy attributable to the Applicant, I shall now decide on whether the parties engaged in a joint family venture by examining the four factors considered in a joint family venture analysis.

14.2 Mutual Effort

[239] J Moreau in *J.A. v J.H*, 2023 NSSC 243 stated:

> …
>
> The Respondent acknowledges the parties were in a long-term relationship during which they raised N. and C. and completed the stated construction/renovation projects. He argues but for those exceptions the parties did not work together to contribute to a common family venture.
>
> I am satisfied the evidence confirms the **mutual effort engaged in by the parties was for a common goal, that being the benefit of the family unit**. In addition to their decision to have and raise children, the evidence corroborates the pooling of efforts and resources for the benefit of the family and their joint endeavors and achievements with respect to the construction/renovation projects. The length of the relationship is also to be considered.
>
> They both contributed to the home. **The Respondent's financial contributions were greater, while the Applicant's provision of domestic services and care of the children exceeded the Respondent's efforts in those areas**.

[240] ML suggested that he "contributed alone, while AA kept her career and finances separate," as their intention was to remain independent. However, he accepted $254,367 from AA for the sole purpose of improving his solely held asset and I am satisfied that AA contributed to other household and / or child related expenses. There was a pooling of efforts and resources for the benefit of the family, and for the construction of their "dream home."

[241] I find both parties contributed to the home according to their respective means. Although ML's financial contributions were greater, AA's contribution to the running of the home and care of the children exceeded ML's efforts.

14.3 Economic Integration

[242] There was conflicting evidence as to the existence of a joint bank account. However, the parties agreed AA held a secondary credit card on ML's Costco account and possibly other credit cards. In addition, ML indicated he left considerable sums of cash for AA's use for the family and / or for AA to use to pay expenses related to the construction of the disputed property. Again, AA provided him with money toward the construction of their dream home.

[243] As indicated by the Honourable J. Moreau in *J.A.* v. *J.H.*, 2023 NSSC 243:

> The existence of a joint bank account is immaterial to my conclusion on this factor as **I am satisfied the Applicant contributed financially to the upkeep of the**

> **household**. Her earnings in whole or in part, from Walmart, caring for the two neighborhood children and from her employment as a Veterinary Assistant went back into the family pool. The Applicant made significant financial contributions to N.'s university fees.
>
> I am also satisfied **the Applicant contributed financially, directly or indirectly to the acquisition of the assets** valued in total at $14,000.00.
>
> Both parties prioritized the benefit of the family unit over individual interest. There was a high degree of economic interdependence. I find there was economic integration.

[244] ML argued that AA continued with her career, managed her business independently without disclosing it, and kept her money and assets separate. She did not combine or share her assets with ML. I find it is more likely than not that AA's income went back into the family pool, with a focus on purchasing the children's items and the family's other necessities, and a focus on contributing to the construction of the disputed property. There was economic integration.

[245] As of July 2015, AA began receiving a monthly salary of $651.33 from DDL. She claims the parties began income splitting as a tax strategy. ML initially claimed AA was paid for organizing events for DDL. Regardless of the reason, AA was paid by DDL, the parties were interdependent economically, and there was economic integration for the benefit of the family unit.

[246] As noted above, ML testified that he allowed AA to keep the money from the rental units at the parties' former residence to pay (arguably his share) for groceries and childcare. ML testified that he usually left at least $50,000 at home

to cover expenses for the family. There was economic integration with money / often cash flowing from ML to AA for the benefit of the family and / or AA, primarily while ML was away.

[247] In August 2015, ML and his brother RL executed a Special Resolution of Dominion Diving Limited (DDL) allowing for the appointment of a Special Consultant which provided for the employment of a spouse of a Shareholder under certain circumstances. In particular, in the event of the death of ML, the company would immediately employ AA for a maximum period of five years, paying her a consulting fee of $50,000 per year in equal monthly installments beginning 30 days after ML's death. They were a family unit, planning for the future together.

14.4 Actual Intent

[248] As noted by Moreau in *F.H.* (supra):

> Notwithstanding the approximate one-year separation, the parties had a long term relationship. M.L asserts they chose to keep their assets separate and he chose not to legally marry the Applicant. The Applicant says the Respondent was **the dominant partner within the relationship and controlled the family's finances.**
>
> The evidence in relation to the circumstances of this relationship, in particular at the start of the relationship, reinforces the Applicant's perspective as to the power dynamic which existed between the parties.
>
> …**The Respondent's choice to maintain any item or component related to the home in his name only was strategic in nature**.
>
> I conclude and find that the **actual intent of the parties was to engage in a stable, mutually beneficial and ongoing relationship**. Within that construct the **Respondent maneuvered the various elements in order to maintain the power dynamic in his favour**.

I conclude that the parties' actual intent was to "engage in a stable, mutually beneficial and ongoing relationship." However, that ML already had all his assets owned within his company, and he was able to maneuver "the various elements in order to maintain the power dynamic in his favour."

14.5 Priority of the family

[249] In *F.H.* (supra) Moreau J addressed the issue of priority of the family in the following manner:

> As stated the decision to raise a family and concentration of efforts thereto was mutual**. The evidence discloses that both parties placed priority on the family and worked towards a shared future**.
>
> While caring for the children, the Applicant also cared for two other children of a similar age in order to contribute to the family's expenses. The Respondent volunteered his time in relation to the children's extracurricular sporting activities. They both have contributed (and continue to contribute) financially to N. and C.'s educational pursuits. The Applicant is still paying on a line of credit from which she withdrew funds to assist with N.'s university expenses in 2018.
>
> **I am satisfied both parties prioritized the family in relation to their financial sacrifices and choices/decisions made, understanding that those choices/decisions were in furtherance of a shared future**.
>
> Finding of Joint Family Venture
>
> **I find the evidence establishes and substantiates that the parties were engaged in a joint family venture and their joint efforts were linked to the accumulation of wealth.** (emphasis mine)

The parties in this case were mutually working to raise a family together. I find both parties contributed to the family's expenses in proportion to their means.

[250] I am satisfied that "both parties prioritized the family in relation to their financial sacrifices and choices/ decisions made, understanding (hoping) that those choices/decisions were in furtherance of a shared future." The evidence establishes and substantiates "that the parties were engaged in a joint family venture and their joint efforts were linked to the accumulation of wealth."

14.6 Monetary Claim

[251] As noted above, AA is not making a proprietary claim to any real property in ML's name, but rather she is seeking a **monetary award of $361,201.00** ($254,367.00 + $106,834.00 interest) and the **transfer of the "Fino Moped title to AA's** name from ML's name". I have already indicated above that I am not prepared to address the issue of the Fino Moped – which was not pled.

[252] ML argued that AA:

> did not provide evidence of her financial situation at the start of the relationship or valuations of her separate property. Without this information, we cannot determine any change in her wealth or if ML is retaining a disproportionate amount of assets acquired jointly.

[253] I have considered the court's comments in *Kerr* (supra):

> …this is a relationship-specific issue; there can be no presumption one way or the other. However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship.
>
> …

> unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed **requires, recourse to a number of different sorts of remedies depending on the circumstances:** see *Peter*, at p. 987; *Sorochan*, at p. 47.
>
> …
>
> **…claimants must show that there is no juristic reason falling within any of the established categories**, such as whether the benefit was a gift or pursuant to a legal obligation. **If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.**
>
> …

ML has not convinced me there is a different juristic reason for him keeping the **$164,057** I find AA contributed to the disputed property **between May 20, 2010 and October 17, 2012**.

14.7 Remedy

[254] I have considered the circumstances of this case including but not limited to AA's "unpaid labour within the household", both her financial and personal contributions to the construction of the disputed property, my findings of a joint family venture, and the much shorter length of this parties' relationship, and the benefits conferred by ML. I find a monetary claim of $164,057 is appropriate in these circumstances.

15 Credibility

[255] In ML's submissions, he stated that three witnesses testified. In fact, four witnesses testified, DJ; AA, ML, and ML's former lawyer, AE testified on June 18, 2024.

[256] In *J.A. v J.H* (supra), J Moreau spoke about credibility stating:

> Credibility
>
> [107] In a number of instances throughout this decision, where the parties' evidence conflicted, I accepted the Applicant's evidence over the Respondent's. In doing so I considered the test set out by Justice Forgeron in Baker-Warren v. Denault, 2099 NSSC 59. In Wells v. King, supra, Justice Jollimore references this authority:
>
> > [5] In Baker-Warren v. Denault, 2009 NSSC 59 at paragraph 19, Justice Forgeron identified factors to be balanced when assessing credibility. These factors include: the inconsistencies and weaknesses in the witness' evidence; whether the witness had an interest in the outcome or a motive to deceive; whether the witness had an ability to observe the factual matters that were the subject of her testimony; the witness' power of recollection; whether the witness' testimony was "in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions"; whether there was an internal consistency and logical flow to the witness' evidence, whether the evidence was provided in a candid and straightforward manner; and whether the witness was capable of making an admission against her interest.
>
> [108] I accept the Applicant's evidence over the Respondent's, not limited to the following: - The Applicant's reason(s) for abandoning her studies at Mount St. Vincent; - The Applicant's contributions towards the 2 construction/renovation projects; and - The manner in which the Applicant's earnings were utilized during the relationship.
>
> [109] Throughout the leadup to this trial, the **Respondent maintained that the Applicant was not entitled to a share of the assets** as F.H. and himself were not unjustly enriched. I am satisfied the Respondent's evidence (both Affidavit and viva voce) on the three points mentioned in the preceding paragraph can be **characterized as self serving in nature**, and was advanced on the belief that he could be made to financially compensate the Applicant. His apparent concession

> during cross examination about the Applicant's entitlement to a share of the equity in the property was strategic and underscores his motive. Medical Plan
>
> [110] I am satisfied the parties' circumstances are such that the Applicant should remain on the Respondent's medical plan for so long as he is obliged to pay her spousal support.
>
> [111] C, too, will remain on the Respondent's medical plan until she completes her current academic program. C's eligibility to remain on her father's medical plan may be reviewed when she completes her program.

[257] Generally speaking, I found that at times ML struggled to recall evidence and / or to direct the court to the evidence he wished the court to consider. At other times, I find ML failed to produce the evidence he stated was in the materials and / or he could obtain. AA raised several concerns about ML's testimony, and I acknowledge those concerns.

[258] Although I was somewhat concerned about one aspect of AA's testimony in relation to historical information, generally speaking, when the parties' evidence conflicts, I preferred the evidence of AA over ML's evidence.

16 Conclusion

16.1 Guideline Income

[259] ML's Guideline Income was found to be :

- **2018**: **$198,552** taking into account losses per *Ward* 2022;
- **2019: $455,872** taking into account losses per *Ward* 2022;

- **2020: $517,877** taking into account losses per *Ward* 2022; and
- **2021: $318,742 ($120,235 + $110,986 + $87,520) pursuant to section 19** and
- **$318,472 as of February 1, 2025.**

16.2 Child Support

16.2.1 Recalculated Child Support from April 1, 2018 to June 1, 2020

[260] ML's available income pursuant to s. 18 as of April 1, 2018 ($198,552); 2019 ($455,872); to June 1, 2020 ($517,877). Counsel shall recalculate child support owed by ML to AA based on the above noted Guideline incomes for each year and then account for payments ML made in lieu of child support to determine the recalculated amount.

16.2.2 Prospective Child Support July 1, 2020 – January 1, 2025

[261] ML's available income from July 1, 2020 to the end of December 2020 is ($517,877); and for 2021 it is ($318,742). Beginning on February 1, 2025, ML's income is imputed to $318,742.

[262] Should ML wish to revisit prospective child support after February 1, 2025, he must retain an expert to analyze both CSH's and DDL's corporate financial, and he must provide the financial documents and a final report to AA and to the court.

16.2.3 Recalculated Special and Extraordinary Expenses

[263] Central to any analysis of the issue of special or extraordinary expenses are the circumstances of the parties and the children. I have considered the circumstances of the parties, in particular AA's income and ML's income. As noted in part at paragraphs 85 – 92:

> AA is seeking the following recalculations for contributions from ML to special or extraordinary expenses:
>
> a. 2018: $532 x 12 = $6,384
> b. 2019: $261 x 12 = $3,132
> c. 2020: 100 x 12 = $1,200
> d. 2021: $294 x 12 = $3,528
> e. 2022: $381 x 12 = $4,572
> f. 2023: $518 x 12 = $6,216
> g. 2024: $518 x 12 = $6,216
>
> A total of **$31,248** in recalculated section 7 expenses. ML has argued he owes nothing.
>
> I am not prepared to order ML to pay for expenses related to either child's enrolment in Titan's Gymnastics 2023, 2022, 2021, 2020, or 2019 and enrolment in St. Andrew's Yoga in 2019 as there is insufficient evidence to prove these were extraordinary expenses per s. 7(1)(1.1) of the *Guidelines*.
>
> I am prepared to order ML contribute proportionately to the net cost of enrolment in paddling camp 2023, 2022, 2021 – as I feel there is sufficient evidence to find the camps were most likely required because both parents were working and / or unavailable.
>
> Special expenses such as childcare (before and after school care / holidays – if the parents were working); health care (chiropractor / uninsured treatment for ADHD or autism or other); and tutoring required by either child based on a professional referral, shall be shared by the parties proportionately both on a retroactive basis between January 1, 2018 and June 1, 2020 and prospectively from July 1, 2020 onward.

Counsel shall recalculate the amount of special or extraordinary expenses owed by ML based on the above-noted determinations and based on ML's yearly Guideline income as determined above: 2018 ($198,552); 2019 ($455,872); 2020 ($517,877) and 2021 ($318,742) and **$318,742 as of February 1, 2025.**

[264] Counsel shall recalculate the amount owed based on the above-noted determinations and based on ML's yearly Guideline Income as determined.

16.3 Property

[265] **ML shall pay AA a monetary award of** $106,834.00 interest.

17 Order

[266] AA's counsel shall draft the order after counsel have an opportunity to exchange calculations based on my findings.

18 Costs

[267] Should counsel wish to file cost submissions, I would expect the Applicant's submissions within one month of receipt of this decision and the Respondent's response two weeks thereafter.

Cindy G. Cormier, J.