SUPREME COURT OF YUKON

Citation: *JAC v VRC*, 2015 YKSC 15

Date: 20150327
S.C. No. 06-D3902
Registry: Whitehorse

Between:

J.A.C.

Plaintiff

And

V.R.C.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Debbie Hoffman	Counsel for the plaintiff
F. Ean Maxwell, Q.C., and Angela Dunn	Counsel for the defendant

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INTRODUCTION

[1] The trial of this matrimonial action took place in Whitehorse, Yukon, on the following dates: November 20 - 22, 2013; November 25 - 29, 2013; January 6 - 10, 2014; January 13 - 15, 2014; March 10 - 14, 2014; March 17 - 20, 2014; March 25 - 28, 2014; April 9 - 10, 2014; with written and oral submissions on June 17 - 21, 2014. This judgment will address the division of family assets under the *Family Property and Support* Act, R.S.Y. 2002, c. 83 (the "*Act*"). The issues of child support, spousal support and costs will be addressed in a subsequent judgment.

[2] The division of assets in this case requires the consideration of some complex corporate structures. The Husband is one of five sons who, along with their father, have an interest in a number of family companies. The family assets of the Husband and Wife are impacted by various shareholder loans and trust vehicles linked to these companies.

[3] At the start of trial, counsel for the Husband agreed that the Husband's interest in the family companies and his shareholder loans are family assets. While there is some disagreement about the value of these assets, by far the most contentious issue in this litigation arises in the context of two trusts created by the Husband. The Wife claims these are family assets; the Husband disagrees.

BACKGROUND

[4] The Husband and Wife commenced cohabitation in 1994, married on July 31, 1996, and separated on December 12, 2006. There are two children, aged 18 and 15 respectively.

[5] The following are all findings of fact. Where there is a dispute in the evidence, I find that the Wife has a more accurate memory and prefer her version of events.

Before Marriage

[6] The Husband is 53 years old. He has a degree in Economics. He is a businessman and worked briefly in Alberta before returning to Whitehorse in 1985 or 1986 to work for the family businesses. Each of five sons received one share in the family businesses in 1977. While initially focussed on gravel crushing and equipment rental in the Yukon, the family businesses have expanded to include diamond drilling worldwide. The Husband's father started the businesses and remained active until 2008 when he received some capital in an estate freeze.

[7] The Husband built a house in the late 1980s. He hired a carpenter and later added a basement suite. He helped with some of the construction. He estimates the cost was $115,000 to $116,000.

[8] The Wife was raised on a farm and obtained a Bachelor of Arts degree in 1992. She came to the Yukon in 1992 and obtained a job at the local fish hatchery. She became the station manager in 1994 and continued to work there in a managerial role until their first child was born in 1997. Her job was challenging in that she was involved in marketing fish at trade shows as well expanding the tank farm. She met the Husband when he supplied gravel to support the tanks.

[9] The Husband and Wife both clearly have a strong work ethic and assisted each other in their respective jobs. For example, before marriage, the Wife did the following:

- Borrowed a weigh scale from the fish farm to weigh loads for the Husband's business;
- Took the Husband's business associates and potential clients on tours of the fish farm;

- Applied on behalf of the family businesses for a water license so they could sell washed sand to a golf course;
- Successfully applied on behalf of the family for funds available for marketing small businesses;
- Travelled with the Husband around the Yukon as he scouted potential gravel crushing sites and took samples for crushing contracts;
- Worked at the family companies, including reception and bookkeeping duties, and provided light janitorial services;
- Accompanied the Husband to deliver fuel and supplies and groceries to job sites;
- Expedited for the family companies on her own at the Husband's request.

[10] These tasks were also part of the courtship and establishment of their relationship. Business and pleasure were both part of most events they participated in together. Part of their attraction to each other was their love of the outdoors and travel which could accommodate both business and pleasure.

[11] The Husband assisted the Wife, before marriage, as follows:

- He took business associates to tour the fish farm;
- He took her on jobs around the Yukon mixing business with pleasure;
- He assisted her at the fish farm when there was an emergency with water flow or oxygen flow to the fish. On one occasion when there was a major emergency he provided staff and water pumps to deal with the emergency.

- The Husband took the Wife to Chile where they met his work associates in Santiago and her fish farming contacts in Puerto Mont. They also travelled to Peru and Ecuador, again mixing business with pleasure.

[12] Shortly before marriage, the Wife had a job offer in the United States and she travelled there with the Husband and his parents to consider the offer. I find that the Wife declined that offer because she and the Husband wanted to pursue their relationship together in the Yukon.

[13] I also find that this was very much a marriage of equals in the business sense, and the Wife gave up her career in fish farming to start raising a family. That could only be done in the Yukon where the Husband worked in the family businesses.

[14] However, the Husband clearly had more assets prior to the marriage. He had the residence which became the family home. He also had a share in the family businesses, which were primarily engaged in gravel crushing, hauling and equipment rental at the time of the marriage but subsequently expanded to include a barite mill and a diamond drilling operation. He also had a Toyota hatchback.

[15] The Wife had a small Toyota pickup; some shares in the fish farm valued at $25,000; a debt to her mother; and, a student loan of $11,000. She used the shares to pay back a loan made by her mother.

[16] There was never any discussion about a marriage agreement or contract and the Husband and Wife were both prepared to work hard for the family and the family companies.

The marriage (1996-2006)

[17] The Husband and Wife married on July 31, 1996, and lived together in the family home. The Wife continued to work as manager of the fish farm until the first child was

born in February 1997. The second child was born in April 1999. The Wife did not have any assistance in managing the household or caring for the children, apart from the occasional use of babysitters. For the duration of the marriage the Wife assumed most of the responsibilities for child care and household management.

[18] There was a significant incident with the first child which captures the parties' respective parental roles. A babysitter was taking care of the first child and, while visiting the workshop of a family friend, the child broke free from the babysitter and ran into something on a welding table. The child suffered a blow to his right eye and is now blind in that eye.

[19] The Husband was in Tunisia at the time looking at a drilling job. The Wife took the child to the hospital for some initial surgery. The child was immediately referred to Vancouver for further surgery and the Wife boarded a commercial flight with the Child in bandages and the second child on her lap. The Husband's parents met her at the airport in Vancouver and took the Wife and the injured child to the hospital for further surgery. The grandparents looked after the second child.

[20] The Husband returned as soon as he heard about the injury and the Wife and Husband took their son to Detroit to explore another medical option which was not successful.

[21] On the return to Whitehorse, the Wife did most of the caregiving and the Husband was able to return to work. The first child has recovered very well and is now a successful and motivated young man.

[22] After the parents separated, the first child applied to go to Pearson College and was accepted to go on a paid seat basis. The annual cost was about $35,000 per year. The Wife wanted him to go and advised the Husband who was initially positive. It

appears that money became an issue and the child did not attend Pearson College. As will be elaborated on below, this is despite the existence of a trust created by the Husband, without the knowledge of the Wife, for the beneficial interest of the children.

[23] The second child presented a different challenge. The Wife enrolled him with the Child Development Centre to assist with his language development and skills. Through an assessment by the Learning Disabilities Association of Yukon, it was determined that he had dyslexia. Both parents supported the Wilson Language Program which has given the child the resources he needs.

[24] Despite these events in the children's lives, the Wife continued to play an active role in the family businesses. Further, the basement suite in the family home was used frequently for employees, drillers and geologists. The other half of the basement was used as storage space for supplies and records.

[25] The Wife, often with the children in tow, contributed in the following ways to the family businesses:

- She advised the Husband about an opportunity to acquire Crown grants from the Hudson Bay Company, which she learned about through her work at the fish farm;
- She expedited for the family companies, taking groceries, drill supplies, core boxes from Whitehorse to various field camps, even while nursing the children;
- She delivered fuel on the back of a pickup truck to various work sites;
- She worked at the weigh scale at the aggregate quarry during pregnancy;
- She provided transportation for staff and the Husband's brothers, who also worked in the family businesses;

- She entertained business clients at home and during dinner meetings;
- She provided accommodation in the family home for key staff members including drillers and geologists;
- She prepared dinners on a regular basis for employees and clients who stayed in the basement suite;
- She cooked, baked, cleaned in camps, even when the first son was a baby, including on one occasion for a month at the Western Copper camp;
- She cleaned and refueled vehicles and equipment for the companies;
- She ran errands and performed janitorial chores;
- She performed flagging duties;
- She cleaned a turbine;
- She provided occasional secretarial and office administration support, including invoicing, bookkeeping duties, banking, payroll, taking the infant children with her to the office;
- She attended to business calls on the home phone;
- She assisted in drafting the Quality Control Program for the businesses' American Petroleum Industry Certification;
- She assisted in claim staking of various mineral properties, including the "Gin claims";
- She discussed the business and acted as a sounding board for the Husband;
- She attended trade shows with the Husband.

[26] The Husband took issue with some of the contributions made by the Wife to the family businesses but his responses were vague and his memory was not good. I find

that the contributions were performed. This is supported by the fact that the Wife's role was considered important enough to put her on the payroll. She was the only spouse who received regular income. She earned the following from the family businesses:

2003 - $45,000

2004 - $45,000

2005 - $65,000

2006 - $50,000

[27] The only significant work done on the family home during the marriage was the landscaping of the front and back yards. While the Husband and the Wife's father moved the heavy rocks, the Wife helped as well. She also built a hockey rink for two winters in the backyard so that the boys could play hockey. She did the floodings.

[28] The Husband was not an uninvolved father. He watched the boys play hockey, hosted barbeques and picked them up at school from time-to-time. But, I accept the Wife's evidence that he became increasingly involved in the management of the family businesses and she provided the primary care for the children especially from 2001 onwards. The Husband would normally be at work by 6 in the morning, come home for lunch and be home for dinner, subject to the contracts they were working on and his international business travel, which was extensive.

[29] Family travel during the marriage was usually a mix of business and pleasure. They went to Arizona for a rock and gem show and travelled to meet the Wife's family in Australia. They went to Disneyland and Cape Canaveral in Florida with the children. The Wife and children visited Nova Scotia, China, England and France without the Husband as business demands did not permit him to join them.

[30] I find as a fact that the Wife did the vast majority of the care for and upbringing of the children and the management of the family home. This does not mean that the Husband did not contribute, but rather that his focus was more towards the family businesses to which the Wife also made a significant contribution.

The separation (December 12, 2006)

[31] I accept the Wife's evidence on the events surrounding and leading up to the separation, on December 12, 2006. In December 2006, she described a lot of strain on the family as the Husband was under stress negotiating drilling contracts and organizing the logistics of putting the crews in place. She needed surgery and flew out to Vancouver. She had the surgery, visited friends in Vancouver and returned to Whitehorse, to a very tense reception from the Husband, who made allegations that she was having an extramarital relationship, which the Wife denied.

[32] On December 13, 2006, the Wife fled the family home with the children following an assault by the Husband. He admitted this in his response to a Notice to Admit but then denied it at trial, on the basis that he did not physically assault her by "like punching her in the head". He did acknowledge that they were arguing and that he took off her sunglasses (which she was wearing because of light sensitivity after surgery) and broke them on the floor but he did not remember pulling her hair. He stated that he picked up a rock, smashed a window and kicked a few chairs around. He told her that she was fired.

[33] Whatever actually happened, I accept that it was a frightening experience for the Wife and she decided to drive out of the Yukon with the children to have a break and make a plan. She did not tell the Husband about this trip. The Husband caught up with her and the children in Watson Lake wanting her to return to Whitehorse, but she would

not speak with him. The police intervened and suggested that the Husband return to Whitehorse, which he did.

[34] The Wife continued on her way, eventually settling with friends in Southern British Columbia and enrolling the children in school and hockey. The Husband obtained a without notice Order, dated January 9, 2007, for her to return the children to him in the Yukon. The Order stated that the Husband would have custody of the children and the Wife would have access. At this point, the Wife returned to the Yukon without any income. She refused the Husband's offer to stay in the basement suite of the family home, or to take the whole house provided that she live there without her new partner. The Wife refused to accept any conditions. She acknowledged that as of February 20, 2007, she was residing in a common-law relationship.

[35] A further Order dated April 12, 2007, granted the Husband and Wife interim joint custody of the children with primary residence with the Wife and specified access to the Husband. That Order also included interim child support, payable to the Wife by the Husband, in the amount of $1,233 per month, based upon his declared income of $83,928. The Order also granted spousal support to the Wife in the amount of $2,400 per month, commencing May 1, 2007. The Husband was ordered to provide a car for her with insurance coverage.

[36] There was a further Order dated September 12, 2008, which continued the interim joint custody order but changed the residency of the children to one week on, one week off with each parent.

The Husband's family businesses and related trusts

[37] Throughout the marriage, the Husband's family business empire was thriving, and it continued to do so after the separation. Some background is necessary here.

[38] The C. Group of Companies includes:

- Kluane Drilling Limited;
- Nahanni Drilling Corp.;
- C. Holdings Ltd.;
- H.C. & Sons Ltd.;
- Loucheux Enterprises Ltd.;
- Nahanni Paving Ltd.

[39] The shares of the C. Group of Companies are controlled 100% (directly or indirectly) by various family members, trusts, or other C. Group of Companies with the exception of Nahanni Drilling and Nahanni Paving, which involve other arm's length parties. Besides the Husband, other family members holding shares are the Husband's father and mother, and the Husband's four brothers.

[40] The Husband also owns shares of Nahanni Drilling, which he holds as a bare trustee for the two children (the "Nahanni Drilling Trust").

[41] In January 2007, shortly after the separation of the Husband and Wife, the Husband's accountant and close friend, Norman McIntyre, began the process of a business reorganization and estate freeze, ostensibly as part of the Husband's father's retirement plan from the family businesses. The Wife was not advised of this.

[42] The estate freeze created the C. Family Trust, the beneficiaries of which are the Husband and his brothers and their children, but not their spouses. The Husband and Norman McIntyre are the trustees.

[43] In January 2006, prior to the separation of the parties, the Husband created a third trust, again with Norman McIntyre (the "Norman McIntyre Trust"). The documentation took years to complete, and, despite the fact that the Husband and Wife

were still married at the time of its creation, its existence was not disclosed to her until well into this litigation. Norman McIntyre is the trustee and the Husband, Wife and the two children are the beneficiaries. The assets in this trust are a 50% share interest in 39055 Yukon Inc., which is a numbered company that produces drill rods for use by Kluane Drilling. The other 50% share interest in 39055 is held by Martin and Karen Loos, who are otherwise unconnected to the C. family. In 2013, 39055 declared a dividend of $700,000 to the Norman McIntyre Trust. This dividend was similarly not disclosed to the Wife in a timely fashion. The validity and true character of the Norman McIntyre trust consumed days of this trial.

[44] Another complicating factor is the Husband's shareholder loan accounts with the C. Group of Companies and 39055, which are family assets, which he essentially used like bank accounts.

THE HUSBAND'S DELAY IN PROVIDING DISCLOSURE

[45] A considerable amount of trial time was devoted to issues arising from the delay of the Husband in providing financial disclosure. I will address the issue of delay in some detail as it bears upon the Wife's claim for an unequal division of assets.

[46] The Court Order dated April 12, 2007 included the following terms:

> 7. the Petitioner and the Respondent shall provide to each other full financial disclosure in a timely manner which will include financial disclosure with respect to all companies, businesses and partnerships in which they have a legal, beneficial or equitable interest;
>
> 8. the Petitioner and the Respondent shall be restrained from hypothecating, mortgaging or disposing of any family or non-family assets either owned by them or in which they have a legal, beneficial or equitable interest, and amongst other [things] and without limiting the generality of the foregoing including, [C.] Holdings, H. [C.] and Sons Ltd., Kluane Drilling Ltd., Kluane International Drilling, Nahanni Drilling, Nahanni Paving Ltd., Old Crow Industries Ltd.,

> Loucheux Enterprises Ltd., Terra Nova Gems and Ciena Minas until the conclusion of these proceedings or further order of this Court.

[47] The Husband filed his first Financial Statement on April 5, 2007, which included a present market value of the Husband's shares in the C. Group of Companies, after personal taxes paid, of $254,884.29. It did not disclose, among other things, shareholder loans or the Norman McIntyre Trust. I add here that his next Financial Statement was not filed until November 16, 2012, after the delivery of the Valuation Report in July 2012, which valued the Husband's interest in the C. Group of Companies at January 31, 2007, in the range of $1 million.

[48] As indicated, the C. Group of Companies completed an estate freeze in 2008. The Husband and Norman McIntyre devoted a great deal of time with tax advisors to the estate freeze. Basically, in such a freeze, the assets of the company are valued at a fair market value and placed in a family trust so that future asset increases in value will be taxed at a lower rate. The fair market value of the businesses at the time of the estate freeze would have been important information for the Wife in this matter, but it was not disclosed until July 2012. This is despite the fact that the expert retained to prepare the Valuation Report was retained in 2008.

[49] The first mention of an estate freeze, unknown to the Wife, arose in January 2007, shortly after the separation of the Husband and Wife. A memo from Norman McIntyre proposed an estate freeze of the family business assets held by the Husband's parents via C. Holdings, H. C. and Sons, Loucheux Enterprises Ltd. and Old Crow Industries.

[50] In November 26, 2007, Norman McIntyre wrote a letter to his colleague, Dan Basso, elaborating on the estate plan, asset protection plan and tax minimization strategy.

[51] The objective of the estate freeze was expressed as follows:

> The intent will be to transfer [the Husband's parents] Family Business interests to the children and their offspring in such a manner that the assets will be protected from allocations resulting from marriage breakdowns of the children, possibly a trust. The trust(s) will hold the Equity interests of the business interests for the benefit of the children and their offspring. The structure should provide asset protection in the event of divorce or bankruptcy of the children.

[52] On December 18, 2007, Norman McIntyre wrote an e-mail to Dan Basso stating:

> The primary purpose of what we are trying to achieve is to provide protection in case of a marital dispute and secondly have income taxed at a low rate from international operations …

[53] In a March 10, 2010 memo to Norman McIntyre, Dan Basso described the 2008 reorganization:

…

2) The [C.] family have extensive business interests. Some of the key companies in the Group are now owned through 0841300 B.C. Ltd. ("084BC") which in turn now owns "mostly all" of [C.] Holdings Ltd.

3) As a result of the December, 2008 reorganization ("the 2008 Reorganization"), [the Husband's father's] remaining participating share of [C.] Holdings Ltd. were exchanged for about $4.5 million worth of "estate freeze" (preferred) shares of 084BC. These preferred shares are voting shares, and as a result, [the Husband's father] continues to control several of the main companies in the Group, through his control of 084BC.

…

5) The [C.] Family Trust was established under the 2008 Reorganization to hold the new growth shares in

> 084BC. [The Husband's parents] are not beneficiaries of this Trust, nor are they Trustees. [The Husband's parents]'s children (but not their respective spouses) and grandchildren are beneficiaries.
>
> …
>
> Freeze of the Husband's 8% share in C. Holdings Ltd.
>
> This plan was left in a holding pattern pending the resolution of the Husband's matrimonial situation. I am not sure if we are any closer to being able to move forward on this item.

[54] A footnote to paragraph 3 above indicates that 084BC was established specifically to allow a partial freeze recognizing that the Husband was not in a position to transfer his shares given his matrimonial situation at the time.

[55] As indicated, the C. Family Trust has the Husband and Norman McIntyre as trustees.

[56] On May 27, 2008, Kluane Drilling established an Employee Profit Sharing Plan (the "EPSP") to permit the distribution of excess profits in order to retain the small business tax status. In 2008, the Husband's brother D. received $350,000 plus employment income, his brother K. received $357,635 plus employment income and the Husband's father received $1,145,100. The Husband was allocated $200,000 to his investment account from the EPSP on August 20, 2008. On the advice of Norman McIntyre, the Husband's allocation was reversed in January 2009 and transferred to his father. The Wife had no information on the value of the C. Group of Companies or the Husband's shareholder loans.

[57] In his examination for discovery on December 7 and 8, 2009, the Husband was asked if there was a C. Family Trust. He responded there was one for his children and made reference to a trust for his children in a company that manufactured drill rods for

the C. Group of Companies in the Yukon. The husband was obviously referring to the Norman McIntyre Trust, rather than the C. Family Trust, as he went on to refer to the numbered company incorporated with Martin Loos and his wife in 2005 or 2006. He also testified that he thought that Norman McIntyre settled the trust and was the trustee. He then corrected himself and said his father was the settlor of the trust with a gold coin. At this point in the examination, counsel for the Wife requested copies of the trust documents, the settlement documents and financial statements of the numbered company. The Husband responded that no financial statements had been produced for the trust but stated he did not know why.

[58] At the time of the discovery of the Wife in December 2009, the trial had been set for May 10, 2010.

[59] Counsel for the Wife made numerous telephone calls and sent a letter dated December 17, 2009, asking for the documents requested in the examination. The trial was adjourned and a new trial date, later vacated, was set for 10 days, starting November 13, 2012. Again, on August 23, 2010, counsel wrote asking for outstanding documents, including the valuation of the companies and documentation related to the Norman McIntyre Trust. . By September 17, 2010, counsel for the Husband indicated she now had a number of these documents in her possession.

[60] On December 16, 2010, counsel for the Husband provided a response to the List of Requests from the examination for discovery on the Husband on December 7 – 8, 2009. It included the following:

Request 49	Response
[The Husband] to produce copies of the trust documents relating to the numbered company; copies of the settlement documents; copies of any financial statements the company may have.	The numbered company is not a family asset. Documents relating to it are not relevant.

[61] I interject at this point to express the view that this was not a legitimate basis on which to refuse production. There was clearly a live issue about whether the trust shares in the numbered company were a family asset. The numbered company was incorporated on December 29, 2005, a year before the separation.

[62] The Wife's letters and Notices with respect to financial disclosure continued through to October 2011, with no real response.

[63] On October 21, 2011, counsel for the Husband indicated that she had met with the Husband and was preparing his financial statement and was hoping to provide it and a supplementary List of Documents in the next two weeks. This did not happen.

[64] On February 8, 2012, counsel for the Wife sent another letter with new requests made by Mr. Goodburn, a chartered business valuator and chartered accountant, retained by the Wife.

[65] Finally, on July 16, 2012, counsel for the Husband produced the Valuation Report entitled "Fair Market Value of the Share Interests held by the Husband in the C. Group of Companies", prepared by Douglas Welsh of the Clark Valuation Group Ltd. This is the first time that some details of the Norman McIntyre Trust were disclosed as follows:

> 2.02 In addition to the value identified above, there is a trust that holds a 50% share interest in 39055 Yukon Inc. ("39055"). The other 50% share interest is held by

> a third party. 39055 produces drilling rods for use by KDrill.
>
> 2.03 The trustee of the trust is Mr. Norm McIntyre, CA. Mr. McIntyre is a partner with WHI MacKay Chartered Accountants and is a long-time consultant and accountant working on behalf of the [C.] Group and the [C.] family. Beneficiaries of the trust are [the Husband]. and [the Wife] and the two children, […]. Under the terms of the trust agreement, <u>Mr. McIntyre has stated that the beneficiaries lose their rights if there is a divorce, however the children remain as beneficiaries. In this report, no value has been assigned to the common shares of 39055 held by the trust, although we note that [the Husband] has a shareholder loan balance owing from 39055 of $108,900</u>. (my emphasis)

[66] I note, parenthetically, that it is highly troubling that, an asset whose documents had not been disclosed for several years was suddenly raised and dismissed without being assigned any value.

[67] Counsel for the Husband also finally delivered his updated Financial Statement sworn September 26, 2012, to counsel for the Wife on November 16, 2012. Significantly, although the document was sworn almost two months earlier, it was delivered just one business day before a Settlement Conference set for Monday, November 19, 2012. It made no reference to the Husband’s shareholder loans or the Norman McIntyre Trust for the two children. It did include his 2011 Income Tax Return and proceeds from the sale of publicly-traded shares in the amount of $213,072.61.

[68] Counsel for the Wife made requests for additional financial documents sought by Mr. Goodburn in January and February 2013. A Notice of Application for further document production was ultimately heard and ordered on April 15, 2013. I note that counsel for the Husband had made significant efforts to obtain all the documents requested and the Order of April 15, 2013 dealt with those that remained outstanding.

[69] This Order required counsel for the Husband to provide an extensive list of financial documents dating from 2007 to 2012, including:

1. An affidavit of documents;
2. An up-to-date Financial Statement of the Husband which shall include disclosure of the Husband's income and all of the Husband's current assets, liabilities and disclosure of property;
3. A written explanation for any documents not provided by May 10, 2013;

[70] In addition, the April 2013 Order set a Case Management Conference on May 30, 2013 and trial dates of November 20 – 29, 2013.

[71] In the meantime, on February 6, 2013, the Wife, on the instructions of her counsel, had gone to Mr. McIntyre's office and requested a copy of the trust documents and was for the first time, provided with a copy of a document entitled, "Norman McIntyre Trust" dated January 27, 2006. Although the document's date preceded the parties' separation by almost a year, this was the first time the Wife had seen the Norman McIntyre Trust, although she knew that the Husband had wanted to establish "a trust for us" as early as 2004.

[72] On May 10, 2013, the Husband provided an Affidavit of Documents but failed to produce a Financial Statement.

[73] A Court Order dated May 30, 2013 (the May 2013 Order) ordered the Husband to produce a complete and up-to-date Financial Statement to include disclosure of the Husband's income and all of the Husband's current assets, liabilities and disposal of property by June 7, 2013.

[74] The May 2013 Order also stated that the continued examination for discovery of the Husband and Wife shall be completed by September 13, 2013.

[75] The Husband produced his updated Financial Statement on June 7, 2013.

[76] I find that the three Financial Statements of the Husband were incomplete in that they did not disclose:

1. the Husband's interest as a beneficiary of the Norman McIntyre Trust or the trust's investment in 39055 Yukon Inc., the company producing drill rods for Kluane Drilling;
2. The Norman McIntyre Trust agreement and three most recent financial statements (as per Rule 63A of the *Rules of Court);*
3. Complete particulars of his shareholdings in the C. Group of Companies which he initially valued at $253,884, but which his business valuator opined to be in excess of $1,000,000 in 2012;
4. The shareholder loans owing to the Husband by the C. Group of Companies and 39055 Yukon Inc.;
5. The fact that there had been a corporate reorganization of the C. Group of Companies in 2008 resulting in the C. Family Trust and his position in that Trust (i.e. his 50% shareholding, with the other 50% held by Norman McIntyre, in 42267 Yukon Inc., the corporate trustee of the C. Family Trust);
6. Mineral claims in his name;
7. "Swaps" carried out by him in his RRSP account and the children's RESP account;
8. His ownership of 2,200,000 shares in Swift Resources, as well as other shares in Kildeer Minerals and Dawson Gold Corp.

[77] The disclosure problems continued throughout the trial. In the November 2013 hearing, counsel for the Husband was ordered to produce, by December 16, 2013, the file of Mr. Welsh, the Husband's expert, and the file of Norman McIntyre, the Husband's accountant and tax advisor, as both had collaborated closely in the preparation of the Valuation Report dated July 16, 2012. During the examination in chief of Norman McIntyre on January 2014, Mr. McIntyre candidly admitted that he did not produce his entire file relating to the Valuation Report of July 16, 2012, as he misunderstood the amount of documentation he was required to produce. This required another adjournment of the trial to the next day to permit both counsel to review the additional documentation during the evening of January 14, 2014.

[78] On January 15, 2014, counsel for the Husband requested an adjournment of the trial because of her discovery that there were documents for a five-year period from 2008 to 2013 that had not been produced. These documents were discovered after counsel for the Wife had left Mr. McIntyre's office the evening of January 14, 2014. There was also some misunderstanding on the extent to which Mr. McIntyre's documents were required to be produced.

[79] In any event, counsel for the Husband did not feel comfortable in continuing with Mr. McIntyre's examination in chief without having reviewed Mr. McIntyre's entire file. Counsel for the Wife opposed this adjournment application on the grounds of prejudice to his client in terms of costs and timing.

[80] I ordered that the trial be adjourned on the condition that the Husband produce the transcript of the hearing.

[81] The trial resumed on March 10, 2014. The issue of costs on the adjournment was not addressed but the Husband paid an advance on capital to the Wife.

[82] I find the following:

1. The Husband delayed in providing full financial disclosure to the extent that it has taken seven years to provide the financial information ordered to be provided on April 12, 2007.
2. Full financial disclosure could have been made in 2008 when the estate freeze took place.
3. The failure to provide timely financial disclosure has prevented the Wife from being able to place a value on her share of the family assets.
4. Despite the disclosure of the Norman McIntyre Trust in the July 16, 2012 Valuation Report, the financial disclosure requested as early as December 2009 was not produced until 2013.

[83] The conduct of the Husband and Norman McIntyre in the delays and lack of disclosure leads me to doubt their credibility.

THE TRUSTS

The Norman McIntyre Trust

[84] The Norman McIntyre Trust, and the lack of disclosure about the details of its creation and the assets in the trust, has contributed to the significant delay in this case. While its existence was acknowledged, somewhat obscurely, in the examination for discovery of the Husband on December 7 and 8, 2009, documentation about it was not provided until early 2013, and it ended up coming from Norman McIntyre directly, rather than through counsel for the Husband.

[85] In the December 2009 examination, the Husband stated:

1. He did not know the number of the numbered corporation, i.e. 39055;

2. He wasn't sure but he thought the other shareholders were Martin Loos and his wife, Karen Loos;
3. He said there was a trust for the other shareholders and the beneficiaries were his boys;
4. He did not know for sure when the numbered company was incorporated but thought it was 2005 or 2006;
5. The numbered company manufactured drill rods for Kluane Drilling;
6. He thought it was Norman McIntyre who settled the trust but he wasn't sure. He corrected this by stating it was his father who settled it with a gold coin;
7. He thought Norman McIntyre was the trustee; and
8. He did not know if financial statements were produced for the trust.

[86] There will be some repetition of facts from the previous section as they bear upon the issue of the validity of the trusts.

[87] As indicated above, in response to a request for the trust document and financial statements of the numbered company on December 16, 2010, counsel for the Husband took the position that the numbered company was not a family asset and the documents relating to it were not relevant. This position of refusing to disclose an asset, whether family or a non-family asset, led to significant delays in getting this matter to trial, not to mention delays in the trial itself.

[88] In July 2012, the Valuation Report revealed further information about the Norman McIntyre Trust set out above.

[89] As stated above, the Wife asked Norman McIntyre for a copy of the trust documents on February 16, 2013. She received a copy of the Norman McIntyre Trust

and the income tax returns for the trust. Mr. McIntyre immediately informed counsel for the Husband that he had given the Wife the Norman McIntyre Trust documentation.

[90] At this point, the Wife and her counsel became aware of the following additional details of the trust:

1. The trust dated January 27, 2006, was called the Norman McIntyre Trust;
2. The shareholder equity in 39055 Yukon Inc. increased from $242,896 on January 31, 2007 to $5,002,556 on January 31, 2013;
3. The Husband's shareholder loan of $108,980 on January 31, 2007, had increased to $158,000 by January 31, 2008.
4. The Husband and Wife were included as beneficiaries in addition to the children;
5. The Trustee was not responsible for any error in judgment, exercise of discretion, or act of commission or omission not amounting to actual fraud; and
6. The Trustee acting personally and not as a fiduciary could add any person or class of persons as a beneficiary.

[91] The Norman McIntyre Trust agreement also contained the following clause:

> 9. **Exclusion from Net Family Property**
>
> The income, including capital gains, arising from any interest passing to a Beneficiary under this Deed shall be excluded from such Beneficiary's net family property or from the value of the Beneficiary's assets on the death, divorce or separation of such Beneficiary, pursuant to the *Family Property and Support Act*.

[92] This clause was interpreted by Norman McIntyre and reported by Mr. Welsh in the Valuation Report as removing the Husband and Wife as beneficiaries on divorce.

“Net family property” is not a concept in the *Act* but appears to arise from Ontario legislation.

[93] At trial on November 21, 2013, the Husband testified that the Norman McIntyre Trust agreement was entered into on January 27, 2006. He confirmed this date in cross-examination on November 28, 2013. As a result of court-ordered document disclosure during the trial from Norman McIntyre on January 15, 2014, it was determined that the Norman McIntyre Trust deed was actually signed in 2008, after this litigation was commenced, but backdated to January 27, 2006. However, legal counsel had been instructed to draft the trust agreement on January 31, 2006. In these instructions to legal counsel, Norman McIntyre included the Husband and Wife as beneficiaries to the trust. He said that he included the Husband and Wife as alternative beneficiaries in the event that something happened to the children. I note that, despite it being contemplated in 2006, the Norman McIntyre Trust was not drafted until after the reorganization of the C. Group of Companies in 2008, one of the purposes of which was to provide asset protection in the event of a divorce.

[94] Norman McIntyre also understood that if no distribution is made from the trust to a beneficiary, it is not considered family property. When asked in examination in chief how he came up with that determination, he answered:

> At some point I was doing some research at the internet, like looking up court cases and that, and legal documents to see how these things operated in the case of a divorce, like because we were in that scenario.

[95] Norman McIntyre stated in e-mails in 2007 that he filed a trust return with the Canada Revenue Agency, ticked the box indicating that the trust agreement was enclosed, but did not enclose the trust agreement as he was still requesting legal counsel to prepare it.

[96] At the date of Norman McIntyre's testimony in January and March 2014, the trust bank account had not been set up.

[97] Until February 2013, the Husband was the only person to have a copy of the Norman McIntyre Trust deed, apart from Norman McIntyre. The Husband did not want the C. family name on the trust. At trial, the Husband stated that he just found out a couple of days earlier from Norman McIntyre that he and the Wife were included as beneficiaries in case the children passed away.

[98] The Husband further stated that he did not know whether there was cash available for the children in the trust and that he thought the children did not need it anyway, despite being aware of his son's financial inability to go to Pearson College as he wanted. In January 2006, when the trust was created, the Wife was a client and friend of Norman McIntyre. Norman McIntyre recalled having a discussion with the Wife about the second child also being interested in going to Pearson College.

[99] The Husband stated that he knew nothing about financial distribution of the Norman McIntyre Trust from 39055. In fact, shareholder loans were repaid to other shareholders well before the Husband's shareholder's loan was repaid in August 2013.

[100] Rather than making distributions from 39055 to shareholders, Martin and Karen Loos borrowed $650,000 from 39055 at January 31, 2011. The net profit of 39055 was as follows:

2007	$601,658
2008	$1,193,191
2009	$742,000
2010	$1,034,057
2011	$1,388,985

2012 $1,404,592

[101] On July 23, 2013, 39055 declared a dividend of $700,000 to the Norman McIntyre Trust. The dividend distribution was not disclosed to the Wife, despite the fact that she knew about the trust at this point. Norman McIntyre testified that he was also not sure that he told the Husband about the $700,000 cheque “but in all probability, I might have told him that, yes, I don’t know”. He carried the cheque for $700,000 in his pocket for six months until he deposited it into his own personal account in January 2014 to avoid the cheque being stale-dated. Mr. McIntyre estimated the lost interest amounted to approximately $3,500 which he did not intend to repay to the trust. Although he intended to open a trust bank account in January 2006, he never did. He explained that his wife had passed away in July 2013, and he was taking a lot of time off as a result and he simply did not get around to it.

[102] I find that, while there is absolutely no suggestion that Norman McIntyre derived any personal benefit, his keeping the cheque in his pocket for six months can only be explained as part of the general pattern of secrecy and non-disclosure pertaining to the Norman McIntyre Trust. Norman McIntyre did have a personal tragedy with the death of his spouse during this period but I am not satisfied that that tragedy can explain the delay in creating a trust account or cashing a $700,000 cheque for six months with this trial pending. I conclude that the delay in full disclosure of all aspects of the Norman McIntyre Trust was a significant factor in the delay and length of this trial. I also find that the Husband and Norman McIntyre deliberately attempted to keep financial information on the Norman McIntyre Trust away from the Wife during this court action, and I can only infer this was to prevent her from discovering the true value of this asset.

The Nahanni Drilling Bare Trust

[103] The Valuation Report prepared by Douglas Welsh dated July 12, 2012, stated the following in footnote 7:

> NDrill's shareholders also include [the Husband] with a 6.46% share ownership (1,000,000 Shares out of 15,490,000). However, we understand that [the Husband] holds these shares as a bare trustee on behalf of [the children]. No value has been assigned to these shares of NDrilling that are held in trust. If it is later determined that these shares are matrimonial property, then [the Husband] and [the Wife's] share of this value would be in the rage of $336,000 to $342,000.

[104] The two Declarations of Trust, one for 500,000 shares to one child and one for 500,000 shares to the other child, were signed by the Husband and dated May 18, 2006. The Declarations of Trust are the same for each child:

DECLARATION OF TRUST

> This declaration of trust is made by [the Husband] (the "Trustee") in favor of his son […] (the "Beneficiary").
>
> The Trustee solemnly declares that he holds 500,000 shares of Nahanni Drilling Corporation (the "Property") in trust solely for the benefit of the Beneficiary.
> The Trustee further promises the Beneficiary:
>
> a) not to deal with the Property in any way, except to transfer it to the Beneficiary, without the instructions and consent of the Beneficiary; and
>
> b) to account to the Beneficiary for any money received by the Trustee, other than from Beneficiary, in connection with holding the Property.

[105] I note that there is no fiduciary obligation expressed in the Declaration of Trust.

[106] Norman McIntyre stated that the Husband's shares were "founder shares" for which he paid nothing. He also testified in cross-examination that he was not sure the Nahanni Bare Trusts were actually dated May 18, 2006.

[107] Norman McIntyre also stated that a trustee could allocate trust capital to adult children who in turn could gift the allocation to a parent.

[108] When the Husband was asked in examination in chief why he put his Nahanni Drilling shares in trust for his children, he stated:

> Well at the time I kind of felt like I wanted to put some assets in their name just for tax purposes.

[109] There is no evidence that the Husband has acted on these Trust Declarations.

The validity of the trusts

[110] In order to settle property on trust, the settlor must either own the property, have an interest in the property or have a power of appointment. As set out in *Waters' Law of Trusts in Canada*, 4th ed. (Donovan W.M. Waters, Mark Gillen & Lionel Smith (Toronto: Thomson Reuters, 2012)), a trust has three essential characteristics (pp. 140-141):

1. The language of the settlor must be imperative and establish a certainty of intention;
2. The subject matter of the trust must be certain; and
3. The object of the trust must be certain.

[111] Counsel for the Wife submits that both trusts are shams based on the principle in *Antle v. Canada*, 2009 TCC 465, confirmed on appeal at 2010 FCA 280. In *Antle,* the trial judge found that the trust in issue was a sham because it lacked certainty in intention and subject matter. Mr. Antle had created a Barbados Spousal trust for the purpose of avoiding capital gains in Canada, but the court found that he never intended to settle shares in a discretionary trust with the trustee.

[112] The Federal Court of Appeal confirmed that surrounding circumstances and not just the formal expression of the parties could be considered in determining the validity of a trust. *Antle* was decided in the context of a tax avoidance scheme rather than in a

matrimonial context. Nevertheless, the Court approved, at para. 16, the following text from *Waters',* at p. 154 with reference to the concept of "sham":

> … Used in the trust law setting, now a practice in Canada as elsewhere, it describes a trust that the courts will declare void because the provisions in the trust instrument do not represent the settlor's true intent as to the terms upon which the trustee is to hold the trust asset(s). Though the trust instrument sets out the persons or purposes that are to benefit, the settlor's true intent is to retain control of the assets purportedly held in trust because the true intent, for instance, is to appear to have disposed of the assets and so to evade tax, to defeat personal creditors, <u>or prejudice the claims of an estranged spouse</u> or the children of the relationship. A trust created by the settlor who declares himself the trustee of the property, rather than make a transfer of asset to another as trustee, lends itself to the misrepresenting behaviour. When the trustee is another person, any false misrepresentation the settlor intends to make does not, of course, affect the trustee, who is expected to act honestly and in good faith. But another as trustee who agrees to assist the falsity, or who is indifferent to whether, in fact, he merely implements the settlor's decisions, will enable the assertion to be made that the trust is but a "sham", a deception, and consequently void. (my emphasis)
>
> 1. No Intention to Create a Trust
>
> An intention to mislead others may mean there is no true intention to create a trust at all. The whole suggestion of a settlor who intended a trust is a fabrication; the defendant is and always has been the owner of an interest in assets that others are now claiming. No evidence is available of a trust instrument or, if there is a trust instrument, it has been withheld from anyone's knowledge and produced when a claim is being made against the property described in the instrument. A declaration of trust by the alleged settlor would be the likely method of such alleged trust creation; it requires no co-operation from others. If there is, in fact, no intention to create a trust, one of the three certainties is missing, and the alleged trust is void. The assets remain in the settlor's name, available to claimants against him or to those assets. This, all are agreed, is a sham trust.

[113] *Waters'* goes on to say that a sham requires both the settlor's deceptive behaviour as well as a trustee, who may be a friend or relative, willing to advance the deception.

[114] *Waters'* elaborates at p. 157:

> Canadian courts to this date have used the term "sham" with regard to trusts only occasionally, and as yet no judicial analysis has been made of the scope of its meaning, and its effect. The infrequency of usage may in part be due to the fact that retention of control by the Canadian settlor has highly deleterious tax effects for the control, the trust may be regarded by the CRA as a trust simply of asset title, and the taxable capital gain will be imputed to the settlor, and taxed in the settlor's hands as his retained property. Both domestic and offshore trusts are subject to this attack in Canadian courts.

[115] In the context of family law litigation, the cases are quite fact specific. In *Antflick v. Antflick*, [1980] O.J. No. 1240 (S.C.), the husband established an *inter vivos* trust in 1969 with his wife and three children as beneficiaries. The parties separated in 1978. No meetings of the trustees were held and the trust had been under the absolute control and management of the husband. The children were to receive the capital with the income at the discretion of the trustees to first meet the needs of the wife. No payments had been made to the wife. Counsel for the wife submitted it was a sham and all of its assets should be taken as assets of the husband. The trial judge concluded that the corporate documentation and the manner of operation "[led] only to this conclusion."

[116] In *Merklinger v. Merklinger* (1992), 11 O.R. (3d) 233 (Gen. Div.) at 241 – 242, affirmed (1996), 30 O.R. (3d) 575 (C.A.), the husband and wife were married in 1972 and separated in 1990. A Muskoka property was a valuable asset in the wife's name prior to separation but the husband stopped paying the mortgage and taxes. The husband then purchased the Muskoka property in 1992 in the name of a limited

company, the shares of which were owned by his solicitor in trust for his children. The trial judge had little difficulty finding the husband's claim of a trust for the children to be a sham.

[117] In *Sagl v. Sagl* (1997), 31 R.F.L. (4th) 405 (Ont. Gen. Div.), the husband created the Sagl Family Trust in 1982, two years before the marriage. The beneficiaries were Mr. Sagl, his three sons from his first marriage and their issue. The parties separated in 1992. The issue was whether the value of certain common shares held in trust should be included in the net family property of Mr. Sagl. The value of the shares was between 26 and 30 million, subject to income tax.

[118] Counsel for the wife urged the inclusion of the shares in Mr. Sagl's net family property because he had treated the trust property as his own, included the value in his personal net worth, and had friends as trustees. The trial judge rejected that submission, and stated at para. 36:

> I agree with Mr. Wolfson that were I to approach this issue on this basis, I would be "turning trust law upside down." The fact is that the Trust was legitimately created after receiving income tax and estate planning advice from Mr. Lyle Hepburn. It was created some two years before the marriage. There is no evidence that it was done so to defeat Mrs. Sagl. She was very well provided for at the time. The Trust is not a sham.

[119] The trial judge concluded at para. 37 that the best way to determine the wife's entitlement was to determine Mr. Sagl's interest in the trust at the date of valuation, without dissolving the trust, and distribute a proportion of that value to the wife.

[120] However, in *E.J.R. v. K.D.A.*, 2002 BCSC 1649, the trial judge decided that dividing a family trust was undesirable as it "would effectively expropriate assets which were intended to benefit the parties' children. While the R. Family Trust was a family asset by the terms of the *Family Relations Act*, the extent to which others, including

minor children, may have had a legitimate legal or beneficial interest in that family asset must be recognized."

[121] Similarly, in *Anderson v. Anderson*, 2004 BCSC 300 (var'd on other grounds, 2005 BCCA 208), the husband and wife began to live together in 1970 or 1971, married in 1977 and separated in about 2000. The husband operated several dental practices over the years and established a family trust which enabled funds to be paid out of the practice for the family's support with minimum tax liability. Although there was no specific date establishing the commencement of the trust, it was in existence during the marriage. The trial judge concluded that the family trust was an intrinsic part of the family's financial structure but declined to divide it as a family asset as neither the ownership nor the rights of the children as beneficiaries were clear. The trial judge could not conclude that the family trust was owned by one or both spouses and some or all of the children. She states the reasons for her decision at para. 67:

> That the trust was created for the benefit of the family as a whole from funds generated by the dental practice does not diminish the legal significance of the rights and interests it may have created. If the parties have for financial or tax planning purposes created for the children separate rights to some of the family property, it is not open to the parties or the court to divide that property between the parties without representation of the children's interests.

[122] In *Fisher v. Fisher*, 2009 BCCA 567, the husband and wife were married in 1990 and separated in 2005. At issue was a Whistler property which the trial judge concluded was not a family asset. The wife's mother acquired the Whistler property before the 1990 marriage and held title in the name of a company in which she held 100% of the shares. The wife's mother transferred her shares to grandchildren and the company signed a declaration of trust for the grandchildren. The husband alleged that the wife was the true beneficial owner of the Whistler property and it was therefore a family

asset. The trial judge found that it was always the intention of the wife's mother to give her interest in the Whistler property to her grandsons, and declined to delve into the validity of the trust on the basis that many of the interested parties did not have notice of the attack on it.

[123] The Court of Appeal agreed, stating at paras. 50 and 51:

> 50 I agree with the trial judge's refusal to decide this complex trust issue on the basis that it would be prejudicial to the respondent and the Company to do so in the absence of notice through proper pleadings. It may well be that the respondent and the Company would have chosen to lead evidence on this issue, which may have shed light on the circumstances in which the 1998 Declaration of Trust was formulated and signed. See Emmett v. Arbutus Bay Estates Ltd. (1994), 95 B.C.L.R. (2d) 339 at para. 9 (C.A.), Scott Bros. Gravel Co. v. N.W. Hullah Corp. (1967), 59 W.W.R. 173 at paras. 9-11 (C.A.).
>
> 51 More importantly, however, is the fact that R. and S., who hold the shares in the Company and claim to be the beneficial owners of the Whistler Property, are entitled to notice of such a claim and to be given the opportunity to address the issue. It is their ownership of the assets, being the shares of the Company, that are being attacked by this argument and they may well have something to say about the claim.

[124] I draw the following general principles with respect to the issue of sham trusts in the family law context:

1. Family trusts are subject to the requirement of having three essential characteristics of certainty of intention, certainty of subject matter and objects;
2. The concept of sham trusts applies to those trusts prepared to defeat spouses or that lack one or more of the three essential characteristics;
3. The finding of a sham trust has been made in situations where the trust may be formally created or documented but the settlor retains total control

and management thereby lacking the intent to transfer the asset to a trustee;

4. Courts are reluctant to strike down family trusts that have been operating prior to the separation of the spouses, even in circumstances where the settlor retains considerable control, as they have a history or track record; and

5. Courts are reluctant to strike down family trusts that have a history and track record particularly where some of the beneficiaries have not been notified of the application to strike down the trust which may affect their interests.

[125] Counsel for the Wife submits that the Norman McIntyre Trust is a sham. There are a number of factors that support this submission:

1. There has never been a payment to the children, or on behalf of the children since the trust was created on January 27, 2006, despite the opportunity to draw on it to send a child to Pearson College;

2. The Trustee has never opened a trust bank account, although he did open a bank account in his own name which he intended to convert to a trust account but had not done so at the time of trial;

3. The Husband and the Trustee are close friends and kept the details and even the existence of the trust a secret until the 2009 examination of the Husband;

4. No financial statements for the trust have been produced;

5. The trust document was not disclosed to the Wife, a beneficiary, until she requested a copy in February 2013;

6. The Trust document was backdated to January 21, 2006, but was actually signed in 2008;

7. Neither the Husband nor the trustee can explain why there are clauses granting the trustee diminished liability and the power to add additional beneficiaries or the attempt to exclude payments to a beneficiary from his or her "net family property";

8. The trustee carried a cheque for $700,000 in his pocket for six months during the pre-trial Judicial Settlement Conferences and the early months of trial;

9. Although the Husband's father is the settlor, it was the Husband that made a shareholder's loan to 39055 that was not repaid until July 2012.

[126] The "sham" quality of the trust can also be inferred from the secrecy surrounding the creation of the trust suggesting that it was less a real trust and more a means to deprive the Wife of her share of family assets.

[127] On the other hand, there are a number of factors which tend to support the validity of the trust:

1. The e-mail to Greg Fekete, the trust lawyer, dated January 27, 2006, confirmed that the trust was created before the separation on December 12, 2006;

2. The 1,000 Class A common shares of 39055 were issued to the trustee on January 30, 2006;

3. the Wife was aware that the Husband wanted to create a trust for the family;

4. The Wife was included as a beneficiary two years after separation;

5. The drafting of the trust document was requested on January 27, 2006, although it was not prepared until 2008;

6. The trustee filed a trust return with the Canada Revenue Agency;

[128] I also have to consider that the children, who are beneficiaries, did not receive any notice that the validity of the trust is in issue.

[129] If the trust is declared to be invalid, the trust property reverts back to the settlor, the Husband's father on behalf of the C. Group of Companies, although his participation in the trust appears to be minimal. The evidence, in my view, supports the fact that the Husband and Norman McIntyre were instrumental in creating the trust. It was the Husband who named it the Norman McIntyre Trust and the Husband was the person that Norman McIntyre reported to during the creation of the trust. The use of the Husband's father signature as settlor was more pro forma to give the trust the appearance of not being entirely at the instigation of the Husband.

[130] These circumstances do not compare favourably to the valid trusts considered in the caselaw. The *Anderson* and *E.J.R. v. K.D.A.* cases are factually quite distinguishable from the case at bar for the following reasons:

1. The Norman McIntyre Trust was not created early in the marriage for the benefit of the family and children;

2. The Norman McIntyre Trust was created in secrecy and not disclosed to the Wife;

3. The asset of the Norman McIntyre Trust was not used for any family purpose in its history from the date of separation to the date of trial.

[131] In other words, this trust does not have the history, full disclosure and benefit for the family as found in *Anderson* and *EJ.R. v. K.D.A.*

[132] Similarly, in *Fisher v. Fisher*, the trust was in existence before the marriage and was quite independently owned by the wife's mother through a corporation and not part of the husband and wife's family assets.

[133] Nevertheless, a declaration that the trust is void, while initially attractive, may have unintended tax consequences. It would deprive the children of their benefit. As well, the Norman McIntyre Trust was created during the marriage before separation, even if the Husband acted in a surreptitious and secretive way. The "sham" attributes arise primarily from the secrecy of the Husband and the trustee in creating and operating the trusts, including the trustee's conduct in not disclosing or cashing a $700,000 cheque.

[134] I have concluded that the Norman McIntyre Trust should not be declared to be a sham, despite the conduct of the Husband and trustee in keeping the details and financial information from the Wife until she requested a copy of the trust agreement. I find that the Husband and Wife had discussed the issue generally, and it would be unfair to visit the outrageous conduct of the Husband and Norman McIntyre on the children. There are other ways to ensure that the Husband does not unjustly benefit from the trusts and to ensure that the Wife receives an appropriate share.

"If and when" order

[135] Counsel for the Husband submitted that it would be appropriate for the Court to make an "if and when" order so that if the trustee exercises his discretion to distribute income or capital directly or indirectly to the Husband, then he or she will hold 50% of the distribution in trust for the Wife.

[136] The application of an "if and when" order arose in *Grove v. Grove*, [1996] B.C.J. No. 658 (S.C.). There, the husband had a contingent interest in a family trust created by

his parents for the benefit of the husband, his siblings and their children. The trial judge found it to be a family asset and apportioned the interest in the amount of 80% for the husband and 20% for the wife, despite her having made no contribution to the trust. The court ordered the wife receive her share only upon the husband receiving his share.

[137] The application of an “if and when” order in the case at bar has a different purpose. In this case, the Wife has a legitimate concern that the assets of the Norman McIntyre Trust could be distributed to the Husband directly or indirectly or to additional beneficiaries added by the trustee so that she and the children would be disadvantaged. I have concluded that an “if and when” order is appropriate in this situation to ensure that the trustee exercises his trust powers for the benefit of the children. Therefore, I order that if the Husband or additional beneficiaries receive a direct or indirect distribution from the Norman McIntyre Trust, including the $700,000 dividend paid out in 2013, there must be an equal distribution made to the Wife. I use the term indirect distribution to encompass any situation where the distribution is made to the children and then gifted back to the Husband or another beneficiary. I also order the trustee to give the Wife 30 days’ notice of any intended distribution including the name of the beneficiary and the amount to be distributed.

[138] I should add that the trustee has an obligation to provide all beneficiaries with financial statements of 39055 and the trust, as well as CRA filings on an annual basis. I also order the trustee to immediately advise the Wife of the details of the Norman McIntyre Trust bank account. I add that in making these orders, I do so for the protection of the children and the Wife and rely upon the trustee’s professional designation and integrity.

[139] The Nahanni Drilling Bare Trust, on the other hand, does not have a trustee to whom the Husband's shares have been transferred. The trust property remains solely in the hands of the Husband. The beneficiaries have received no benefit from it, and I conclude that the true intent was not to create a trust but to prejudice the claim of the Wife. The certainty of intent is missing and I find that the Nahanni Drilling Bare Trust is void.

[140] In my view the assets of both trusts, valid or not, are family assets for reasons that follow. The Norman McIntyre Trust falls under s. 4(b) of the *Act:*

> 4 In this Part, "family assets" means a family home as determined under Part 2 and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation, or for household, educational, recreational, social, or aesthetic purposes, and includes
>
> …
>
> (b) if property owned by a corporation, partnership, or trustee would, if it were owned by a spouse, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse having a market value equal to the value of the benefit the spouse has in respect of the property;
>
> …

See *Tratch v. Tratch* (1981), 30 B.C.L.R. 98 (S.C.), at para. 37.

[141] However, as I have upheld the trust and created an "if and when" order, only the shareholder's loan of $158,000 to 39055 needs to be divided equally between the Husband and the Wife.

[142] With respect to the void Nahanni Drilling Bare Trust, the trust is void and the Wife shall receive one-half of the value of the Husband's shares at $342,000, the value established by Mr. Welsh.

THE C. GROUP OF COMPANIES

[143] Another major issue in this trial is the Wife's claim for a share of the Husband's interests in the C. Group of Companies and his shareholder loans in them. As the Husband's shareholding and shareholder loans in the C. Group of Companies are admitted to be a family asset, it is acknowledged that the Wife will receive a share. The dispute is whether changes in the value of these assets between December 12, 2006, and the date of trial make the equal division of family assets inequitable. The value of the C. Group of Companies increased substantially between date of separation and date of trial.

Kluane Drilling Limited

[144] Kluane Drilling provides diamond drilling services for mineral exploration companies in the Yukon and internationally. It is managed from Whitehorse but has a significant international focus. It owns three Longyear 38 drills built in 1986 valued at $50,000 altogether. In 2006, three new drills were built in Whitehorse, valued at $360,000. The drills are portable and can be transported to remote locations in the Yukon by helicopter or bulldozer.

[145] The drilling business is cyclical and income depends on commodity prices and financing for junior exploration companies. Kluane Drilling is very profitable when commodity prices are strong.

[146] Internationally, Kluane Drilling initially had a joint venture with another drilling company called Energold and had drilling operations in Ecuador, Guatemala, Brazil, Peru and the Dominican Republic with minor operations in Zambia and Vietnam. Neither party was satisfied with the arrangement and in 2006, the international assets

were divided up. Kluane Drilling received the Ecuador and Guatemala drilling operations.

[147] To give some perspective of the success of Kluane Drilling, the shareholders' equity was $6,061,216 as at January 31, 2007, and $44,130,237 as at January 31, 2013.

Nahanni Drilling Ltd.

[148] Nahanni Drilling, which is primarily owned by Kluane Drilling, was incorporated in 2005 to seek mineral and drilling opportunities in China. It generated revenues in excess of $4.5 million in 2006, in no small part due to the management of the Husband who travelled an average of 30 – 40 times to China from 2005 to 2009. Most of the Chinese business was generated in the summer of 2006 but has since declined rapidly because of difficulties of operating in China.

C. Holdings Ltd.

[149] C. Holdings is a holding company with no assets except for advances to related companies and common shares of Kluane Drilling and H. C. and Sons.

H. C. and Sons Ltd.

[150] H. C. and Sons is a Yukon-focussed business consisting of gravel and construction operations. It has heavy duty equipment and is wholly owned by C. Holdings. It has an interest in the Peruvian operations of Kluane Drilling and owns industrial real estate in Whitehorse. It is the company built up by the Husband's father. Its shareholders' equity was $5.12 million as at January 31, 2007, and $2.17 million as at January 31, 2013, as a result of a capital dividend of $1.49 million in 2009.

Loucheux Enterprises Ltd.

[151] Loucheux Enterprises owns industrial real estate in Whitehorse. It generates most of its income from renting loaders and gravel crushing equipment to other C. companies.

Old Crow Industries Ltd.

[152] Old Crow Industries began as a barite crushing mill and acquired its major asset, a crushing mill in Ross River, in 1997. Barite is used in oil and gas drilling. This corporation is no longer in the barite milling business but rents equipment to other C. companies.

Nahanni Paving Ltd.

[153] Nahanni Paving owns an asphalt plant, asphalt paver, rollers and other assets. It was 50% owned by the family and is not active.

THE VALUATION OF THE C. GROUP OF COMPANIES

[154] Because January 31 is the year-end for most of the companies, January 31, 2007, is a useful reference date for valuation as it is close to the actual separation date of December 12, 2006. Similarly, I will fix the date of trial value at January 31, 2013.

The Husband's management role and minority discount

[155] There has been some disagreement between the Wife and the Husband as to the role that the Husband has played in the daily operations and success of the C. Group of Companies, which is a C. family operation. Mr. Welsh reports that:

> The job responsibilities for each […] brother is not clearly defined, but in general terms, [the Husband] oversees the financial and administrative end of the […] businesses. [D.] is on the ground in the Yukon dealing with the operational end of the local contract work. [R.'s] involvement includes opening up the drilling operations in various countries and dealing with issues abroad. Finally, [K.] oversees the gravel

> hauling business. [J.] was a labourer at one point, but is now involved in the […] businesses at this time.

[156] I find, based on the evidence of the Husband, the Wife, Norman McIntyre and Fraser Roberts that the Husband is the effective leader and manager of the C. Group of Companies. I have no doubt that the Husband’s father, who is 79 and resides in Victoria, got the gravel hauling and construction support business going in the early years but now plays more of an advisory role, except perhaps with respect to the corporate reorganization and estate freeze that took place in 2008.

[157] It is the drilling business which has produced remarkable profits, and that has been led by the Husband and his brother, R. It is the Husband who has the education, skills and experience to lead the C. Group of Companies, particularly in its highly successful international drilling business. I accept the Wife’s evidence, which is based on her own experience with the C. Group of Companies, that the Husband was the primary directing mind and had the final say in business decisions after family discussion. That is not to diminish the role of the rest of the C. family but simply to find that the Husband was the leader and driving force, which he could not have been without a supportive and involved wife.

[158] This finding is supported by the evidence of Fraser Roberts, the Chief Financial Officer for the C. Group of Companies. He was formerly employed at Price Waterhouse Cooper and moved to the C. Group of Companies in May 2009. He earned a salary of $140,000 in 2010, a salary and bonus of $195,416.74 in 2011 and $150,000 in 2012. As CFO for the C. Group of Companies, he has most contact with the Husband and testified that the Husband would decide if securities should be sold to provide cash for the companies. He described the Husband as “kind of in charge of the day-to-day” operations.

[159] Norman McIntyre, the chartered accountant and tax advisor for the C. Group of Companies has had a long friendship with the Husband from their childhood school days. In correspondence dated November 26, 2007 to Dan Basso of the Kelowna office of McIntyre's firm and providing background for the estate freeze, Norman McIntyre stated as follows:

> <u>Management and family participation</u>
>
> The General Management and overall strategic direction for the company is provided by [the Husband] (46 years old). [The Husband's father] (72 years old) is actively involved in the business operating equipment and providing on the ground management for specific jobs. [The husband's father] participates in the decision making on major issues, but generally leaves the running of the business in the Husband's hands. [D.] and [R.] each work in the business and manage project specific jobs and provide on the ground services. [D.] generally has worked in the quarry/gravel crushing and [R.] is a diamond driller. [D.] and [R.] participate in the larger decisions. [K.] works summers in the Gravel Crushing and construction work around Whitehorse, but does not participate in the decision making. [J.] works in the company in various minor roles, but does not participate in any of the decisions.

[160] In a further e-mail to Dan Basso on December 20, 2007, Norman McIntyre described the team of advisors listing the Husband as "final decision maker" and "I will represent the C. family on the team and consult with [the Husband] in the background on issues."

[161] Part of the tax planning involved the creation of a Barbados company, which was never brought to fruition. Norman McIntyre wrote a letter dated November 1, 2008, to the Bank of Nova Scotia in Barbados introducing the Husband as follows:

> [The Husband] is a very competent and capable business person. He is largely responsible for corporate strategy, and the financial aspects of the company. [The Husband] has a four year economic degree from the University of Victoria in Canada. He has been one of the primary individuals

> responsible for building this international diamond drilling company from revenues of nil at startup in 1987 to revenues in 2008 of approximately $40,000,000 for the Kluane Group of companies.

[162] Norman McIntyre also referred to C. family decision-making as a "consensus model". While I do not doubt that "consensus" plays an important role in such a successful family business, I nonetheless find that the C. Group of Companies are led by the Husband.

[163] Mr. Welsh has applied a minority discount ranging from 10% to 15% for the Husband to recognize the fact that he does not control any of the companies and is not in a position to prevent actions that he does not approve of.

[164] The application of the minority discount recognizes that the Husband has no power to unilaterally pay dividends or redeem shares. In his evidence, Mr. Welsh referred to the minority discount as a "discount for lack of marketability".

[165] The result is that in the January 31, 2007 valuation, the valuation of $1,030,000 to $1,080,000 drops to a range of $920,000 to $970,000 after applying the minority discount. Support for the application of a minority discount is found in *Balcerzak v. Balcerzak* (1988), 41 R.F.L. (4th) 13 (Ont. Gen. Div.), and *Guckert v. Koncrete Construction Ltd.*, 2009 SKQB 484. In *Balcerzak*, at para. 29, the Court stated:

> … I do not consider that the discount should be very high where all of the other shareholders hold similar minority interests, particularly where the shareholders are a close family unit that have worked together for many years and will probably continue to do so for many years to come. …

[166] On the other hand, Mr. Goodburn, the chartered accountant and business valuator retained by the Wife, stated that he has stopped making minority discount assessments and now leaves it to the courts. He stated that he is a business valuator and he is not an expert at judging past or future family behaviour.

[167] I also note that the authors of *Financial Principles of Family Law* take the following view at p. 7-17:

> (d) Family Control/Group Control
>
> It is generally accepted that when a shareholder is part of a group of shareholders who have historically acted in concert to their mutual benefit, and will likely continue to do so, including eventually selling their collective interests together, no minority discount is appropriate.
>
> The Canada Customs and Revenue Agency (CCRA, formerly Revenue Canada) has acknowledged that in cases where a taxpayer is a minority shareholder but other family members hold a sufficient number of shares to all form a control group, a minority discount is not appropriate. …

[168] In my view, the application of a minority discount is not appropriate for this business valuation in the context of this family business. The concept of applying a minority discount on a notional sale that is not even a consideration is inappropriate. The Husband is the effective manager and leader of the C. Group of Companies. The family has historically operated on a consensus model, however the Husband has been described as “the final decision-maker” in the estate freeze and he is a trustee of the C. Family Trust that has been created in the process.

[169] I am of the view that factually and conceptually, the application of a minority discount is not appropriate.

The Valuation Report

[170] The Valuation Report dated July 12, 2012, was prepared for “matrimonial purposes” by Douglas Welsh at a cost of approximately $133,000 paid by Kluane Drilling Ltd.. This date is six years after the deemed date of valuation and four years after the valuation provided for the estate freeze.

[171] There are three types of reports recommended by the Canadian Institute of chartered Business Evaluators: the Comprehensive Valuation Report, Estimate Valuation Report and the Calculation Valuation Report. The Comprehensive Valuation Report provides the highest level of assurance and the Calculation Valuation Report provides the lowest level of assurance.

[172] This Valuation Report is an Estimate Valuation Report “that is based on limited review, analysis and corroboration of relevant information.”

[173] The Valuation Report considers the Husband’s shareholder loans of $600,058 to be in addition to the value of his shareholdings in the C. Group of Companies.

[174] The conclusions of the Valuation Report as to fair market value are not based upon the highest price in an open or unrestricted market between informed and prudent parties acting at arm’s length. Rather, the estimate of fair market value of the shares of the C. Group of Companies is viewed in the context of a notional marketplace. The Valuation Report also has regard to factors that include external industry and economic conditions such as historical gold prices, publicly-available information on mining operations and economic industry and industry conditions. The Clark Group have had discussions with the Husband and Norman McIntyre regarding the history and nature of the operations of the C. Group of Companies.

[175] Major assumptions relied upon in the Valuation Report are:

1. That the combined market rate of salaries provided by the family members approximates market value; and
2. The market value of capital assets estimated by the Husband and Norman McIntyre is materially accurate.

[176] The Valuation Report has "not attempted to verify independently the accuracy or completeness of any such information, representations or warranties." Should the assumptions or representations made by the C. Group and their management not be accurate, Douglas Welsh says the conclusions could be "significantly different."

[177] In the Summary of Valuation Calculations, Douglas Welsh divided the C. Group of Companies into two categories: the drilling companies and the asset-based companies.

The drilling companies' discounted cash flow

[178] The drilling companies are Kluane Drilling (Canada and International) and Nahanni Drilling (Chinese operations). Mr. Welsh valued the drilling operations as going concerns using discounted cash flow ("DCF") method. The DCF analysis involves forecasting the relevant cash flow stream over a certain period and then discounting that stream back to present value at an appropriate discount rate. Mr. Welsh stated that the forecast of future cash flows for the drilling companies was based on projected pre-tax earnings provided by C. Group management with the assistance of Mr. McIntyre. Mr. Welsh applied a range from a low discount rate of 33% and a high discount rate of 44%.

[179] Douglas Welsh was retained in the summer of 2008. That date coincides with the completion of the estate freeze which also involved the valuation of the C. Group of Companies. There does not appear to have been any communication between the estate freeze team and Douglas Welsh, although the Husband and Norman McIntyre were directly involved in both valuations.

[180] Douglas Welsh visited Whitehorse in 2010 to get to know the businesses and see the assets. He testified that after that time "nothing really happened very much." He

said that after the trip they left a fairly detailed list of information that was needed "and from that point we were waiting for information."

[181] In July or August 2011, Mr. Welsh received the next block of responses to his detailed list of questions and had come to conclusions on the five asset-based companies consisting of Loucheux, Old Crow, C. Holdings, H. C. and Sons, and Nahanni Paving.

[182] However, Mr. Welsh wanted to value the drilling-based companies based on earnings or cash flow that was being generated by Kluane Drilling and Nahanni Drilling. But in the summer of 2011, in his words, "the file just stalled". Norman McIntyre was the prime contact person. Mr. Welsh said he did not receive the forecast for the drilling companies until the spring of 2012. The draft report followed in May 2012. Mr. Welsh was not given any explanation for the delay in 2012 but has subsequently been informed that Mr. McIntyre's wife was ill with cancer.

[183] A further complicating factor in the preparation of the Valuation Report was that financial and tax information before January 1, 2007 was prepared by Ernst and Young for Energold and Kluane Drilling International. Norman McIntyre had the difficult task of determining the source of those entries for a reorganization that took place five years before. However, that task would have to have been addressed in the 2008 estate freeze as well.

[184] Mr. Welsh chose to do an earnings-based or cash flow analysis because both drilling companies were capable of generating a very decent return. That analysis requires historical cash flow and taking that cash flow into the future and then bringing those cash flows back to the valuation date using a discount.

The $2.8 million error

[185] Chris Goodburn is a chartered accountant and chartered business valuator retained by counsel for the Wife to review the Valuation Report prepared by Douglas Welsh.

[186] On October 18, 2012, Mr. Goodburn e-mailed Mr. Welsh to point out that a receivable due to Kluane Drilling from Kluane International Drilling Ltd. in the amount of $3,278,548 was not accounted for.

[187] On November 5, 2012, Mr. Welsh filed an amendment to the Valuation Report indicating that only $463,351 of the receivable should have been written off. The result was a $2.8 million error in the value of Kluane Drilling.

[188] This resulted in an amendment to the Valuation Report increasing the aggregate fair market value of the Husband's interest in the C. Group of Companies to a value ranging from $1,030,000 to $1,080,000.

[189] The amendment also indicated a shareholder's loan of $102,564 owing from Kluane Drilling to the Wife, which had previously been omitted in the valuation. It is acknowledged that the Wife is not a shareholder but, in any event, this has been treated as owing to the Wife.

The barite mill

[190] Old Crow Industries owned a barite mill in Ross River, Yukon. The barite mill was not appraised but valued by Mr. McIntyre, Mr. Roberts and the Husband in the spring of 2011 at a value of $372,000 with other mill equipment. This value was relied upon by Douglas Welsh in the Valuation Report dated July 12, 2012, and his amended Valuation Report of November 5, 2012.

[191] In fact, the barite mill sold on September 30, 2011, for $700,000. This was not disclosed by the Husband to Douglas Welsh until Sunday, November 24, 2013, the evening before his testimony was presented in Court. Douglas Welsh accepted the Husband's explanation for the increase in value as a unique opportunity without doing any independent investigation of the purchase. The increase in sale value was not reflected in the ultimate valuation of the Husband's interest in the C. Group of Companies.

The value of the Husband's interest in the C. Group of Companies

[192] I have a number of concerns that lead me to doubt the accuracy of the valuations in the Valuation Report.

[193] The first concern goes to the very premise of the Valuation Report in assuming the accuracy of the market value of capital assets estimated by the Husband and Norman McIntyre without any attempt to independently verify the accuracy or completeness of that information. The financial information provided by the Husband and Norman McIntyre, upon which the Valuation Report is based, is extensive, including:

- A detailed list of capital assets for each C. Group of Company;
- The estimated fair market value for these capital assets;
- The revenue by client for Kluane Drilling and Nahanni Drilling
- Projections of income for Kluane Drilling's Canadian operations and Nahanni Drilling Chinese operations.

[194] Having found the credibility of the Husband and Norman McIntyre to be wanting, the reliance of Douglas Welsh on their estimates casts doubt on the valuation that he gives to the Husband's interest. This point was clearly demonstrated when the barite

mill, valued at $372,000 with mill equipment sold for $700,000 before the Valuation Report was prepared. Mr. Welsh was not advised of the sale, and when he was advised on the eve of trial, he accepted the explanation of his client without any independent verification. It is one thing to write a report assuming your client's values to be accurate, it is quite another to make no investigation when confronted with a significantly different value.

[195] Secondly, the $2.8 million error is very significant and would not have been revealed but for the review of Mr. Goodburn.

[196] Thirdly, the cash flow analysis is based upon Norman McIntyre's values and the Court has little confidence in the accuracy of those numbers. Mr. McIntyre, as demonstrated by his conduct with the Norman McIntyre Trust, in addition to being a tax and business advisor, is a long-time friend and advocate for the Husband.

[197] Finally, Mr. Welsh's reliance upon Mr. McIntyre for his purported legal opinion on the interpretation of the McIntyre Trust leads me to question his objectivity and independence. To paraphrase Finch J. in *Vancouver Community College v. Phillips Barratt* (1988), 26 B.C.L.R. (2d) 296 (S.C.), at paras. 305 and 306, the Valuation Report has become partisan and unfair, and I view it essentially as Mr. McIntyre's opinion advanced through an expert.

[198] It is, however, the only valuation I have. Following Mr. Welsh's analysis and rejecting the minority discount factor because of the Husband's leadership role in the C. Group of Companies, the valuation of the Husband's interest in the C. Group of Companies is at least $1,080,000 and the Wife's share would be $540,000. In my view, this is a low evaluation given the concerns I have just noted.

REMAINING FAMILY ASSETS

Shareholder loans

[199] It is also significant that, in addition to the Husband's shareholdings in the C. Group of Companies, he held the following shareholder loans from these companies as at January 31, 2007:

•	Kluane Drilling	$286,640
•	H. C. & Sons	$144,753
•	Loucheux	$27,358
•	Old Crow Industries	$3,296
•	Nahanni Paving	$29,111
•	39055	$108,900
	Total	$600,058

[200] The shareholder's loans are agreed to be family assets. The Wife's shareholder loan to Kluane Drilling must also be included so the total value of shareholder loans is $702,622.

Family Home

[201] The Family Home was purchased and constructed by the Husband in the late 1980s at a cost of $115,000. The Husband and Wife lived in the Family Home for 10 years while they raised their children. The Wife and Husband both contributed to the maintenance and improvement of the Family Home and I have found that the Wife did the vast majority of the care and upbringing of the children.

[202] The value of the Family Home at date of separation was $224,000 and the Husband has resided there since separation without occupation rent, which the Wife says would be $2,000 per month. I view the Husband's offer that the Wife could reside at the house without her new mate as somewhat disingenuous.

[203] The Wife has valued the Family Home at May 30, 2012 at $390,000 and seeks an equal share at $195,000. The Husband relies on the date of separation value and seeks an unequal share because of his premarital contribution of $115,000 leaving a balance of $109,000 ($224,000 - $115,000) to be split equally.

Gold in safety deposit box

[204] There is a dispute about whether a bag of approximately 20 ounces of gold in a safety deposit box rented by the Husband and Wife is a family asset or an asset belonging to one of the C. Group of Companies. The Wife had repeatedly asked the Husband for the key to the safety deposit box but he did not produce it. Finally, in the spring of 2013, the Wife advised the Husband that she was going to drill the safety deposit box. The Husband did not attend the drilling in time to examine the contents but the Wife provided photographs of all the contents, which were primarily personal effects of the Wife, some family paperwork, and the 20-ounce bag of gold.

[205] The Wife believed the bag of gold came from the repayment of a loan of the Husband and Wife to a friend, Peter Welsh. Peter Welsh testified that he did not borrow money and he did not recognize the gold.

[206] The Husband was unsure precisely where the gold came from but thought that it belonged to H.C. and Sons from a bunkhouse trailer sale in the 1980s before he became involved in the business.

[207] He said that the gold had been kept at the company office but for security reasons, he moved it to the safety deposit box. He said that the company did not have a safety deposit box at the time. Fraser Roberts testified that the company did have a safety deposit box but he was not aware for how long.

[208] Although I find it strange that a company asset of long-standing would not be kept in a company safety deposit box, I conclude that the Wife's understanding was not borne out. The gold is not a family asset and should be returned to the Husband and properly recorded as an asset of the company.

The Fox Lake property

[209] During the marriage, the Husband acquired real property located at Fox Lake by transfer from Harold Duck on October 8, 1998. The affidavit of value indicated a value of $7,000. The Husband testified that he paid no consideration but took the transfer on the understanding that he would build Harold Duck a cabin. This did not occur. The Husband stated that he intended to give the property back to Harold Duck after the divorce. The Fox Lake property is now valued at $50,000.

[210] As there is no evidence contradicting the Husband or suggesting that the Fox Lake property was used by the Wife or children for family purposes, I conclude that it is not a family asset.

The mineral claims

[211] The Husband and Wife were involved in staking quartz mineral claims for the C. Group of Companies at various times. A number of these claims remain in the Husband's name. I accept the Husband's evidence that these claims are not owned personally but rather as agent for H.C. and Sons. This is a common practice in the mining industry when large numbers of claims are staked in the name of various stakers to be transferred into the name of the mining company at a later date.

RRSPs and investments

[212] Counsel are agreed that at the date of separation, the value of the Husband's RRSP was $343,470.39 and the Wife's RRSP was $237,378. The difference is

$106,092 and I order that the Husband make an RRSP equalization payment to the Wife's RRSP in the amount of $53,048.

[213] At the date of separation, the Wife had a non-RRSP investment valued at $168,550.

[214] Although the Husband swore two Financial Statements (April 5, 2007 and September 26, 2012) stating that he had $60,000 in non-RRSP investments, it now appears that he had none according to his June 7, 2013 Financial Statement.

[215] I find that the Wife's non-RRSP investment is a family asset to be divided equally so that the Wife transfers $84,275 to the Husband..

Airline points

[216] The Husband had 331,695 airline points at date of separation and the Wife had 208,908. The difference is 122,787 and the Husband should transfer 61,393 airline points to the Wife.

The RESP and RRSP swaps

[217] The Husband used a financial transaction called "swaps" which involved transferring shares into an RESP for the children in exchange for cash which he then placed in his shareholder loan accounts to assist the C. Group of Companies. Fraser Roberts indicated that by selling shares and doing the swaps in the period of 2009 – 2011, the C. companies were able to meet payroll and pay suppliers. He said that the Husband would share-swap between his private trading account and his RRSP which effectively got tax free money out of the RRSP which was paid to the company. The net effect of the share swaps was that there was always money being loaned back to the company.

[218] The TD Waterhouse Education Savings Plan (RESP) was owned by the Husband and Wife for their children as beneficiaries. After separation between 2009 and 2011, the RESP had a cash value of approximately $550,000. The Husband continued to transfer shares in and pull cash out to be loaned to the company. Unfortunately, the value of the shares has declined drastically so that the RESP is now valued at approximately $50,000. The shares were from exploration companies that Kluane Drilling worked for.

[219] The Husband did not notify or consult the Wife about any of these transactions. He did acknowledge that he felt very badly about the loss in the RESP account and said that he would help the children with post-secondary education. I note that when he expressed this concern in examination in chief, he did not mention drawing on the Nahanni Drilling Bare Trust or the Norman McIntyre Trust until his counsel specifically questioned him about any other trusts created for the children.

[220] The complicating factor is that although the Husband had no right to deplete the RESP account, it is my understanding that the cash from the swaps went into the Husband's shareholder's loan account and arguably financed the C. Group of Companies. Thus, while it is arguable that the RESP is a family asset, it is not an asset that the Wife would share equally, as it is for the benefit of the children.

SUMMARY OF FAMILY ASSETS

[221] Section 6(1) of the *Act* states as follows:

> 6(1) If a marriage breakdown occurs, each spouse is entitled to have the family assets owned at the time of the breakdown by one spouse or both spouses divided in equal shares, despite the ownership of the assets by the spouses as determinable for other purposes.

[222] The following table sets out the family assets at date of separation, December 12, 2006, with the equal share of the Wife listed in the third column. Although I have expressed reservations about the under valuation of the C. Group of Companies, I have used Mr. Welsh's valuation.

Family Assets	Value at date of Separation	Wife's Share
Nahanni Drilling Bare Trust	$342,000	$171,000
C. Group of Companies	$1,080,000	$540,000
Shareholder Loans	$702,622	$351,311
Family Home	$224,000	$112,000
RRSPs	$106,092 (Husband's exceeds Wife's)	$53,046
Totals	$2,452,714	$1,226,357

[223] I note that the Wife received an advance on capital during trial in January 2014 in the amount of $119,000, which must be credited to the Husband in the final accounting between the parties. In addition, the Wife will be required to transfer $84,275 of her non-RRSP investment to the Husband.

UNEQUAL DIVISION UNDER THE *ACT*

[224] I agree with the view that in the vast majority of cases for married persons dividing their assets, the equal division contemplated by the *Act* is fair and just. See *McNamee v. McNamee*, 2011 ONCA 533, at para. 66, and *Symmons v. Symmons*, 2012 ONCA 747. In most cases, the major family asset will be the family home, and given a medium to long marriage taking into consideration the contributions of child care and household management, an equal division will be equitable.

[225] Counsel for the Husband conceded at the start of the trial that his interest in and shareholder loans to the C. Group of Companies are family assets.

[226] Pursuant to s. 6 of the *Act*, each spouse is entitled to have the family assets owned at the time of the marriage breakdown by one spouse divided in equal shares.

[227] Section 6(2)(b) deems the marriage breakdown to occur at date of separation which is agreed to be December 12, 2006. Section 15(3) states that "family assets shall be valued as of the earliest date which the marriage breakdown is deemed to have occurred" under s. 6(2), i.e. December 12, 2006. This is a significant issue in this case because the value of the family assets increased quite dramatically after this date. The *Act* is unlike the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "*FRA*"), in that the latter Act has no provision for a valuation date or dates and allows a measure of judicial discretion in setting it.

[228] Sections 65 and 66 of the *FRA* set out when a court can order an unequal division of family assets. Although these sections differ somewhat from s. 13 of the Yukon *Act*, I take guidance from *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.) which set out the following principles:

1. In determining whether an equal division of a family assets would be unfair pursuant to s. 65 "it is often necessary to have some idea of the value of an asset at the triggering event (e.g. separation) for whether or not there is to be a variation of the right of entitlement must be determined by the facts existing when that right came into existence".
2. In determining the amount of compensation payable, if any, under s. 66, the court must have regard to the value of an asset at the date of trial.

[229] The point in *Blackett v. Blackett* is that the date of trial, when issues of valuation are determined, is relevant to the division of assets. Similarly, in *Hartshorne v. Hartshorne*, 2004 SCC 22, although addressing the fairness of a marriage agreement, the determination of whether an agreement operates unfairly under s. 65 must be done with a consideration of its operation at both the time of the agreement and the time of

the application to the Court (paras. 47 and 77). In assessing any division of assets, the legislated or contractual division is the starting point for the court, but, in B.C., that division is necessarily subject to the fairness review under s. 65 of the B.C. *F.R.A.*.

[230] The Yukon *Act* provides for unequal division of family assets as follows:

> 13 The Supreme Court may make a division of family assets resulting in shares that are not equal if the Supreme Court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to
>
> (a) any agreement other than a marriage contract or a separation agreement;
>
> (b) the duration of the period of cohabitation under the marriage;
>
> (c) the duration of the period during which the spouses have lived separate and apart;
>
> (d) the date when property was acquired;
>
> (e) the extent to which property was acquired by one spouse by inheritance or gift;
>
> (f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, or use of property rendering it inequitable for the division of family assets to be in equal shares;
>
> (g) the date of valuation of family assets.

[231] Section 13(g) appears to be unique in Canadian legislation and permits consideration of the date of valuation in the determination of whether the division of family assets in equal shares is inequitable. In my view, this consideration was added to the common list of factors to permit a review based upon the possibility that the deemed date of valuation would make an equal sharing of family assets inequitable. Although s. 13(g) would not permit the changing of the date of valuation to the date of trial, it should be interpreted to allow the Court to consider a value at a different point in time as

a factor in determining whether the equal sharing of family assets is inequitable in some circumstances.

[232] In *McRobb v. McRobb*, 2004 YKSC 40, the primary issue was the determination of the date of valuation for shares of a company. Gower J. refused to consider a constructive trust argument on the facts of that case, as he found s. 13 of the *Act* could apply if an equal division of family assets would be inequitable. However, there was no actual application of s. 13 in the case other than a statement that Ms. McRobb could apply under it. However, in what I take to be an *obiter* comment, Gower J. said at para. 21:

> … Ms. McRobb has made no contribution to the shares since the date of separation. If the shares either increased or decreased in value since that date as a result of the actions of Mr. McRobb as a minority shareholder, then presumably Mr. McRobb should bear the benefit or the burden of that change in value …

[233] While that observation may have been appropriate in the circumstances of *McRobb*, in the view that I take of s. 13(g), it is open for a court to make an unequal division where an equal division would be inequitable, even in circumstances where there have been no contributions after the date of separation. In this respect, I rely upon the dissenting judgment of McLachlin J., as she then was in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at para. 69, where she said the doctrine of constructive trust should not be applied where the *Family Law Act*, 1986 (Ontario) provides a remedy. She further stated, at para. 96, that s. 5(6)(h) of the *Family Law Act* permits the trial judge to vary the equal division where assets increase or diminish in value between the date of separation and trial.

[234] Similarly in *D.T.R. v. T.M.R.*, 2011 YKSC 58, Whitten J. addressed the issue of whether the husband should receive an unequal share of the family home on the basis

that he had maintained it while the wife was suffering from a progressive disability in a long-term care facility. The family home increased in value from $300,000 at date of separation to $369,000 at date of trial.

[235] The Court did not permit the wife to suffer a diminishment of her right to an equal share and ordered that the wife was entitled to an equal share of the present value of the family home. The judge stated that the same result would apply under s. 13 or by way of constructive trust.

[236] Section 13 of the *Act* generally provides for judicial reapportionment based upon whether an equal division is inequitable, as determined by reference to factors (a) through (g). There is nothing in the *Act* stating that each factor must be given equal weight (see *Tratch,* para. 47). The ultimate test is whether equal division is inequitable.

[237] Section 13 does not specifically state that it is the family assets in the aggregate that must be reviewed, although the aggregate value will always be considered. In my view, the family assets may be considered individually and a determination made as to whether an equal sharing is inequitable for each, as the circumstances and applicable factors may differ for each family asset.

[238] Section 13(a) permits the court to consider any agreement other than a marriage contract or separation agreement and is not applicable in this case.

[239] Section 13(b), the duration of cohabitation under the marriage, is generally interpreted so that the longer the marriage, the less significance there is to any unequal contributions in acquiring a family asset. In *Wilson v. Fotsch*, 2010 BCCA 226, at para. 64, Huddart J., after reviewing the case law suggested three categories of marriage: long (12 years or more); medium (6 – 11 years); and short (5 or fewer years).

[240] Section 13(c), the duration of the period during which the spouses have lived separate and apart, addresses the length of separation and raises issues of delay and the reasons for it. In *McPhee v. McPhee* (1996), 74 B.C.A.C. 308, the wife did not claim for the division of family property until after 20 years of separation. The wife was limited to a 50 % share of $30,000, the value of the home at the date of separation rather than the value of $240,000 at the time of her application, 20 years later.

[241] Section 13(d) addresses the date when the property was acquired, particularly before marriage. It decreases in relevance as the length of the cohabitation during marriage increases. See *Livingstone v. Livingstone*, 1999 BCCA 295.

[242] Section 13(e), the extent to which property was acquired by one spouse by inheritance or gift, similarly diminishes in relevance according to the length of time that the marriage subsisted following the receipt of the inheritance. See *Lodge v. Lodge* (1993), 31 B.C.A.C. 72, at para. 17.

[243] Section 13(f) permits the non-exhaustive consideration of "any other circumstance" relating to the acquisition, disposition, preservation, maintenance, improvement or use of property. Significantly, the section of the *Act* does not include the *FRA* language that includes "the capacity or liabilities of a spouse". In *Margolese v. Margolese* (1981), 30 B.C.L.R. (3d) 705 (C.A.), the Court observed at para. 21 that "exceptional circumstances" are not required before there can be unequal division. Notably, preservation wholly through the efforts or one spouse may justify reapportionment in one spouse's favour: *Kopejtko v. Kopejtko* (1985), 49 R.F.L. (2d) 26 (B.C.C.A.).

[244] In *LeBlanc v. LeBlanc*, [1988] 1 S.C.R. 217, at paras. 10 and 11, the Supreme Court of Canada said that the principle of equal division must be respected, and in

applying the principle, courts are not permitted to engage in measurements of relative contributions or make fine distinctions regarding the relative contributions of spouses to a marriage.

[245] In *S.B.M. v. N.M.*, 2003 BCCA 300, Donald J.A., discussed the procedure under the *FRA*'s s. 65, which, again, with the exception of s. 13(g), makes similar considerations to s. 13 of the Yukon *Act*:

> … The question is not whether an unequal division would be fair; that is not the obverse of the test in s. 65(1). The Legislature created a presumption of equality - a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends.

VALUE AT DATE OF TRIAL

[246] The prospect that counsel for the Wife would pursue a division of assets based on asset value at the date of trial was contemplated early on in this litigation. Counsel for the Wife pleaded and advocated for a date of trial valuation from the outset of this trial. Fraser Roberts, the CFO of the C. Group of Companies even proposed sending counsel for the Wife a covering letter saying that 2013 "looks really bad and we are preparing financial projections to see whether we have enough cash to get through the year in the hope that [counsel for the Wife] desists from trying to value the company on date of divorce rather than date of separation."

[247] The *Rules of Court* provide as follows:

> 34(23) In giving an opinion to the court, an expert appointed under this rule has a duty to assist the court and that duty overrides any obligation the expert may have to any party or to any person who is liable for the expert's fee or expenses.

[248] In spite of the reality that a date of trial valuation may be relevant to the Wife's entitlements, Mr. Welsh did not provide any view on value to assist the Court at any other date than at the date of separation, with the exception of the adjusted net book value of the Husband's interest in the C. Group of Companies as at July 31, 1996, which was not an opinion of value.

[249] In the absence of a valuation report, counsel for the Wife submitted that shareholder equity values from financial statements could be used as an indicator of value. Although there was evidence given by Mr. Welsh at trial on the fallacy of using shareholder equity as a valuation method, I note that he was prepared to use this method to calculate the adjusted net book value of the Husband's shares as of July 31, 1996, to be taken into consideration on an unequal division of family assets in favour of the Husband.

[250] Nevertheless, the Reply sets out a number of reasons that shareholder equity cannot be relied upon as the only measurement of current value:

- It fails to consider changes to projected income;
- It fails to consider the changing commodity markets and the dramatic drop in exploration expenditures;
- It fails to take into account the risk factors associated with investments, equipment, inventory and accounts receivable in foreign markets;
- It fails to consider the reorientation of the family business from primarily asset based to primarily market and drilling based.

[251] The Reply also states that there is no evidence that the increased shareholder equity of the business has increased the fair market value of the Husband's shares because:

- Retained earnings are not the equivalent of cash available to shareholders particularly when a company operates in a cyclical market that requires the use of all available capital saving during a upswing to sustain itself during a downswing;
- Retained earnings belong to the company, not the Husband and the Wife only has a right to a portion of the value of the Husband's shares;
- The defendant bears the onus of proving the Husband's shares have increased in value since separation, and has failed to satisfy that onus.

[252] Counsel for the Husband submits that Mr. Goodburn could have performed a valuation at the date of trial and counsel for the Wife could have applied for an advanced costs funding. However, Mr. Goodburn was retained on a limited basis and, given the difficulties of obtaining disclosure, would not have the access Mr. Welsh had to the financial information on the C. Group of Companies.

[253] It is notable that, despite the fact that shareholders' equity does not equate with fair market value, there is a remarkable similarity between the aggregate values set out in the Valuation Report and shareholders' equity at the date of separation:

Company	Aggregate value as determined by Final Welsh Report		Shareholders' Equity based on Financial Statements
	Low	High	
Kluane Drilling	$6,100,000	$7,500,000	$6,061,000
Nahanni Drilling	$5,200,000	$5,300,000	$5,620,108
C. Holdings	0	0	$60,827
H. C. & Sons	$4,630,000	$4,630,000	$5,120,000
Loucheux	$630,000	$630,000	$425,220
Old Crow Industries	$370,000	$370,000	$62,912
Nahanni Paving	$470,000	$470,000	$352,566
Sub-Total	**$17,400,000**	**$18,900,000**	**$17,702,633**
C. Holdings pref shares	5 prefs @ $2,490/share = $12,450		
39055 Yukon Inc.	Not Valued	Not Valued	242,896

[254] I conclude from this evidence that shareholders' equity, although it cannot be equated with fair market value, is nonetheless a useful indicator of value when there is no other expert opinion available.

[255] I am left with the best evidence rule to determine the value of the Husband's interest in the C. Group of Companies at January 2013. In my view, the best evidence is shareholders' equity. Both Mr. Welsh and Mr. Goodburn agree that it is an indicator of value but cannot be equated with fair market value. Mr. Goodburn also said it was a high indicator of value.

[256] Thus, I am left not with a decision between competing expert opinions on fair market value but with the somewhat imprecise determination of value based upon shareholders' equity.

[257] The following table shows a comparison of shareholders' equity of the C. Group of Companies at January 31, 2007 versus at January 31, 2013, the latest figures available:

Company	Shareholders' Equity	
	As at 31/Jan/2007	As at 31/Jan/2013
Kluane Drilling	$6,061,216	$44,130,237
C. Holdings	$60,827	$590,227
H. C. & Sons	$5,120,000	$2,170,000
Loucheux Enterprises	$425,220	$419,731
Old Crow Industries	$62,912	$527,082
Nahanni Paving	$352,566	$254,572
Total	**$12,082,741**	**$48,091,849**

[258] Nahanni Drilling is a subsidiary of Kluane Drilling and its value is included in Kluane Drilling.

[259] This table indicates that shareholder's equity has increased by a factor of roughly four between 2007 and 2013.

[260] I calculate the approximate value of the Husband's interest at January 31, 2013, in the following table:

Company	Current shareholders' equity	Husband's current ownership interest	Wife's share of current shareholders' equity
Kluane Drilling	$40,000,000	8%	$3,200,000
C. Holdings	$590,227	8%	$47,218
H. C. & Sons	$2,170,000	8%	$173,600
Loucheux	$419,731	30%	$125,919
Old Crow Industries	$527,082	16.67%	$87,864
Nahanni Paving	$254,573	12.50%	$31,822
C. Holdings		5 prefs @ $2,490/share	$12,450
Total	**$43,961,613**		**$3,678,873**

[261] I accept the submission of counsel for the Husband that the $44,130,000 shareholders' equity is an overstatement and hence the figure of $40,000,000 is more appropriate for Kluane Drilling. There is also a disagreement about whether the Husband's 8% interest in Kluane Drilling is really closer to 4% as a result of the estate freeze. Whether the 8% figure is notional depends upon the conclusion of the estate

freeze in 2008, which left the Husband out because of the Court Order dated April 12, 2007 that restrained the Husband from disposing of any family or non-family assets. As the Husband's estate freeze interest will be determined after this decision, it would be speculative to conclude it is notional. I also note that the Husband admitted that his interest in Kluane Drilling changed from 4% to 8% effective January 1, 2009.

[262] The result of this imprecise valuation approach is that I can only really conclude that the Husband's interest in the C. Group of Companies has a value in the range of $3 million plus the shareholder loans.

[263] Counsel for the Husband does not concede that the Wife should receive compensation for the delay in receiving her half in the Husband's share of the family assets, which she was entitled to as of December 12, 2006. However, in the event that I do decide that the Wife should be compensated for not having access to her interest in the Husband's shares and shareholder loans, counsel for the Husband submits that reasonable compensation would be a compound interest rate at 4% on a settlement of $1 million, which she calculates to be an additional $300,000. In my view, this would correspond with a "fee-for-service" or "value received" rather than the "value surviving" approach, which I find to be more appropriate as the Wife was deprived of both her share in the Husband's interest and the shareholder loans that contributed to the financial success of the C. Group of Companies.

ANALYSIS OF UNEQUAL DIVISION

[264] There are two family assets that counsel submit should be divided into unequal shares. Counsel for the Husband submits that the Family Home should be divided in unequal shares favouring the Husband. Counsel for the Husband also submits that the Husband's interest in the C. Group of Companies should be divided unequally in favour

of the Husband at the valuation on the date of separation. Counsel for the Wife sought an equal share at a valuation on the date of trial.

Family Home

[265] Counsel for the Husband submitted that he had purchased the land around 1986 and had the house built in 1988. Counsel calculates the value at that time was approximately $115,000 and submits that this should be deducted from the valuation of $224,000 at the date of separation so that the Husband would receive $115,000 plus $54,000 and the Wife would receive $54,000. Counsel for the Husband relies upon s. 13(d), the date of acquisition and s. 13(f), any other circumstance related to acquisition and improvement. Counsel submitted that the improvement work by the Wife's father should not be credited to the Wife.

[266] Counsel for the Wife, based upon a May 30, 2012 appraisal of $390,000 submits that equal division should be ordered as of that date. Counsel submits that an occupation rent of approximately $2,000 per month should be considered, which could be in the range of $168,000 over the period 2007 – 2014, less maintenance and taxes, when the Husband had sole occupancy of the Family Home. I have previously indicated that the Husband's offer of the Family Home to the Wife and children after date of separation, provided that she reside there without the new spouse, was disingenuous.

[267] In my view, given the duration of cohabitation of approximately 10 years and the fact that the Wife contributed the lion's share to child care and household management while they cohabitated, the presumption of equal division of the Family Home should not be disturbed. In my view, measuring relative contributions or making fine distinctions with respect to financial contribution to the Family Home would not be appropriate where the cohabitation in marriage is medium to long and the child care and household

management contribution by the Wife is significant. The Husband's financial contribution is not a sufficient basis upon which to rest a finding that equal division is inequitable. As the value of the Family Home has fluctuated since the date of separation, I order that the Family Home be sold and the Husband and Wife share equally in the proceeds after necessary deductions.

The C. Group of Companies

[268] Counsel for the Husband also seeks unequal division of his interest in the C. Group of Companies on s. 13 factors as follows:

a) The period of cohabitation under marriage is only 10 years;

b) The shares were gifted to the Husband by his father (s. 13(d) and (e));

c) The Husband contributed to the C. Group of Companies over 20 years before the marriage (s. 13(b), (d) and (f));

d) The Husband is 53 years old and has worked in the C. Group of Companies for nearly four decades (s. 13(f));

e) The whole C. family has been engaged in the business prior to the marriage, during the marriage and after the marriage (s. 13(f)).

[269] I do not take issue with the facts stated by counsel for the Husband. However, it does not take into consideration s. 13(g), the date of valuation and its impact on the division of this family asset. Based on the evidence and witnesses I have heard, s. 13(g) is a very significant factor in this case. The delay in and lack of disclosure by the Husband has rendered an equal division of the asset based on its value at the date of separation inequitable.

[270] The Husband was ordered by this Court to produce his financial disclosure "in a timely manner" with respect to all companies, businesses, and partnerships in which he

had a legal, beneficial or equitable interest. He substantially failed to do that for six years. He produced Mr. Welsh's Valuation Report in July 2012. However, he also proceeded to do an estate freeze in 2008, which specifically would have required a valuation of the business assets that could have provided a basis for a Valuation Report or a basis for the Wife, with disclosure, to assess the value of family assets at date of separation. Unfortunately, the Wife was not able to learn the true value of the family assets until the trial, and then the information was provided over a period of eight months and the process fraught with ongoing disclosure issues. There is an aspect of pre-trial misconduct to this, but that is a matter to be addressed in costs, as punishment for pre-trial conduct is not a consideration under s. 13. In my view, however, the Husband had the exclusive use of a significant family asset and I find that the delay and lack of disclosure makes an equal division of the value at date of separation inequitable.

[271] There is also the fact that the shareholder loans, also a family asset of which the Wife was entitled to an equal share at date of separation, were used by the Husband to finance the C. Group of Companies during a period of significant profitability. The Husband also used his shareholder loan accounts to run his personal affairs. In fairness, it must be acknowledged that some of this money was used for support of the Wife and children. However, the main purpose of the shareholder loan accounts was to keep the C. Group of Companies financed.

[272] I conclude that an equal division of the Husband's interest in the C. Group of Companies at the date of separation is inequitable for the Wife.

[273] In so finding, I nonetheless acknowledge that the contribution of the Husband and his family to the increase in value of the C. Group of companies, as well as the Husband's pre-marriage contribution, must be given consideration.

[274] I conclude that the Wife should receive $1 million of the Husband's interest in the C. Group of Companies.

[275] In summary, my division of family assets based on a review of the s. 13 factors and a finding that an equal division of the Husband's interest in the C. Group of Companies at date of separation would be inequitable, results in the following division of family assets:

Family Assets	Value at Date of Separation	Wife's Share
Nahanni Drilling shares	$342,000	$171,000
C. Group of Companies	$1,080,000	$1,000,000
Shareholder Loans	$702,622	$351,311
RRSPs	$106,092 (Husband's exceeds Wife's)	$53,046
Family Home	$224,000	½ of sale value
Totals	**$2,454,714**	**$1,575,357**

[276] The Wife's share must be reduced by $84,275 (1/2 of her non-RRSP investment) and her advance on capital in the amount of $119,000.

[277] I conclude that the application of s. 13 as I have interpreted and applied it does not require a finding of unjust enrichment and the application of the doctrine of constructive trust.

THE DOCTRINE OF CONSTRUCTIVE TRUST

[278] In the event that I am incorrect in applying s. 13(g) of the *Act* in the manner I have, I would have reached the same conclusion on the basis of the doctrine of constructive trust.

[279] If constructive trust can be applied, it permits a declaration of constructive trust at the time of separation and a valuation of assets at the time of trial rather than the date of separation as deemed by the *Act*.

[280] In *Rawluk*, a majority in the Supreme Court of Canada decided that the doctrine of constructive trust applied to married persons under the Ontario *Family Law Act*, 1986, S.O. 1986, c. 4 (now R.S.O. 1990, c. F.3). In that case, the value of the property in the husband's name had increased dramatically between the time of separation at June 1, 1984 and the date of trial in 1986.

[281] The Court began with the general rule that a legislature is presumed not to depart from prevailing law without an express intention to do so.

[282] The majority in *Rawluk* concluded at para. 55, that the *Family Law Act*, 1986, did not constitute an exclusive code for determining the ownership of matrimonial property. The majority concluded: :

> … The application of the remedy in the context of the Family Law Act, 1986 can achieve a fair and just result. It enables the courts to bring that treasured and essential measure of individualized justice and fairness to the more generalized process of equalization provided by the Act. That vital fairness is achieved by means of a constructive trust remedy and recognition of ownership.

[283] I conclude that where both spouses have contributed to the acquisition or maintenance of family assets, the spouse who does not have legal title may claim an interest by way of constructive trust and, where appropriate, a declaration of constructive trust may be made at the time the unjust enrichment arises. This could mean that the asset will be valued at date of trial, as the titled spouse holds the property in trust for the non-titled spouse. I note that McLachlin J. in her dissent in *Rawluk* did not say that the doctrine of constructive trust could not be applied to the *Family Law Act*, but rather, that the *Family Law Act* provided a remedy that must be considered before declaring a constructive trust.

[284] The case law in this jurisdiction supports the view that the doctrine of constructive trust can apply to property being divided under the *Act*.

[285] In *McRobb*, the court found that the question of constructive trust need not be adjudicated in that case because the shares of the company were family assets. Gower J. decided that s. 13 could have been applied if the equal division of family assets would be inequitable.

[286] However, counsel for Ms. McRobb submitted that the constructive trust issue must be addressed first. In declining to do so, Gower J. said this at para. 19:

> … The Family Property and Support Act has, for most purposes, displaced the need for the application of a constructive trust argument at common law. Under s. 5 of the Act, it is presumed that there will be an equal division of the family assets on marriage breakdown (I repeat, this is what Ms. McRobb seeks). And, if an equal division of the family assets would be inequitable, then s. 13 would apply and could result in an unequal division of the family assets. There are a number of circumstances set out in s. 13 which might give rise to an unequal division of family assets, including the date of valuation of the family assets.

[287] Thus, the doctrine of constructive trust has not been displaced in a permanent sense by the *Act*, but rather this Court has held that s. 13 of the *Act* should be considered first.

[288] The Supreme Court of Canada has further refined the law of constructive trust in *Kerr v. Baranow*, 2011 SCC 10, which included the case of *Vanasse v. Seguin*. Both cases dealt with common law spouses but also discussed the question of how to deal with an unjust enrichment arising in the context of a spousal relationship.

[289] The principle of constructive trust, applied to the case at bar, would permit recovery where the Wife can establish three elements: an enrichment of the Husband by the Wife, a corresponding deprivation of the Wife and an absence of a juristic reason

for the enrichment. The Supreme Court has taken a straightforward economic approach to the elements of enrichment and deprivation. The Wife must show that she has given a tangible benefit that the husband received and retained. The enrichment must correspond to the deprivation.

[290] The absence of a juristic reason means that there is no reason in law or justice for the husband to retain the benefit.

[291] Cromwell J. identified one basis for unjust enrichment at para 60:

> It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

[292] Cromwell J., at para. 47, stated that the first remedy to consider is a monetary award which will be sufficient in most cases. The proprietary award is appropriate when a monetary award is inappropriate or insufficient.

[293] The monetary award may be based on, but is not restricted to, “value received” or a “fee-for-service” basis. But where there is a joint family venture and no detailed accounting of the spouse’s contribution, the monetary remedy should be calculated on the proportionate contribution of the claimant to the wealth accumulated by the joint family venture, i.e. the “value surviving” approach (para. 81 – 87). There is no

presumption that the wealth be shared equally, nor should there be any component of punishment for the conduct of a spouse.

[294] Cromwell J. listed the relevant factors, which is not a closed list, to determine whether the unjust enrichment arose from a joint family venture as follows at para. 89:

a) Mutual effort;

b) Economic integration;

c) Actual intent; and

d) The priority of the family.

[295] He also stated that there is no presumption of equal sharing but stated that the enrichment should be assessed by the claimant's proportionate contribution to the accumulated wealth (para. 142). There are many ways in which such an award may be calculated.

[296] I also note that Cromwell J., for cases that were not joint family ventures, adopted the mutual benefit analysis by Huddart J. in *Wilson v. Fotsch*, *supra*, which concluded that mutual enrichments should be considered at the defence and remedy stages. Cromwell J. also approved the framework established by Huddart J., which I do not propose to follow step-by-step as I find there was a joint family venture between the Husband and Wife. A complicating factor is the fact that there is also a joint family venture of the C. family that comes into play, but in my view that can be addressed under the discussion of monetary award.

ANALYSIS OF CONSTRUCTIVE TRUST

[297] The doctrine of constructive trust requires the establishment of three elements:

1. An enrichment of the Husband;

2. A corresponding deprivation of the Wife; and

3. The absence of any juristic reason for the enrichment and corresponding deprivation.

[298] The categories of juristic reason include a contract, a disposition of law, or an intent of gift.

[299] This analysis applies to the Husband's interest in the C. Group of Companies and the shareholder loans.

[300] The enrichment of the Husband is established by the fact that the shareholders' equity in Kluane Drilling, as an example, has increased from $6,061,216 as at January 31, 2007, to $40,000,000 at January 31, 2013. How that increase should be valued is a difficult matter but I have previously concluded that the Husband's interest would be in the range of $3,000,000.

[301] As to the corresponding deprivation of the Wife, since separation, she has been unable to access her share of the Husband's interest in the C. Group of Companies or shareholder loans, which the Husband used to finance the enormous increase in shareholders' equity. There was a delay of seven years in producing the January 31, 2007 valuation of the C. Group of Companies, which is attributable to the Husband. He was under court order to make full financial disclosure of all the companies, businesses and partnerships in which he had a legal, beneficial or equitable interest as of April 12, 2007. He did not make reasonable financial disclosure until the Valuation Report of July 2012, followed by further court orders to produce. I find that the Valuation Report could have been completed in 2008 when the estate freeze took place. That delay, during which the Husband was using the Wife's money to increase the value of the C. Group of Companies, enriched the Husband and deprived the Wife correspondingly. The Husband also used the children's RESP and a jointly owned RRSP to enhance the cash

position of the C. Group of Companies. I should add that financing the C. Group of Companies through shareholder loans was particularly attractive to the C. family, as it allowed them to avoid relying upon financial institutions leery of the cyclical mining industry.

[302] I add that the deprivation of the Wife was not merely notional as she was unable to purchase a house without her family's financial assistance.

[303] There is no juristic reason for the enrichment.

[304] Therefore, I make the alternative finding of a constructive trust for the Wife in the Husband's share of the C. Group of Companies and his shareholder loans. I value the Wife's monetary award at $1,000,000 (1/3 of $3,000,000).

[305] The balance of the Wife's share of the family assets is the same as in paras. 275 and 276.

DISTRIBUTIVE TAXES

[306] In the matter of distributive taxes, Norman McIntyre testified that the Husband cannot take money from the company tax-free and would likely pay a tax of 27%. However, he can access funds from the sale of the family home and pay-out of his shareholder loans without tax consequences.

[307] I agree with counsel for the Wife that the general rule in family law is that distributive taxes are not taken into account in valuing the shares in a company, unless the taxes are imminent and calculable or will be necessarily incurred in the division of assets. Taxes which are not presently incurred ought not to be taken into consideration in a valuation because they are speculative and there is no positive reality that the companies will be sold or the taxes incurred.

[308] At this point, it is speculative to decide on the merits of deducting a distributive tax that has not been calculated or determined to be necessary. Indeed, there may be ways to divide the family assets with minimal tax consequences. Counsel for the Husband will be at liberty to apply for directions, if necessary.

SUMMARY

[309] I grant the divorce. The Wife is entitled to a division of family assets as follows:

Family Assets	Value at Date of Separation	Wife's Share
Nahanni Drilling shares	$342,000	$171,000
C. Group of Companies	$1,080,000	$1,000,000
Shareholder Loans	$702,622	$351,311
RRSPs	$106,092 (Husband's exceeds Wife's)	$53,046
Family Home	$224,000	½ of sale value
Sub-Totals	**$2,454,714**	**$1,575,357**
Wife's non-RRSP Investment		-84,275
Wife's advance on capital		-119,000
Total of Wife's share		**$1,372,082** (½ of sale value to be added)

[310] As stated, the issues of child support, spousal support, costs and distributive taxes, if any, will be addressed after counsel and their clients have had an opportunity to review this judgment.

VEALE J.