



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *Shears v. Shears*, 2019 NLCA 40

**Date:** July 4, 2019

**Docket Number:** 201401H0070 and 201401H0084

**BETWEEN:**

BOYD SHEARS and  
W. BRYANT SHEARS LIMITED

APPELLANTS/  
RESPONDENTS BY CROSS-APPEAL

**AND:**

SHARON SHEARS and  
SHARMAT SERVICES INC.

RESPONDENTS/APPELLANTS  
BY CROSS-APPEAL

**Coram:** Welsh, Hoegg and O'Brien JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
Family Division 201002F0499

**Appeal Heard:** April 16, 17 and 18, 2018

**Judgment Rendered:** July 4, 2019

**Reasons for Judgment by:** Hoegg J.A.

**Concurred in by:** Welsh and O'Brien JJ.A.

**Counsel for the Appellant/Respondent by Cross-Appeal:** Nick Avis Q.C.

**Counsel for the Respondent/Appellant by Cross-Appeal:** Jean Dawe Q.C.

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**Hoegg J.A.:**

## **INTRODUCTION**

[1] Boyd Shears and the company he controls, W. Bryant Shears Limited (WBSL), appeal a trial decision involving the division of matrimonial property, claims respecting the assets and debts of several businesses and a trust, spousal support and retroactive child support. Mr. Shears listed 44 grounds of appeal in his notice of appeal, but this number was reduced to 20 in his factum. The respondents, Mr. Shears' former wife Sharon Shears now known as Sharon Chaulk, and the company she controls, Sharmat Services Inc. (Sharmat), have cross-appealed, stating an additional 35 grounds.

[2] Mr. Shears and Ms. Chaulk were married in 1973 when they were in their early 20s. They have three children who were aged 11, 17 and 18 when the couple separated in 1995. Mr. Shears and Ms. Chaulk divorced in 1998. When the trial commenced in early 2012, all of their children were employed and living independently of their parents.

[3] Four actions respecting the parties' rights and obligations pertaining to the matters referenced in paragraph one were consolidated for trial. The trial began in February 2012 and lasted 41 days intermittently over a period of nearly two and one-half years.

## **ISSUES**

[4] Mr. Shears' appeal alleges two overarching errors: (1) that the Judge failed to find that Ms. Chaulk abused the process of the Court, and (2) that the Judge erred in her treatment of the evidence. Mr. Shears argues that Ms. Chaulk's abuse of the Court's process resulted in costly and undue trial delays. His argument respecting the Judge's treatment of the evidence rests on two alleged errors: (a) that the Judge failed to adhere to the rule in *Browne v. Dunn* in assessing the evidence and (b) that the Judge failed to properly assess the credibility of several trial witnesses.

[5] Mr. Shears argues that the Judge's treatment of the evidence caused her to make specific errors in valuing and treating the business assets of both WBSL and Sharmat under section 29 of the *Family Law Act*, R.S.N.L. 1990, c. F-2 (the *FLA*), in finding that a \$902,030 debt allegedly owed by WBSL to Provincial Video Wholesalers Limited (PVWL) and a debt of \$123,872 owed to Anchois Ltd. were not matrimonial debts, and in finding that there was an enforceable

contract between WBSL and Sharmat. Several other errors respecting more discrete questions of mixed fact and law are also alleged.

[6] Ms. Chaulk's cross-appeal involves issues respecting the interpretation and application of the provisions of section 29 of the *FLA* to her claim against WBSL, the valuation of Mr. Shears' interest in WBSL, and the valuation of Ms. Chaulk's interest in other companies. She alleges that the Judge erred in concluding that her claim to the business assets of WBSL was fairly compensated by the Judge's ultimate decision to allow Mr. Shears to retain the full value of WBSL and Ms. Chaulk to retain the full value of Sharmat. Ms. Chaulk alleges several other errors respecting the Judge's valuation and division of matrimonial property, the valuation of Mr. Shears' income for the purposes of child and spousal support, and the Judge's decision not to award costs.

## **ANALYSIS**

### **Abuse of Process**

[7] Mr. Shears asks this Court to determine whether Ms. Chaulk's conduct of the litigation amounts to an abuse of process. He alleges that Ms. Chaulk took unreasonable positions in her conduct of the litigation, used trial time to conduct discoveries, and certified readiness for trial when disclosure was incomplete and discoveries had not concluded. There was no specific finding by the Judge respecting abuse of process, which makes Mr. Shears' argument in this regard an unusual ground of appeal. Nevertheless, I will address it as follows.

[8] Mr. Shears' fundamental position is that Ms. Chaulk took 14 years to prosecute her claims against him, during which time she had ample opportunity to pursue disclosure of documentation, the late production of which caused trial delays and resulted in the trial being "akin to a discovery process". He argues that this situation "impacted all of the major issues at trial" and had "a major impact on the length of the proceedings and hence the costs involved". Mr. Shears also points out that counsel for Ms. Chaulk certified trial readiness when the case was, in his submission, clearly not ready for trial.

### **Background**

[9] In her decision, the Judge commented on several matters concerning the conduct of the trial. At paragraphs 178-181, she noted that one of Mr. Shears' accountants had not taken his witness responsibilities seriously. The accountant had failed to look for files respecting relevant issues which Ms. Chaulk's counsel had requested. He ultimately located the files and produced a copy to

Ms. Chaulk's counsel the day before the trial resumed, with the result that counsel's examination of the accountant was, according to the Judge, "more akin to a discovery". At paragraphs 300-302, the Judge identified another delay due to the accountant having had no access to some of the documentation respecting one of the companies involved in the litigation, and stated that "both counsel were to blame".

[10] The Judge addressed some of Ms. Chaulk's conduct which could be supportive of Mr. Shears' abuse of process allegation in the costs section of her judgment, saying:

[429] Both parties seek costs.

[430] After the three actions were started in 1998, there were many applications made for disclosure of relevant records. This court made two Orders for disclosure by Ms. Chaulk in February 2002 and January 22, 2003, but Ms. Chaulk has never fully complied with the terms of either Order, which is unacceptable given the vigor with which her counsel pursued Mr. Shears for full disclosure.

...

[432] Ms. Chaulk maintains that she has been pursuing disclosure from Mr. Shears since 1998 and has been continuously frustrated. She specifically alleges that she requested her complete personal files and those of Sharmat Services Inc. from Mr. Blagdon in 1998 and has never received the records. She maintains this has prevented her from being able to quantify the matrimonial and business assets as of the date of separation.

[433] Mr. Shears claims that the records for Sharmat for the period of 1991 to 1993 are "missing" and he blames Ms. Chaulk. He suggests that it is convenient to her case that they have not been produced because he was very involved in the records in that period.

[434] On cross-examination, it was established that Ms. Chaulk was not always reasonable in the positions she maintained prior to trial. For example, she requested that Mr. Blagdon release to her the original of her personal and corporate records. He wanted \$600.00 for copying charges and she refused to pay it. As a result, the records were not delivered and no further requests were made.

[435] In addition, Ms. Chaulk would not agree that she was responsible for either half of the cost of the environmental assessment on the property at 197 Nicholasville Road, Deer Lake (\$24,701.80) or the appraisals on the matrimonial home (\$678.00).

[11] The Judge also commented on Mr. Shears' conduct of the litigation and the conduct of his accountants. At paragraphs 309-310, the Judge commented

on the failure of Claude Blagdon, Mr. Shears' cousin and chief accountant, to provide relevant documentation and prepare for his testimony, describing it as conduct which "borders on contempt". Mr. Shears did not tender Mr. Blagdon as a witness, so Mr. Blagdon had to be subpoenaed by Ms. Chaulk to provide evidence respecting the financial affairs of the companies involved in the litigation and information respecting Mr. Shears' income. I note that Mr. Blagdon's failure to co-operate as an important witness in the litigation was the subject of an earlier appeal to this Court (2012 NLCA 17). I note as well that the two accountants working under Mr. Blagdon also had to be subpoenaed by Ms. Chaulk.

[12] Mr. Shears and his expert witness, David Howe C.A., were the only two persons who testified for Mr. Shears. It is clear that Mr. Shears' accountants – Mr. Blagdon and two others working under him – had much relevant and necessary evidence to give, and equally clear that requests for production of documents and attendance at discoveries were not met prior to trial. While Ms. Chaulk may have had the legal means to obtain the requested information before trial, to do so would have required much persistence, effort, and cost given Mr. Blagdon's stone-walling of her requests. Moreover, one must not lose sight of the fact that the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sched. D place an obligation on each party to make disclosure without forcing opposite parties to request it.

[13] The Judge also commented on Mr. Shears' conduct of the litigation at paragraph 436:

Lack of cooperation was also evident from Mr. Shears. As early as 1999, he suggested in an affidavit that the only asset he was prepared to concede [as] matrimonial was the home.

and at paragraph 437, concluded:

In earlier decisions on this file, I have made conclusions on delay which I will not repeat here. Suffice to say, my disappointment that actions commenced in 1998 would not come to trial until 2012 have already been expressed and I have found that both parties are to blame.

[14] The Judge then summarized the damages awards, noting that Ms. Chaulk was largely successful. The Judge stated:

[440] In light of the foregoing, I would make no Order as to costs, subject however to:

- counsel's submissions on the effect of any offers to settle; and
- counsel's submissions on the effect of the Company having paid a disproportionate amount of the legal and accounting fees associated with this litigation.

### ***The Law***

[15] Abuse of process in the context of a civil proceeding was addressed by the Supreme Court of Canada in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227. At paragraphs 39-40, the Court stated that the doctrine "is not limited to criminal law" and "is characterized by its flexibility". The Court quoted with approval Goudge J.A.'s comments about abuse of process at paragraphs 55-56 of *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.) (whose dissenting reasons were endorsed by the Supreme Court of Canada, 2002 SCC 63, [2002] 3 S.C.R. 307), saying that it:

... engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it would in some other way bring the administration of justice into disrepute. ...

See also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 36-37.

### ***Analysis***

[16] It is clear from the record and the Judge's decision that both parties' conduct of this litigation left much to be desired and that both parties did not always adhere to the rules, procedures, and practices of the Court. In these circumstances, it cannot be seriously argued that Ms. Chaulk was solely responsible for trial delays or that her conduct of the litigation was "manifestly unfair" to Mr. Shears. Neither can it be said that Ms. Chaulk's conduct of the litigation brought the administration of justice into disrepute. Accordingly, Mr. Shears has not demonstrated that Ms. Chaulk abused the process of the Court.

### **The Judge's Treatment of the Evidence**

#### ***The Rule in Browne v. Dunn***

[17] The "rule in *Browne v. Dunn*" was first stated by Lord Herschell in *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.):

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed ...

[18] In *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 the Supreme Court of Canada confirmed the rule in *Browne v. Dunn* as a “sound principle of general application” but stated that it is a flexible concept whose application is within the discretion of a trial judge:

65 The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. ...

See also *Apotex Inc. v. Takeda Canada Inc.*, 2013 FC 1237 at paras. 159-160.

[19] In summary, the rule in *Browne v. Dunn* is a rule of fairness. The principle is if a party intends to impeach a witness’s evidence by subsequently calling contradictory evidence, the party ought to give the witness notice of the potentially impeaching evidence. This provides the witness with an opportunity to address it while the witness is still testifying and able to do so.

[20] Another well-established rule of evidence is that a trial judge can accept all, some, or none of a witness’ testimony, and a judge is not bound to accept evidence just because it has not been challenged by cross-examination. The British Columbia Court of Appeal addressed this issue in *R. v. Mete* (1971), [1973] 3 W.W.R. 709, 22 C.R.N.S. 387, saying:

...I can see no reason or logic in any view that a judge may not reject evidence which he disbelieves merely because it has not been cross-examined upon.

This same reasoning was employed by the Newfoundland and Labrador Supreme Court Trial Division in *M. Hodge & Sons Ltd. v. Monaghan* (1985), 51 Nfld. & P.E.I.R. 173 (Nfld. S.C.(T.D.)) and also in *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 NLTD(G) 175, 330 Nfld. & P.E.I.R. 233, at paras. 74 to 78, reversed on other grounds in 2014 NLCA 46.

[21] On appeal, Mr. Shears asserts that the Judge erred in failing to accept evidence from him or his accountants when their evidence was not subjected to

cross-examination, saying that this violated the rule in *Browne v. Dunn*. Mr. Shears argued application of the rule in *Browne v. Dunn* at trial, and the Judge rejected his argument, explaining why at paragraphs 11 to 16:

[11] Mr. Shears was the first witness to testify in a 38-day trial that has taken more than two years to conclude. He deferred the majority of questions on his income and business interests to his accountant, a position that I have determined was only partially appropriate. In these circumstances, any shortcomings in counsel's cross-examination of Mr. Shears should not be held to violate the fair play rule with the result that subsequent evidence would be inadmissible or afforded less weight. Counsel could not predict the detailed evidence that would subsequently be provided in documentary form and through testimony of multiple witnesses which, it is argued, should have been put to Mr. Shears in cross examination.

[12] As to Messrs. Blagdon, Tilley and Dwyer, Certified General Accountants, subpoenaed by counsel for Ms. Chaulk, the analysis is somewhat different.

[13] Mr. Blagdon was not only a reluctant, but a hostile witness. Having taken an oath to tell the truth, the whole truth and nothing but the truth, he was evasive, rude to counsel for Ms. Chaulk, often unprepared and answered questions with riddles. Against this backdrop, were I to ascribe reduced weight to subsequent evidence that provided clarity to questions for which Mr. Blagdon provided no assistance or that contradicted Mr. Blagdon's testimony, the result would be a complete injustice to Ms. Chaulk.

[14] As to Messrs. Tilley and Dwyer, each of whom attempted to be as helpful as possible, both accountants deferred many issues to Mr. Blagdon and, in my view, properly so. They acted on Mr. Blagdon's direction without questioning his motives, the propriety of his accounting practices or the effects they would have on the client. In these circumstances, any failure to cross-examine these witnesses on issues for which Ms. Chaulk's subsequent witnesses provided assistance or gave contrary evidence, should not warrant reduced weight to be applied to such evidence.

[15] I agree that the testimony of John Morgan, C.A. gives rise to a conspiracy theory in which Mr. Tilley would be implicated and that this conspiracy theory was not put directly to Mr. Tilley. However, Ms. Dawe, Q.C.'s cross-examination of Mr. Tilley was rigorous and lengthy. Throughout his cross-examination, Mr. Tilley would have been aware that the appropriateness of his accounting practices was challenged. It would not have been necessary for Ms. Dawe, Q.C. to actually suggest to Mr. Tilley that he had conspired to prepare records that would be to the benefit of Mr. Shears and the detriment of Ms. Chaulk. That suggestion was obvious to the court and, I conclude, also obvious to Mr. Tilley. In any event, as will be subsequently apparent, I have concluded that Mr. Tilley did not conspire to prepare records to impair Ms. Chaulk's financial position. Mr. Tilley, like Mr. Shears and Ms. Chaulk, simply followed Mr. Blagdon's directions.

[16] Relative to these concerns of Mr. Avis, Q.C., I see no role for the application of the rule in *Browne v. Dunn*.

[22] In this case, Mr. Shears' principal accountant, Mr. Blagdon, had relevant evidence to give which was important to many of the issues raised in the case. Despite being the chief accountant for the Shears entities involved in this litigation, he had been evading discovery before trial and was not tendered as a trial witness by Mr. Shears. Instead, Ms. Chaulk had to subpoena Mr. Blagdon, who was declared hostile at trial. The two other accountants who worked with Mr. Blagdon on Mr. Shears' affairs also had to be subpoenaed by Ms. Chaulk. They also had relevant and important evidence to give which incidentally showed that they had been carrying out Mr. Blagdon's instructions in structuring the Shears entities and providing financial and accounting services to them. As well, all three accountants provided personal financial and accounting services to Mr. Shears and Ms. Chaulk during the marriage.

[23] Where the evidence of Mr. Shears and his accountants was rejected, despite not being subjected to cross-examination, the evidence of Ms. Chaulk or her expert, John Morgan C.A., was generally accepted. The differences were on matters pertaining to the financial affairs of the entities implicated in the litigation and the financial affairs of Ms. Chaulk and Mr. Shears, and Mr. Shears' income. These matters were in play throughout the lengthy conduct of the litigation and during the trial.

[24] As the Judge noted in paragraph 15 of her decision, there was no realistic possibility that Mr. Shears, Mr. Blagdon and the two other accountants did not have general notice of the issues respecting the financial matters of the entities involved in the litigation or that they were otherwise caught by surprise by the evidence of Ms. Chaulk and Mr. Morgan. In fact, Mr. Shears and his accountants knew the financial affairs of Mr. Shears and the Shears entities intimately – better than Ms. Chaulk and Mr. Morgan.

[25] Likewise, there was no realistic possibility that Mr. Shears was caught by surprise respecting matters pertaining to the nature and particulars of his and Ms. Chaulk's marriage, their matrimonial property, and their relationships with their children. These matters were in play from when the couple separated in 1995 and each knew the general position of the other respecting them. Mr. Shears did not cite any instance that could support a finding of him being unfairly treated by virtue of his not having had the opportunity to respond to potentially impeaching evidence through cross-examination.

[26] Further, as Ms. Chaulk points out in her factum, the Judge granted Mr. Shears leave to call reply evidence to address any matters to which he argued the rule in *Browne v. Dunn* applied. Mr. Shears declined the opportunity.

[27] Mr. Shears also argues that the Judge erred in rejecting his evidence that was not contradicted by other evidence. He identifies uncontradicted evidence that was favourable to his overall position respecting his involvement in the relationship between PVWL and the Matthew Shears Trust, work that was done by his father's widow, Ethel Shears, for WBSL, whether the accrued value in WBSL would go to the children, whether Ms. Chaulk owed one-half of the WBSL debt, and Ms. Chaulk's mental health issues. He argues that the Judge's rejection of his uncontradicted evidence was also in violation of the rule in *Browne v. Dunn*.

[28] I am dubious about Mr. Shears' contention that all of the evidence he references was uncontradicted. However, even if I were to accept his argument that some of the rejected evidence was uncontradicted, I do not accept his argument that the Judge was obligated to accept it.

[29] As noted above, a trial judge can accept all, some, or none of a witness' testimony, and a judge is not bound to accept evidence just because it has not been contradicted. A similar argument to the one advanced by Mr. Shears was recently considered and rejected by the British Columbia Court of Appeal in *Jampolsky v. Insurance Corp. of British Columbia*, 2015 BCCA 87:

38 Throughout his written argument, counsel for Mr. Jampolsky seemed to take the position that the judge was required to accept any evidence that was not specifically contradicted in cross-examination or on which there was no contradictory evidence tendered by the defence. He cited no authority for this proposition. This is not the law.

[30] The Judge's rejection of Mr. Shears' evidence in the above-noted respects engages her assessment of his credibility. At paragraphs 54-104 of her decision, the Judge provided reasons for her assessment of the credibility of Mr. Shears and Mr. Blagdon. This section of her judgment, together with the reasons she gave for her rulings respecting discrete issues, amply supports her decision to reject aspects of the evidence favorable to Mr. Shears despite the evidence being uncontradicted.

[31] In the result, the Judge did not err in finding no role for application of the rule in *Browne v. Dunn* to the conduct of this litigation. There was no unfairness or surprise occasioned by the way in which the evidence of Mr.

Shears and his accountants was received or treated by the Judge and no obligation on the Judge to accept evidence which was not cross-examined or contradicted.

***The Judge's General Credibility Assessments-***

[32] Mr. Shears argues that the Judge erred generally in accepting Ms. Chaulk's evidence over his, in rejecting much of Mr. Blagdon's evidence, and in failing to recognize that Mr. Shears put "blind trust" in Mr. Blagdon and therefore did not understand "the details of transactions for which Mr. Blagdon was the mastermind".

[33] The Judge concluded that Mr. Shears was not forthright with the Court respecting his involvement in and knowledge of the operations and financial health of many of the Shears entities (paragraph 55). She gave several examples of how his evidence did not ring true or hang together with the other evidence. She found that Mr. Blagdon's evidence respecting certain issues lacked credibility, and gave reasons why she so concluded. As for Ms. Chaulk's credibility, the Judge noted some minor inconsistencies which she found were explained by the passage of time.

[34] It is well established that credibility assessments are the province of trial judges and are not to be lightly disturbed on appeal. Trial judges see and hear witnesses and directly receive documentary evidence. Consequently, they are in a better position than appellate judges to evaluate how a witness' evidence meshes with other trial evidence in the context of the issues being tried.

[35] This Court addressed the role of a trial judge in evaluating credibility in *Stassis v. Amicus Bank*, 2014 NLCA 38, 356 Nfld. & P.E.I.R. 80. In *Stassis*, White J.A. endorsed the well-known and time-tested approach to credibility assessment set out by the British Columbia Court of Appeal in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, (B.C.C.A.), saying:

33 The issue of credibility is discussed by O'Halloran J.A. in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) at page 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. ...

Continuing on the same page, Justice O'Halloran wrote:

... The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divining insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case."

[36] Trial judges themselves are uniquely situated to evaluate credibility. Under the palpable and overriding error standard of review, an appeal court can only interfere with the credibility findings of a trial judge when those findings are "clearly wrong." This requires the identification of a discrete error that has had an impact on the result. As stated by Fish J. in *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401:

56 In my respectful view, the [palpable and overriding error] test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence". In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. ...

[37] The Supreme Court of Canada emphasized the importance of deference to trial judges' findings of credibility in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 72:

72 With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. ...

[38] Mr. Shears' complaint is based on the notion that he was dependent on Mr. Blagdon and only repeating what he learned and understood from Mr. Blagdon, because Mr. Blagdon had "masterminded" the network of companies and his financial affairs. In other words, Mr. Shears wants to be excused for depending on Mr. Blagdon's advice. However, at the same time Mr. Shears argues that the evidence of Mr. Blagdon and that of the two other accountants was not fairly considered by the Court.

[39] The standard of review respecting a trial judge's credibility assessments is palpable and overriding error. This is a high standard to meet. Mr. Shears identifies issues which he argues the Judge ought to have decided differently. While it was open to the Judge to come to different conclusions respecting the issues he raises, Mr. Shears has not demonstrated any palpable, let alone overriding, factual errors in the Judge's reasoning respecting those issues. The Judge gave reasons why she accepted the evidence of certain witnesses over that of Mr. Shears, Mr. Blagdon and the other accountants, on all of the controverted issues. Her general credibility assessments respecting all of the witnesses and her acceptance and rejection of certain evidence from certain witnesses are ably explained in her decision and well supported by the evidence. Accordingly, there is no merit to Mr. Shears' credibility assessment argument.

[40] Having found that the Judge committed no error with respect to the two overarching issues raised by Mr. Shears, there is no need to consider several specific grounds of appeal which flow from those overarching issues. However, several discrete grounds of appeal which warrant further consideration remain.

### **The Matthew Shears Trust**

[41] In 1994, the year before Mr. Shears and Ms. Chaulk separated, a trust for the benefit of their son Matthew (the MST) was created. Ms. Chaulk was named the settlor of the trust and the trustee was Kevin Dwyer, one of the two accountants working with Mr. Blagdon. Neither the MST nor Matthew Shears was a party to this litigation.

[42] The Judge found that Ms. Chaulk owned matrimonial property in the form of PVWL shares which had been placed in the MST, and that she was due her share of their value which calculated to \$7,286.66. The Judge correctly stated at paragraph 228 of her decision that "beneficiaries alone have the rights to pursue the trustees" of a trust, and at paragraph 251, that Matthew Shears is the sole beneficiary of the MST. However, the Judge ruled at paragraph 223 of her decision that Mr. Shears effectively controlled the MST, and she ordered him to arrange for Ms. Chaulk to be paid her due from the trust in return for which her shares would be endorsed over to the MST.

[43] Mr. Shears maintains that the Judge erred in so ordering, arguing he has no legal or beneficial interest in the trust, and therefore no ability to "arrange to pay" monies to Ms. Chaulk from the trust.

[44] It is easy to see why the Judge concluded that Mr. Shears effectively controlled the MST. However, in the absence of specific provision, trust law does not give authority to Mr. Shears to pay or to direct payment of monies from the MST. It is only Matthew Shears, the sole beneficiary of the MST and not a party to this litigation, who could arrange to pay Ms. Chaulk monies from the MST. While there may be situations where a court can order a trust to be pierced or monies from a trust to be disgorged, a ruling respecting such a situation would be arrived at after consideration of evidence and legal argument respecting the purpose for doing so and how this could be accomplished. It does not appear that such submissions were made and considered at trial.

[45] In the result, I accept Mr. Shears' argument and declare that the Judge erred in ordering him to arrange to pay Ms. Chaulk \$7,286.66 from the MST. The Judge's order should therefore be vacated. While the Judge erred in directing Mr. Shears to make arrangements to have Ms. Chaulk paid, there was no argument on appeal that the Judge erred in finding that the \$14,575.33 due to Ms. Chaulk from the MST is a matrimonial asset subject to equal division. As such, it is only the order compelling Mr. Shears to make the payment that I would disturb.

## **Matrimonial Debt**

### ***The PVWL Debt***

[46] Mr. Shears argues that the Judge erred in deciding not to include two significant debts as matrimonial debts. Mr. Shears testified that at the time of separation he owed – through his proprietorship of Pro-Video – an amount of \$902,030 to PVWL. A further \$123,872 was allegedly owed by Mr. Shears and his companies to Anchois Ltd. (Anchois). The Judge did not accept either of these debts as matrimonial debts, and did not factor them in to her property division analysis.

[47] Mr. Shears argues that the Judge erred in holding that the PVWL debt was not proven to be matrimonial. He maintains that the PVWL debt was matrimonial and that Ms. Chaulk was as liable for it as he. Mr. Shears argues that his expert, David Howe C.A., accepted the legitimacy of the PVWL debt and says that the Judge did not explain why she rejected Mr. Howe's evidence.

[48] Ms. Chaulk's position is that the PVWL debt of \$922,030 was a paper debt which was not legitimate. She relies on the evidence of John Morgan C.A.

who said that the debt “had never really existed”. In any event, Ms. Chaulk argues that if there is a debt, it is not matrimonial.

[49] The Judge agreed with Ms. Chaulk’s position, saying at paragraph 217 of her decision:

[T]here is not a shred of evidence to suggest that this debt was incurred for the benefit of the family.

She continued at paragraph 218, saying that Ms. Chaulk “received no benefit from the losses incurred”. At paragraph 220 the Judge concluded:

The contradictory accounting records, the charging of interest without a contractual requirement, the questionable management fees without proof of supporting services and Mr. Blagdon’s deferral to others of questions he should have been able to answer, support the conclusion that the alleged matrimonial debt of \$922,030.00 has not been established.

[50] I do not accept Mr. Shears’ argument. Both Mr. Howe and Mr. Morgan testified and were cross-examined on the PVWL debt issue. The Judge considered their evidence and also the evidence from Mr. Blagdon and Mr. Shears on the issue, and determined that the alleged matrimonial debt was not established. The reasons why she rejected Mr. Shears’ position are noted in the paragraph above. Mr. Shears has not identified any palpable and overriding error in the Judge’s consideration of the issue.

### ***The Anchois Debt***

[51] Similarly, Mr. Shears argues that the Judge erred in finding that the Anchois debt was not matrimonial. The Judge found there was no evidence supporting that the \$123,872 alleged to be payable to Anchois by Mr. Shears and his companies was money borrowed for matrimonial purposes. She concluded that Mr. Shears had the onus of proving that the debt represented money he personally borrowed for matrimonial purposes and that he did not meet this onus. Mr. Shears has not demonstrated any palpable and overriding error in the Judge’s fact finding, reasoning or conclusion on this issue.

[52] Accordingly, Mr. Shears grounds of appeal with respect to the division of debts fails.

## **Division of Matrimonial Property**

[53] The Judge's findings on the division of matrimonial assets have been subject to several grounds of appeal and cross-appeal. These challenges relate to which assets the Judge determined to be matrimonial as well as the way in which she valued and divided the assets she found to be matrimonial.

### ***Equalization of the RRSPs***

[54] At the time of separation, both parties had RRSPs in their own names. In determining how to order equalization of the RRSPs, the Judge was faced with the task of parsing out what changes in value to the RRSPs were the result of investment interest (which would ordinarily be subject to division), and which changes were the result of contribution and withdrawal.

[55] There was evidence of the value of Mr. Shears' and Ms. Chaulk's RRSPs at the date of separation, and at the time of trial. However, there was no evidence on how to account for contribution and withdrawals respecting Mr. Shears' RRSPs, whereas there was such evidence respecting Ms. Chaulk's.

[56] In determining equalization, the Judge adopted the novel strategy advanced by Ms. Chaulk. The strategy involved considering the difference in value between Mr. Shears' RRSP and Ms. Chaulk's RRSP at the date of separation, and then ordering Ms. Chaulk to make a tax-free rollover to Mr. Shears in an amount representing half the difference in their RRSPs in 1995 plus a rate of return equivalent to that which Ms. Chaulk's RRSPs obtained between 1995 and the date of trial.

[57] Mr. Shears takes issue with this approach and argues that the Judge erred in assessing his evidence. It is his position that the records show that he continued to make contributions to his RRSPs, as the Judge found, but that she erred in saying that he also made withdrawals. He argues that the Judge's approach results in him not receiving the benefit of the increase in value of Ms. Chaulk's one significant divisible asset. In his factum, Mr. Shears provides another "rough and ready approach" to determine RRSP equalization.

[58] It was held by this Court in *Martin v. Martin* (1998), 168 Nfld. & P.E.I.R. 181 that "as a general rule, the content of the RRSPs should be determined at the date of separation but valued at the date of rollover or transfer" (paragraph 40). That said, general rules are flexible, and they must adapt to unique circumstances.

[59] The Judge's approach does result in a potential inequity to Mr. Shears. While she found him entitled to the benefit of the increase in value of Ms. Chaulk's RRSPs up to the end of 2013, this benefit only attaches to the difference in value between her RRSPs and Mr. Shears' RRSPs at the date of separation. If Ms. Chaulk's RRSPs as a whole achieved a greater rate of return than those of Mr. Shears between the date of separation and the date of trial, then he is at a disadvantage under this method.

[60] The Judge was not unaware of this potential inequity. However, she found that it was made necessary due to the passage of time and insufficient documentation provided by Mr. Shears.

[61] The fact that there are different approaches to resolving a unique problem does not make one approach necessarily wrong. There is no error in principle in the Judge's approach. It was taken for a reason and it was not demonstrated that an injustice resulted. Accordingly, I would dismiss this ground of appeal.

### ***Judgment Interest on Shares***

[62] Mr. Shears argues that the Judge erred in ordering that pre-judgment interest be paid on Ms. Chaulk's interest in Investments Holdings Inc. (IHI). He argues that pre-judgment interest should not attach as the whole value of Ms. Chaulk's interest will be calculated in the present when it is divided and paid.

[63] For her part, Ms. Chaulk says that the value of her interest, determined by the Judge at trial to be \$115,593.00 on the basis of Mr. Morgan's calculation, is out of date. I agree it is out of date, given that it was determined in 2012.

[64] Regardless of the valuation being out of date, it was a determination at trial based on the evidence and has not been shown to be in error. Accordingly, judgment interest is payable on this amount from the date of valuation relied on by the Judge.

### ***Taxes and Insurance Costs for the Matrimonial Home***

[65] Mr. Shears also argues that the Judge erred in failing to order Ms. Chaulk to pay one-half of the taxes, insurance, and utility charges for the matrimonial home after she left.

[66] Ms. Chaulk objects, arguing that it was Mr. Shears who benefitted from use of the home after she moved out. In particular, Ms. Chaulk says that after the couple separated, each of their children had lived from time to time in the

home with Mr. Shears' consent, that Mr. Shears had an office in the home which he continued to use, and that he stored excess WBSL inventory there. Ms. Chaulk also says that Mr. Shears filled in the swimming pool at the home without her knowledge or consent, and that when she sought his agreement to sell the home or buy out her one-half interest in 1999, he refused to do either.

[67] The Judge considered the evidence on this point, and decided that Mr. Shears should cover the taxes and costs of insurance and utilities for the matrimonial home. No error on her part has been shown. Accordingly, this ground of appeal fails.

### ***Deductions for Environmental Study***

[68] The matrimonial assets included several parcels of real property. A garage had been situated on one of these properties for over 30 years. To assist in determining its value, Mr. Shears obtained an environmental study of the property to determine whether it was contaminated, for if it were contaminated its original appraised value would doubtless be less. The Judge found that Ms. Chaulk was responsible for half the value of the assessment. Ms. Chaulk has cross-appealed this liability.

[69] Ms. Chaulk argues that notional costs related to the disposition of matrimonial property are not permissible deductions from its value, and she relies on the Ontario case of *McPherson v. McPherson* (1988), 63 O.R. (2d) 641, 48 D.L.R. (4th) 577 (Ont. C.A.) for the proposition. I would reject this argument as it applies to the present case, for two reasons.

[70] In *McPherson*, Justice Finlayson does not claim to be making an absolute statement that notional costs are not permissible deductions from the value of real property. Rather, he concludes that the question of deductibility is a factual inquiry into the likelihood of the liability being incurred, for if incurring the liability is speculative, it "can safely be ignored."

[71] In this case, the cost for the environmental study is not a hypothetical cost, rather it is an actual cost that Mr. Shears has incurred. As such, *McPherson* is of no application.

[72] Similar to the cost of appraisal, the cost of the environmental study was incurred for the sake of properly valuing the property. In other words, it was necessary to assist the Court in answering the question before it. Absent an argument that Mr. Shears obtained the study in a bad faith effort to expend matrimonial assets, there is no reason why the cost should not be borne by both

parties. Accordingly, the Judge did not err in ordering Ms. Chaulk to pay half the share of the environmental study.

***Deer Lake Development Inc.***

[73] On cross-appeal, Ms. Chaulk argues that the Judge erred in failing to classify Deer Lake Development Inc. (DLD) as either a business asset or a matrimonial asset. She argues that the Judge erred because only \$100,000 of DLD, representing its accounts receivable and not its full value, informed the Judge's reasoning.

[74] The Judge found no reliable evidence upon which to award Ms. Chaulk anything but her interest in the \$100,000 accounts receivable. However, Ms. Chaulk maintains that the Judge ought to have ordered that the DND shares were matrimonial, and either ordered a transfer of half of them to Ms. Chaulk or ordered an appraisal of DLD's realty and determined its value, as she did with IHI.

[75] DLD was incorporated by Mr. Shears in 1993, and he is the sole shareholder. The company was incorporated for the purpose of purchasing a parcel of land. The money to purchase the land was "loaned" interest-free by WBSL, and Mr. Shears testified that the loan remained outstanding. The loan was approximately \$100,000.

[76] The Judge declined to treat DLD as either a business asset, or a matrimonial asset. Rather, she found that, because the only investment in the company during the marriage was the \$100,000 loan, and because the loan remained outstanding as an account receivable on the books of WBSL and was therefore included in the valuation of WBSL, Ms. Chaulk's interest in DLD would already be compensated through her entitlement to an interest in WBSL.

[77] The Judge characterized the asset for division as Mr. Shears' "investment" in DLD. In fact, the asset is the shares, which were "acquired by either or both spouses [in this case Mr. Shears] during the marriage" (section 18(1)(c) of the *FLA*). As the shares were acquired during the marriage, they must be a matrimonial asset unless they fall within one of the enumerated exceptions. Section 18(1)(a) of the *FLA* defines "business assets" as "property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose". Business assets are one of the enumerated exceptions to property classified as matrimonial assets.

[78] The Judge found that DLD was established for the purpose of purchasing land “for future development”. She further found that, following the parties’ separation, the activities of the company were “confined to purchasing and renting properties”. A comparable provision to section 18(1)(a) of the *FLA* in the Nova Scotia legislation was considered by the Supreme Court of Canada in *Clarke v. Clarke*, [1990] 2 S.C.R. 795, at 814. In *Clarke* the Court remarked that “business assets are assets which have as their purpose the generation of income in an entrepreneurial sense”.

[79] In the circumstances, I am satisfied that the findings of the Judge ground a conclusion that the shares in DLD were a business asset, incorporated on Mr. Blagdon’s advice as a cog in Mr. Shears’ complex corporate dealings.

[80] As a business asset, any claim by Ms. Chaulk to division must be grounded on section 29 of the *FLA*. While the operation of section 29 in this case is discussed in more detail later in this decision, it is sufficient to resolve this aspect of the appeal by noting that there was no finding by the Judge that Ms. Chaulk made any direct contribution to, or had any direct dealings with DLD.

[81] The record before this Court is not sufficient to determine whether the \$100,000 loaned by WBSL to DLD were funds that would otherwise have been available to Mr. Shears, and therefore the family, so as to constitute a contribution by Ms. Chaulk to the improvement of DLD. Therefore, I am satisfied, like the Judge, that Ms. Chaulk’s interest in the shares of DLD, if any, is sufficiently compensated by her proportionate entitlement (through her interest in WBSL) to the \$100,000 loan outstanding from DLD to WBSL.

[82] In the result, the Judge’s reasoning was not inconsistent with the law respecting the division of a business asset. Given that her conclusion respecting DLD was a component of a larger property division scheme, I would defer to her decision, and leave her conclusion undisturbed.

### ***Buick Roadster***

[83] When the parties separated, Ms. Chaulk was driving a 1993 Ford Probe she purchased with money drawn from Sharmat. Mr. Shears was driving a Buick Roadster which was owned by WBSL. The Judge found the depreciated value of the Probe at the date of separation to be matrimonial property subject to division, but found that the Buick Roadster was not matrimonial property so she did not divide its depreciated value. Ms. Chaulk argues that this was an error,

and relies on section 18(3) of the *FLA* in support of her position. She requests an equalization payment of half of 70% of the purchase price of \$35,000, which calculates to \$12,250.

[84] Section 18(3) of the *FLA* provides a spouse with a claim to shares of a corporation held by the other spouse when that corporation owns property which would be considered a matrimonial asset, but for the fact that it is owned by the corporation. In such circumstances, shares of the corporation with a market value equal to the benefit the other spouse has in respect of the property are treated as a matrimonial asset. This entitles a spouse to claim division of property which is “effectively owned” by the other spouse but legally owned by a corporation in which the other spouse owns shares.

[85] Accordingly, because the Buick roadster was owned by WBSL, shares in WBSL owned by Mr. Shears equal to the benefit he received from the Buick Roadster could be treated as a matrimonial asset. This requires consideration of Mr. Shears’ use of the vehicle.

[86] Mr. Shears had exclusive use of the Buick Roadster. However, Mr. Shears’ use of it was also business related, and he claimed his personal use of it as a benefit in his taxable income. The benefit to Mr. Shears was therefore already included in his income for purposes of spousal support. As well, the value of the vehicle was included in the valuation of WBSL, and Ms. Chaulk has received her share of WBSL through her section 29 claim. To grant this ground of appeal would effectively be giving Ms. Chaulk the value of her share of the Buick Roadster twice. Accordingly, the Judge’s treatment of this issue was not in error.

#### ***Amount in Director’s Account***

[87] The Judge found that amounts withdrawn from Mr. Shears’ director’s account with WBSL were matrimonial assets subject to equal division. She accepted the evidence of Mr. Morgan, stated at paragraph 222 of her decision, that the amount currently outstanding was \$848,977, and found that Ms. Chaulk was owed half of this amount.

[88] Ms. Chaulk has cross-appealed the Judge’s finding on this point, claiming that the Judge misapprehended Mr. Morgan’s evidence. Ms. Chaulk submits, and Mr. Shears concedes, that the evidence showed that the amount outstanding was \$1,697,954. Thus the Judge erred by dividing in half a number which had already been divided in half.

[89] Mr. Shears concedes this mathematical error. However, he argues that this error is only relevant if this Court dismisses his ground of appeal related to the PVWL debt. For reasons explained in this decision, this Court has dismissed his ground of appeal related to the PVWL debt.

[90] Mr. Shears' concession on the mathematical error is also "subject to deducting the tax benefit that [he] received and from which the family obviously benefitted." In the Judge's initial order that Ms. Chaulk was owed \$424,488, the Judge did not deduct any amount for the tax benefit received which benefitted the family. Mr. Shears has not put forward on appeal any basis to find that there was an error in the Judge's failure to do so. Accordingly, I see no reason why the amount owing to Ms. Chaulk should be adjusted on appeal beyond doubling it in accordance with the positions of the parties.

[91] Therefore, the amount due to Ms. Chaulk is varied from \$424,488 to \$848,977.

### **Claims Respecting the Business Assets of WBSL and Sharmat**

[92] WBSL is a company that was established by Mr. Shears' father before the couple married. The parties agreed that the value of WBSL in 2010 was \$5,922,000.

[93] The Judge found that Mr. Shears brought 48 shares in WBSL into the marriage and that he was gifted one other share in 1987. She found these 49 shares were not matrimonial assets and not assets that Ms. Chaulk was entitled to an interest in under section 29 of the *FLA*. She found the remaining 51 shares were business assets subject to division on the basis that Mr. Shears acquired them with funds that would have otherwise been available for the family's use and enjoyment (paragraphs 44-47 of the decision). In so doing, the Judge reasoned that section 29 of the *FLA* limited Ms. Chaulk's claim to "business assets built up during the marriage" and that what was built up during the marriage could not exceed the 51 shares.

[94] Mr. Shears argues that the Judge significantly overstated Ms. Chaulk's entitlement to the WBSL shares. While he argued at trial that WBSL was his business and his alone, he acknowledges on appeal that Ms. Chaulk has a section 29 claim based on certain shares being purchased with matrimonial funds. However, he maintains that this entitlement only applies to 27 of the 51 shares acquired during the marriage, and further that Ms. Chaulk is only entitled to the original purchase price (plus interest) of the 27 shares, not their current

value. Further, he argues that Ms. Chaulk is not entitled to a section 29 claim by virtue of her homemaking contribution to the family, and he relies on *Snook v. Snook*, 2010 NLCA 57, 301 Nfld. & P.E.I.R. 113, at paras. 18-24 to support his position.

[95] Ms. Chaulk maintains that all of the shares held by Mr. Shears in WBSL are business assets subject to division, arguing that the whole value of the company, and not just the value of the 51 shares which were purchased with matrimonial money, was “built up during the marriage and maintained as a joint family venture”. She argues that the Judge’s interpretation of sections 5 and 29 of the *FLA* is narrow and limiting and in conflict with the meaning of “built up by a spouse during a marriage” in section 5(d) of the *FLA*. Alternatively, Ms. Chaulk argues entitlement to the pre-matrimonial shares in WBSL by virtue of the constructive trust and joint family venture principles set out in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269.

[96] Sharmat was a company incorporated in 1991 to provide management and payroll services to WBSL. Ms. Chaulk was the sole shareholder and employee.

[97] The Judge found that Sharmat was a duly incorporated company, that Ms. Chaulk was the sole shareholder, and that there was an enforceable contract between Sharmat and WBSL. She found that Sharmat was matrimonial property subject to division, as it had been established for the purpose of obtaining “a second small business deduction” and benefits from income splitting for the benefit of the family and that it had been purchased with matrimonial money.

[98] Mr. Shears argues that he was the true owner of Sharmat despite its incorporation and the contract between Sharmat and WBSL. He says he was its directing mind and the beneficiary of the anticipated tax benefits and income splitting resulting from its establishment, and further maintains that Ms. Chaulk was fully compensated for the payroll services she performed through Sharmat.

[99] Ms. Chaulk argues that Sharmat was incorporated as her company, and that she was its sole employee and operating mind, as the Judge found.

### ***Entitlement to Division of Business Assets***

[100] Sections 5(d) and 29 of the *FLA* set out the basis for entitlement to business assets claims:

5. The purpose of Parts I and II is to reform the law with respect to matrimonial property in order to

- (a) recognize the contribution made by each spouse to a marriage;
- (b) give a 1/2 interest in the matrimonial home to each spouse;
- (c) provide for the deferred sharing of most other property acquired during marriage; and
- (d) provide for judicial discretion in sharing business assets built up by a spouse during a marriage.

...

29. Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

- (a) direct the other spouse to pay an amount that the court orders to compensate the contributing spouse; or
- (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

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

[101] Two relevant considerations emerge from section 5(d) of the legislation. First, the language provides for judicial discretion in sharing business assets. Second, the business assets subject to sharing are those determined to have been “built up by a spouse during a marriage”.

[102] What are the business assets that could be said to be “built up during a marriage”? Are they only the assets that were acquired during a marriage, or are they any business assets that stand in the name of either party in a marriage which have been “built up” or “increased in value”, during a marriage. The language of section 5(d) does not limit claims for business assets that were acquired during the marriage. The only limiting language in the *FLA* is that the business assets must have been built up by the claiming spouse during the marriage, provided that spouse meets the entitlement criteria set out in section 29 of the *FLA*.

[103] I agree with Ms. Chaulk’s argument that the Judge erred in interpreting section 5(d) of the *FLA* so narrowly. I see no reason in principle to exclude

from sharing the business assets which were brought into a marriage if a judge concludes, on a proper exercise of her or his discretion, that those business assets were built up, enhanced, or improved by a spouse during a marriage and the claiming spouse meets the criteria set out in section 29 of the *FLA*.

[104] In this regard I refer to the Supreme Court of Canada decision *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, which held that, absent clear legislative language, matrimonial property legislation should not be held to abrogate the common law constructive trust remedy (page 97). The overlap between the common law of constructive trusts and section 29 of the *FLA* has been recognized in this jurisdiction in *Marsden v. Marsden*, 2008 NLUFC 18, 280 Nfld. & P.E.I.R. 43, at para. 18. Given that the language in sections 5(d) and 29 of the *FLA* does not clearly limit claims to business assets to those business assets that were actually acquired during the marriage, claims based on section 29 could succeed on the basis of contribution to the acquisition, management, maintenance, operation or improvement of property brought into a marriage.

[105] In this case, the Judge calculated monies due by WBSL to Sharmat under the contract between those two entities, adjusting the value of WBSL down to \$4,268,903 to account for WBSL's liability to Sharmat. She then determined the adjusted value of Mr. Shears' matrimonial interest in WBSL to be \$2,177,140.

[106] While the Judge did err in law by restricting her sections 5(d) and 29 analysis to the 51 shares acquired during the marriage, I am satisfied that the law properly applied to the circumstances leads to the same result.

[107] The Judge found that Ms. Chaulk contributed to her husband's interest in WBSL by performing duties including "cheque authorization and signing, management assistance in the store and advice on purchasing" and holding various director and executive positions in the company. However, the Judge found Ms. Chaulk's most significant contribution to WBSL involved the usage of family funds for the purchase of 51% of the shares during the marriage. Ms. Chaulk played no role in the acquisition of the other 49 shares. While her work on payroll can be considered "management, maintenance, operation or improvement" of the assets, I am satisfied that this contribution is adequately compensated through the division of the 51 shares acquired during the marriage.

[108] Mr. Shears is correct to state that this Court held in *Snook v. Snook*, 2010 NLCA 57, 301 Nfld. & P.E.I.R. 113 that one spouse taking a primary role as a homemaker does not create entitlement to business assets under section 29.

However, the Judge did not rely on Ms. Chaulk's homemaking as providing entitlement. While the Judge recognized that Ms. Chaulk's domestic role played an important part in enabling Mr. Shears to contribute to the company in the way he did, the Judge further stated that this fact was not "strictly relevant" to the section 29 analysis. Rather, she primarily relied on the fact that matrimonial funds were used to acquire the shares, which she found to be a clear contribution to the business assets by Ms. Chaulk.

[109] In the result, I would dismiss the grounds of both the appeal and the cross-appeal relating to the entitlement of Ms. Chaulk to the business assets of WBSL.

### ***Relationship Between WBSL and Sharmat***

[110] Despite finding that Ms. Chaulk was entitled to half of 51% of the value of the WBSL shares, division of this amount was not ordered as part of the Judge's holistic property division assessment. The appropriateness of this approach to division has been challenged on cross-appeal, and requires consideration of the relationship between WBSL and Ms. Chaulk's company, Sharmat.

[111] Sharmat was a company incorporated in 1991 to provide management and payroll services to WBSL. Ms. Chaulk was the sole shareholder and employee.

[112] The Judge found that there was an enforceable contract between Sharmat and WBSL for payment of \$5,000 per month and 15% profit on payroll for WBSL administered by Sharmat. Pursuant to this contract, the Judge found that WBSL owed Sharmat \$1,653,097. The Judge further found that Mr. Shears would be entitled to half of this amount, either on the basis of the Sharmat shares being a matrimonial asset, or on the basis that Mr. Shears has a section 29 claim to half the value of Sharmat.

[113] After valuing Ms. Chaulk's interest in WBSL at \$2,177,140 (this was based on half of a 51% interest, with the value of WBSL adjusted to account for the liability of \$1,653,097 to Sharmat), the Judge declined to order division of the values of WBSL and Sharmat respectively. Rather, she accepted that the parties carrying the companies in their own names was a financial arrangement made by them, and that Ms. Chaulk keeping the full value of Sharmat and Mr. Shears keeping the full value of WBSL achieved a "fair result".

[114] Mr. Shears has appealed the finding that there was an enforceable contract between WBSL and Sharmat entitling Sharmat to payment. Ms. Chaulk has cross-appealed the Judge's decision to not order division of the respective

properties. She challenges the appropriateness of the Judge's decision generally, and further asserts that the Judge erred in determining the value of WBSL that Ms. Chaulk would otherwise have been entitled to.

[115] Mr. Shears' argument that there was not an enforceable contract is based on his position that he was the directing mind of both WBSL and Sharmat and, as such, he alone had the right to determine what was or was not paid from WBSL to Sharmat. Ms. Chaulk argues that the purpose of creating Sharmat as a corporation is irrelevant, and that as an entity with the capacity, rights, powers and privileges of a natural person under the *Corporations Act*, R.S.N.L. 1990, c. C-36, Sharmat is entitled to enforcement of the legal contract.

[116] The Judge considered the specific factual circumstances surrounding the incorporation of Sharmat, and the relationship between Sharmat and WBSL, and gave reasons for why she decided this property issue as she did. In arguing that the contract between the WBSL and Sharmat should not be enforceable, Mr. Shears has not identified any palpable and overriding error of fact on the Judge's part. Accordingly, this ground of appeal fails.

[117] On cross-appeal, Ms. Chaulk argues that the Judge's ultimate conclusion on the division of property was based on incorrect considerations, and produced an unfair result.

[118] As noted above, the Judge adjusted the agreed value of WBSL to account for WBSL's liability to Sharmat in the amount of \$1,653,097. Ms. Chaulk argues that the Judge's deduction of the entire liability was in error as a portion of this liability was already reflected in the valuation of WBSL. This had the effect of improperly lowering the value of WBSL when valuing Ms. Chaulk's entitlement. Ms. Chaulk refers specifically to Mr. Morgan's expert report as indicating that \$600,417.36 was already accounted for as payable in the unadjusted valuation of WBSL.

[119] Mr. Morgan's report was filed in this Court. On review of it, it is not clear to me or "so obvious that it can easily be seen or known" or "readily or plainly seen" (as per *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 5) that Mr. Morgan had already partially accounted for WBSL's liability to Sharmat in his valuation of WBSL. I am therefore unable to say that this error, if committed, is palpable. More importantly, though, if the error did occur as is suggested by Ms. Chaulk, I am unable to say that it was overriding.

[120] As discussed above, the Judge calculated the value of Mr. Shears' interest in WBSL that was subject to division, but she did not actually order one-half of that amount to Ms. Chaulk. In the same vein, she valued Sharmat but did not actually order one-half of that amount to Mr. Shears. Rather, she found that the established structure already fairly divided the family wealth, and ordered that WBSL pay Sharmat \$1,653,097 in satisfaction of the breach of contract claim, Ms. Chaulk's claim to WBSL, and Mr. Shears' claim to Sharmat.

[121] The Judge's approach resulted in 56% of the combined value of the divisible WBSL and Sharmat shares going to Mr. Shears, and 44 % going to Ms. Chaulk. The Judge saw this as a "fair result" based on all the evidence, and exercised her discretion to order accordingly. If the error Ms. Chaulk alleges actually did occur, the percentages would be adjusted to 60% in favour of Mr. Shears, and 40% in favour of Ms. Chaulk.

[122] The business assets claim under the *FLA* was only one piece of this complicated and multi-faceted family litigation. Other claims and awards also flowed from the litigation. On a holistic view of the evidence respecting the division of matrimonial and business assets, the awards respecting spousal and retroactive child support, and other issues, I am satisfied that a 4% difference in the award respecting Ms. Chaulk's claim to the business assets of WBSL would not have altered the result ordered by the Judge.

[123] With respect to Ms. Chaulk's challenge to the appropriateness of the division order generally, I am satisfied that the Judge's decision on this point survives appellate scrutiny. As noted above, the *FLA* specifically provides for judicial discretion in determining claims to business assets. Moreover, the division of all property in family law proceedings, with the exception of the matrimonial home, involves the exercise of judicial discretion. As stated by Cromwell J.A. of the Nova Scotia Court of Appeal (as he then was) in *MacLennan v. MacLennan*, 2003 NSCA 9, 212 N.S.R. (2d) 116, at para. 9: "Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice".

[124] In exercising her discretion, the Judge was satisfied that she had achieved a "fair result". I would note that Mr. Shears and Ms. Chaulk have been separated since 1995. Valuations of the business assets were done for trial approximately 15 years later. In the intervening period, Ms. Chaulk did not contribute to building up the business assets. Rather, it was only Mr. Shears

who did so. In these circumstances, I do not see the result amounting to an injustice to Ms. Chaulk. Accordingly, I would not interfere with the Judge's decision on the division of WBSL and Sharmat on the grounds raised in either the appeal or the cross-appeal.

### **Retroactive Child Support**

[125] The Judge ordered that retroactive child support respecting Matthew should be paid to Ms. Chaulk. Matthew was a child of the marriage when he lived with his mother for three years after she and Mr. Shears separated. Mr. Shears argued at trial that he owed no retroactive child support for Matthew because he "supported and helped support the children after separation, and still supports Lesley" and also that the Court had no authority to order it because Ms. Chaulk did not apply for child support until trial, when Matthew was 29 years old and no longer dependent.

[126] The record shows that Ms. Chaulk applied for child support for Matthew, then approximately 14 years old, when she filed her answer to Mr. Shears' Petition for Divorce in 1998. Accordingly, Mr. Shears' argument that Ms. Chaulk's claim for child support is time barred by virtue of late application is not supported by the record.

[127] The Judge ordered that Mr. Shears pay Ms. Chaulk retroactive child support respecting Matthew after hearing all of the evidence respecting the family dynamics in play at the time. In the result, she exercised her discretion to order retroactive child support for Matthew, without interest, and gave reasons at paragraphs 364 and 368-369 of her decision. I see no basis on which to interfere with her decision. The Judge correctly noted that the *Child Support Guidelines* were not legislated at the time of this entitlement. However, I do not see any error in her referring to them as a resource in determining the amount of support.

[128] Accordingly, the Judge's order that Mr. Shears pay \$83,200 to Ms. Chaulk as retroactive child support for Matthew stands. The Judge's decision not to award interest on the retroactive award is also a ground of cross-appeal, and is considered below.

[129] Section 3(3) of the *Judgment Interest Act*, R.S.N.L. 1990, c. J-2 confers discretion on a judge to decline to order pre-judgment interest. However, as recognized by this Court in *Gosse v. Sorensen-Gosse*, 2011 NLCA 58, 311 Nfld. & P.E.I.R. 76, at paras. 141 – 144, this discretion must be exercised judicially,

and is limited to circumstances “where it is proven to the satisfaction of the Court that it is just to do so having regard to the circumstances.”

[130] The Judge was not silent on why she declined to award pre-judgment interest. She explained (at paragraphs 369 and 415) that pre-judgment interest was not added because the award was based on current support tables.

[131] The usage of current tables in calculating retroactive support was not raised as an issue on appeal. As there was no argument on this point, I offer no opinion on the appropriateness of such a practice, and whether it accomplishes the same goals as pre-judgment interest, namely recognition of the impact of inflation and the impact of the recipient being denied the opportunity to utilize the funds at the time they were due (*Courtney v. Cleary*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85, at para. 88).

[132] Rather than challenge the Judge’s reasons for not awarding pre-judgment interest, Ms. Chaulk has simply attacked her decision not to do so. She has referred this Court to other cases where pre-judgment interest was awarded on support. However, the fact that interest has been awarded in other cases does not establish the principle that interest must be awarded in every case.

[133] The Judge articulated her reason for not awarding pre-judgment interest. Ms. Chaulk has not argued that this reason was conceptually flawed. Accordingly, the Judge’s exercise of discretion is entitled to deference, and I would uphold her decision not to order pre-judgment interest on the retroactive support award.

### **Retroactive Spousal Support**

[134] The Judge awarded Ms. Chaulk \$541,800 in retroactive spousal support plus post-judgment interest. Mr. Shears argues that there was no retroactive support owing. He maintains that Ms. Chaulk had no need for spousal support, and says that she did not apply for an increase in spousal support until 2001. Ms. Chaulk requested an order for spousal support in her answer to the divorce petition in 1998. She had filed an interim application for support in 1999, but the Judge accepted that this application was not pursued following a partial settlement of the amount due to Sharmat from WBSL. Mr. Shears began paying \$2,000 a month in spousal support pursuant to a consent order in 2001.

[135] In the above circumstances, the Judge found that Ms. Chaulk had not unduly delayed the advancement of her claim for support, and I see no basis to interfere with this finding.

[136] Mr. Shears also argues that the Judge erred by not imputing additional income to Ms. Chaulk that she could have received by working during this time period in, at the least, minimum wage employment. The Judge's decision not to impute additional income was driven by her factual findings, and for the reasons outlined at the outset of this decision on credibility, I would not disturb this aspect of her decision.

[137] Ms. Chaulk has cross-appealed certain other findings of the Judge with respect to the retroactive spousal support order. The Judge only ordered retroactive spousal support to commence in January 2003. She declined to order support for the time prior to that on the basis that funds available to Ms. Chaulk at the time through the Sharmat settlement, and the amount subsequently found to be owing to Sharmat, provided adequate support for that time period. Ms. Chaulk argues that this justification is flawed, as it requires her to consume her assets to support herself, which is inconsistent with the basis for spousal support.

[138] In 1999, Sharmat received \$412,439.50 that was due to it from WBSL. The Judge found that this payment should have met her spousal support needs until 2002. In making this finding, the Judge found that Ms. Chaulk was otherwise entitled to spousal support of \$9,000 a month. While the Sharmat settlement was less than \$9,000 a month for the four-year period of 1999 to 2002 (\$432,000), the Judge justified this difference on the basis that the \$412,439.50 "represented funds on which taxes had already been paid" while "spousal support speaks in terms of taxable dollars" (paragraph 408).

[139] Ms. Chaulk claims, and Mr. Shears concedes, that the \$412,439.50 was not available as after-tax dollars. As the Judge relied on the Sharmat payment being in after-tax dollars to justify not awarding spousal support, appellate intervention is warranted. However, because Ms. Chaulk has challenged the decision not to award spousal support more generally, her broader argument should be addressed before determining a remedy based on the misapprehension of the tax status of the Sharmat payment.

[140] Ms. Chaulk submits that the Judge erred by double counting the impact of the \$412,439.50, and by finding it a sufficient supplement to Ms. Chaulk's income when in fact, it was the entirety of her income. The Judge found that Ms. Chaulk had an adjusted income of \$40,483.00 "before consideration of her ability to draw (tax free) from the \$412,439.50 paid to Sharmat". Ms. Chaulk submits that this is an error, as she asserts that the \$40,483 in income came from the \$412,439.50. This assertion is made without any reference to the evidence,

and a bald assertion of error is not sufficient to displace a specific factual finding of a trial judge.

[141] Ms. Chaulk further argues that the Judge erred by finding that the entirety of the \$412,439.50 was available to Ms. Chaulk when in fact she had significant corporate expenses which needed to be paid out from the Sharmat settlement. However, at no point does the Judge refer to the entirety of the amount being available to Ms. Chaulk. There is no indication that the Judge misapprehended this point.

[142] The Judge essentially treated the 1999 Sharmat settlement as a component of the parties' property division in this matrimonial proceeding. Ms. Chaulk argues that by finding that the \$412,439.50 provided adequate support for the time period in question, the Judge relied on Ms. Chaulk consuming the principal of her share of matrimonial and business assets. She argues that a similar error underlies the Judge's decision on quantum for future support.

[143] For the reasons that follow, I would not give effect to this ground of appeal. The Judge's decision respecting the \$412,439.50 paid to Sharmat recognized that "the funds payable to Sharmat were intended as income splitting" (paragraph 405). Accordingly, the Sharmat division was primarily a division of income between the parties, as opposed to property division in the conventional sense.

[144] With respect to future support, the Judge did not base her decision on the assumption that Ms. Chaulk will have to consume the principal of her share of the matrimonial and business assets. In considering future support, the Judge took into account the parties' relatively modest lifestyle during the marriage as well as the assumption that this modest lifestyle would have benefited them both as they aged, as they would be able to draw on the wealth they accumulated (paragraph 422).

[145] Rather than assuming that Ms. Chaulk will consume the principal of her share of the assets, the Judge took into account that a portion of the significant amount owing to Ms. Chaulk would be invested, and that this investment income, in addition to a marginal "top up" through spousal support, would enable her to support herself. This is a factually driven inquiry, and there is nothing in the Judge's approach to this issue that is contrary to law.

[146] As such, I would leave the Judge's decision on retroactive spousal support largely undisturbed. Ms. Chaulk has submitted that because the entire

retroactive award is so flawed, the Court should completely vacate the award and decide the issue based on a fresh analysis under the *Spousal Support Advisory Guidelines*.

[147] However, because I have found that the only error in the Judge's analysis on retroactive support related to treating the 1999 payment to Sharmat as an after-tax amount, the error can be directly remedied within the framework utilized by the Judge. The Judge utilized an approximate deduction of 30% as an estimate of the tax implications of support (at paragraph 414), and I would apply this factor in the present analysis.

[148] In 1999, Sharmat was paid \$412,439.50. Had spousal support been paid for the time period in question, the amount would have been \$432,000. I would award Ms. Chaulk the difference between these two amounts, less 30% to address the tax implications. Accordingly, she is entitled to an additional lump sum payment of \$13,692.35. I would not adjust the award for retroactive spousal support beyond this.

### **Determination of Mr. Shears' Income**

[149] To determine Mr. Shears' child and spousal support obligations, the Judge was required to determine his income. Having found that Mr. Shears' line 150 income was not the most reliable basis on which to determine his income, the Judge proceeded to determine his income on various bases. These calculations were conducted in accordance with the *Federal Child Support Guidelines*, SOR/97-175 (the *Guidelines*). The Judge recognized that this approach to determining income is not binding in the context of spousal support, but is a practice that is typically followed.

[150] The Judge recognized that, while the guidelines state that the payor's line 150 income is a starting point (section 16), there are various ways to determine income when the line 150 income will not be a reliable indicator (sections 17 – 23 of the *Guidelines*).

[151] The Judge focussed her analysis primarily on sections 17, 18, and 19 of the *Guidelines*:

#### **Pattern of Income**

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount

that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

### **Non-recurring Losses**

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

### **Shareholder, Director or Officer**

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

### **Adjustment to Corporation's Pre-tax Income**

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

### **Imputing Income**

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

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;

- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

#### **Reasonableness of Expenses**

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

[152] Ms. Chaulk's expert proposed an analysis to determine Mr. Shears' income using the approach contained in section 18(1)(a). This section, which can be triggered when the spouse is a shareholder, director or officer of a corporation, allows a court to consider all or part of the pre-tax income of the corporation to be the income of the spouse. In determining the pre-tax income, a court is to include certain corporate expenses paid to non-arm's length parties, unless the expenses are shown to be reasonable.

[153] The Judge did not accept the approach advanced by Ms. Chaulk—whereby all corporate pre-tax income was attributed to Mr. Shears, less a \$50,000 deduction for the costs of a part-time CFO. Instead, the Judge accepted that half of WBSL's pre-tax income should be attributed to Mr. Shears. This was calculated and averaged over the period from 1995 to 2012 to determine an approximate annual income of \$333,705.

[154] The Judge also approximated Mr. Shears' income under section 19 of the *Guidelines*, which allows a court to impute a payor's income "as it considers appropriate in the circumstances". Under this more general analysis, the Judge considered the terms of Mr. Shears' contract with WBSL, his sworn financial statement filed in 2012, and his 2007-2012 income tax returns. The Judge added

\$58,000 to these amounts as an approximate measure of the grossed-up housing and auto benefits received by Mr. Shears. On average, this approach resulted in an imputed income of \$357,666, which the Judge noted was not drastically different from the annual income of \$333,705 that was determined under section 18(1)(a).

[155] Having attempted to approximate Mr. Shears' income in two different ways under the *Guidelines*, the Judge then averaged the two numbers to produce an approximate income of \$345,686 per year. The Judge's determination of Mr. Shears' income was originally the subject of both the appeal and the cross-appeal, with Mr. Shears' saying that the Judge overstated his income and Ms. Chaulk arguing that it was understated. Mr. Shears abandoned his ground of appeal on this point, while Ms. Chaulk pursued hers.

[156] Ms. Chaulk has challenged the Judge's approach on several fronts. More specifically, she argues that the Judge erred by averaging his income over 18 years, by declining to add amounts expensed by WBSL to his pre-tax income, by declining to include legal and accounting fees paid by WBSL to his income, and by placing the onus on Ms. Chaulk with respect to the percentage of pre-tax corporate income available to Shears.

[157] With the exception of the limited period of time that retroactive child support was found to be payable, the focus of the Judge's income determination related to determining quantum of retroactive spousal support. This is significant because, while the *Guidelines* are frequently applied when determining income for spousal support, they are not binding. It has been noted that the policy rationale behind imputing income for child support purposes is "much weaker for spousal support," and that a court may be less willing to attribute pre-tax corporate income as income in the context of spousal support (Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice, 2016) at 22).

[158] While the non-binding nature of the guidelines in this context does not entitle a judge to make arbitrary decisions, it does give the judge increased discretion to determine income for the purposes of spousal support, so long as that determination is based on the evidence and appropriate principles. In the present case, the Judge determined income using two different approaches under the *Guidelines*. These two approaches created a range of \$333,705 to \$357,666, which the Judge averaged to determine an annual income of \$345,686 for the period between 1999 and 2014. For future spousal support calculation purposes, the Judge used an income of \$370,750.

[159] Mr. Shears' financial affairs were structured in a complex manner. However, the evidence indicated that this manner pre-dated the separation, and was used for the purpose of minimizing tax costs. While the Judge could have determined retroactive support payable based on a finding of his income for every year between 1999 and 2014, I am not satisfied that the decision to take a higher level approach to income determination was an error. The Judge was faced with unclear evidence over an extensive period of time. I do not see unfairness or a reviewable error with respect to her practical method in determining Mr. Shears' income for spousal support purposes.

[160] The Judge's conclusion with respect to the treatment of legal and professional fees paid by WBSL is not entirely clear from the decision. It was found that \$270,114.04 in legal and professional fees were paid by Mr. Shears and WBSL respecting the subject litigation in 2012; \$36,744.26 of this amount was attributed to Mr. Shears, while the remaining 77% was paid by WBSL.

[161] At paragraph 320 of her decision, the Judge found that this was a disproportionate amount for WBSL to have paid, and that 50% of the expenses should have been attributed to Mr. Shears as income. This would result in an increase to his 2012 income of \$140,587.24.

[162] However, in her further calculations involving Mr. Shears' 2012 income, the Judge did not include the additional \$140,587.24. Instead, at paragraph 351 of her decision, the Judge stated that as a "one-off" payment, she was not including it as income for spousal support purposes. Instead, she found it potentially relevant to costs, and invited further submissions on the topic (at paragraph 440). No further submissions were filed.

[163] While the Judge's comments regarding including the \$140,587.24 as income are inconsistent with her ultimate treatment of the issue, it is clear that she decided not to treat it as income for spousal support purposes. She instead found that it would be considered under the issue of costs following argument of the parties, which argument was never submitted. The Judge could have included the amount corresponding to the expenses as income for 2012, but she was not obligated to do so. She exercised her discretion to reserve consideration of the issue to costs, and I do not see a reviewable error in her decision to do so.

### **Duration of Spousal Support Award**

[164] The Judge awarded Ms. Chaulk lifetime spousal support. This support was designed to give her an approximate monthly income of \$10,000. Because

the Judge found that Ms. Chaulk could earn a reasonable income from investing the award relating to retroactive support and the business assets, she found that a spousal support award should be a modest “top up” variety. Accordingly, for future support, she ordered a monthly payment of \$3,000. However, because this award was contingent on her receiving the investment income, the Judge ordered that payment be in the amount of \$10,000 a month until all balancing payments were made by Mr. Shears.

[165] Mr. Shears has challenged the duration of the award, as well as the structure of the future award. It is his position that the award should be indefinite, which would leave him the opportunity to apply to vary the support following a material change in circumstances. He also argues that having the payment amount remain at \$10,000 until all payment is made is unfair, as it does not take into account the fact that certain payments to Ms. Chaulk as ordered have already been paid, so a proportionate reduction should take place.

### ***Lifetime Support***

[166] In making a finding on future support, the Judge referred to the duration of the award as “lifetime support”. Section 15.2(3) of the *Divorce Act*, R.S.C. 1985, c. 3 provides that an award can be made for “a definite or indefinite period or until a specified event occurs”.

[167] There is significant case law regarding indefinite spousal support. In this regard, see the decision of Fry J. in *Collins v. Collins*, 2008 NLUFC 31, 281 Nfld. & P.E.I.R. 1, at paras. 70 and 86. However, indefinite support should not be equated to permanent support. This point of clarification was explicitly stated by the Manitoba Court of Appeal in *Cadigan, v. Cadigan*, 2007 MBCA 28, 212 Man. R. (2d) 291:

[9] One final point. Although the motions judge made an indefinite award of support, indefinite does not mean infinite or permanent. The award of support is variable under appropriate circumstances pursuant to the *Divorce Act*.

[168] Accordingly, I would substitute the Judge’s decision with an order for indefinite support. While this may still result in Ms. Chaulk receiving lifetime support, it preserves authority for subsequent judicial intervention in accordance with the provisions of the *Divorce Act*.

[169] I would not disturb the Judge’s decision to require the indefinite support award to be secured or guaranteed in some way. Such an order has previously

been made in this province with respect to an indefinite support award in *Dobbin v. Dobbin*, 2009 NLUFC 11, 284 Nfld. & P.E.I.R. 6.

### ***Change in Support Provision***

[170] Mr. Shears has argued that the requirement that payment be settled before the spousal support award changes is not proper. He argues that the order was not for a specific amount of money, but rather was one which will require additional calculations for interest and appraisals. He also emphasizes that the requirement to cause payment from the Matthew Shears Trust is not within his power, which would preclude the adjustment to spousal support.

[171] Mr. Shears' argument is that the future support award should be adjusted to account for payments on the division of property that Mr. Shears has already made (for approximately \$1,000,000), as well as a deemed income to Ms. Shears.

[172] While the argument regarding proportionate adjustment based on payments already made is not unreasonable, it does not establish that the Judge erred in her analysis. Common sense would dictate that the Judge was aware that the balancing payment of over \$3,000,000 would not be made in a single payment, yet she declined to make an order that adjusted to account for proportionate payment.

[173] The Judge was acutely aware of the history of the file and the associated delay. It is a reasonable inference that the spousal support award was structured to facilitate speedy resolution of the outstanding issues.

[174] With respect to Mr. Shears' position that the award requires payment out of the Trust which is outside of his control, I have determined this aspect of the Judge's decision should be overturned by this Court, so this concern is no longer present. In terms of the payments that require further steps to ascertain, several of these concerns have also been resolved by this decision. It is expected that the parties will work with reasonable diligence and cooperation to determine the final valuation issues.

[175] There being no error in the Judge's approach to this issue, I would dismiss this ground of appeal.

## Costs at Trial

[176] The Judge made no order as to costs, setting out her reasons why at paragraphs 429 to 440 of her decision.

[177] Ms. Chaulk argues that she is deserving of her party and party costs of the litigation as she was largely successful in her claims. In support of her position, she argues that the Judge erred in failing to consider (1) that Sharmat's claim for breach of contract was fully successful in the face of Mr. Shears' position (characterized by contradictory financial evidence and adverse rulings from Revenue Canada) that Sharmat was really his company and Ms. Chaulk was not entitled to any of it, (2) that some of Ms. Chaulk's pre-trial positions which have been characterized as unreasonable were the result of journal entries manipulated by Mr. Shears' accountants, and (3) that the inordinate trial time taken to sort out property division and support issues was due to Mr. Shears' intransigent pre-trial positions that Ms. Chaulk had no entitlement to anything but one-half of the value of the matrimonial home. Ms. Chaulk further argues that three of the four issues on which she was unsuccessful at trial involved only a small percentage of court time.

[178] This trial was hard-fought for nearly two and one-half years, during which time some of the Judge's rulings, including Mr. Blagdon's desire to be excused from testifying, had to be decided by the Court of Appeal. Further, much trial time was spent locating evidence and then interpreting it within the context of the byzantine network of entities involved in the litigation. The Judge was presented with many tangled and time-consuming challenges, and she found both parties to blame. She spelled out her reasons for not awarding costs, which are cogent and supported by the record. While I am of the view that the Judge exercised her discretion judicially in declining to order counsel costs, I am of the view that she ought to have awarded Ms. Chaulk the costs associated with retention of her expert witness, John Morgan C.A.

[179] The Judge referred to Mr. Morgan's evidence 37 times in the course of her 110-page decision. In almost every instance, she accepted Mr. Morgan's evidence or found it helpful. In her decision, she identified only one instance where she did not accept Mr. Morgan's evidence. It concerned his adding back into Mr. Shears' pre-tax corporate income what he (Mr. Morgan) considered to be non-arms-length expenses. By contrast, Mr. Shears' expert, David Howe C.A., whose evidence the Judge found generally helpful, was referred to by the Judge six times. The Judge noted that Mr. Howe's retainer was limited and that his report was based on selected material provided to him by Mr. Shears.

[180] Ms. Chaulk's argument that Mr. Morgan's evidence was fundamental to the fair resolution of the trial issues was put this way in her factum: Mr. Morgan had to "decipher the conflicting and contradictory entries in the financial records of W. Bryant Shears Limited and Sharmat, both of which were maintained by Claude Blagdon", and conduct a "forensic" investigation before providing a report.

[181] The issues in this complicated litigation involved claims respecting at least six incorporated companies, a trust, claims respecting different matrimonial properties, retroactive child support and past and future spousal support. Mr. Shears did not provide the documentation necessary to resolve the issues until trial or just prior to trial. Mr. Morgan's evidence, the product of time-consuming diligence and hard work, illuminated the trial issues and both parties' positions in a way which allowed for resolution which would not likely have been otherwise possible. Without the evidence of Mr. Morgan, the trial would have taken much longer, have been much more challenging to conduct, and possibly would have led to an unfair result. While recognizing that Mr. Morgan was clearly Ms. Chaulk's expert witness, he was in some ways akin to a friend of the Court in sorting out the tangled financial affairs of Mr. Shears, Ms. Chaulk, and the Shears companies. In this regard, I note the Judge's comments at paragraphs 24 and 25 of her decision that substantial costs were incurred in the engagement of experts, preparation of reports, and attendance at trial and that:

Use of a single expert would make a positive difference to the adjudication of family law claims of this nature. The adversarial process would be reduced and time and cost savings would be the result. Counsel could still engage their own accountants to assist them should they choose, but the entire process would be simplified.

[182] It was only after Ms. Chaulk had incurred the expense of retaining Mr. Morgan to investigate, analyze, report, and testify, that matters were clarified. In this regard, I note that Mr. Morgan's expert opinion actually resulted in Mr. Shears making some concessions to Ms. Chaulk's position.

[183] In family litigation, courts across Canada have occasionally ordered that costs of an expert be addressed separately from the rest of a costs award. This unique treatment of an expert's costs arises when the expert is of general assistance to the court. See, for example, *Barry v. Barry* (1995), 136 Sask. R.

277 (Sask. Q.B.), at para. 40 and *Tadayon v. Mohtashami*, 2015 ONCA 777, at paras. 11 and 72.

[184] While not directly comparable, the case of *Chandra v. Chandra* (2002), 212 Nfld. & P.E.I.R. 138 (Nfld. U.F.C.) provides a useful analogy to the present case. In *Chandra*, the Trial Judge appointed a chartered accountant to review the bank records of the husband to determine the amounts in certain accounts at the time of separation. The Judge noted that this was made necessary by the husband's refusal to disclose, and as such, he ordered that the entirety of costs associated with the expert be paid by the husband, with the remaining costs of the litigation to be paid by him on a party and party basis:

Plaintiff's counsel argued that I should calculate costs and make a lump sum award. I would not be comfortable doing so and accordingly I order that costs including all disbursements shall be taxed on a party-and-party basis. **The account of the court-appointed expert [...] shall also be borne by the defendant as the appointment was made necessary in an effort to do justice to the parties as a result of the defendant's non-disclosure.**

(Emphasis added.)

[185] In this case, I am of the view that Mr. Morgan's extensive retainer was made necessary by the resistance of Mr. Shears and his chief accountant Mr. Blagdon to fully disclose financial information related to the companies and Mr. Shears' income in a timely manner. I am also satisfied from the Judge's comments, reasons, and decisions that she relied extensively on Mr. Morgan's evidence. Accordingly, I would order that Mr. Shears pay Mr. Morgan's taxed costs to Ms. Chaulk.

[186] Beyond the order for Mr. Morgan's taxed costs, I would not interfere with the Judge's decision not to award costs. The Judge was well positioned to gauge and assess the conduct of the parties during this lengthy and challenging litigation.

## **COSTS**

[187] Both parties have sought costs with respect to the appeal. Ms. Chaulk has requested costs be awarded to her on column 5 under the scale of costs in the *Court of Appeal Rules*.

[188] As outlined in the decision and in the disposition below, success on this appeal has been limited, with the Judge's decision being largely upheld. While

Ms. Chaulk was successful on one significant monetary ground of appeal, this issue was conceded by Mr. Shears, and involved only a small portion of her argument.

[189] In the present case, both the appellant and the cross-appellant had limited success on each's numerous grounds of appeal. I would therefore exercise my discretion to make no order as to costs.

## **DISPOSITION**

[190] The following changes to the Judge's order should result from this appeal:

**(1) The Matthew Shears Trust**

The Judge's order that Mr. Shears arrange for payment of \$7,286.66 to Ms. Chaulk from the MST is vacated.

**(2) Amount in Director's Account**

The amount due to Ms. Chaulk respecting matrimonial monies withdrawn from Mr. Shears' director's account is varied from \$424,488 to \$848,977. Accordingly, Ms. Chaulk is entitled to an additional \$424,488 beyond the Judge's order.

**(3) Retroactive Spousal Support**

Ms. Chaulk is entitled to an additional \$13,692.35 in spousal support in respect of the period covering 1999 to 2003.

**(4) Duration of Support**

The duration of future spousal support is varied to indefinite.

**(5) Costs at Trial**

Mr. Shears is ordered to pay to Ms. Chaulk the taxed costs of John Morgan C.A. for his professional services, including his time in Court, on this case.

**(6) The Judge's order is upheld in all other respects.**

**(7) There is no order as to costs on appeal.**

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L. R. Hoegg J.A.

I concur: \_\_\_\_\_

B. G. Welsh J.A.

I concur: \_\_\_\_\_

F. P. O'Brien J.A.