

CANADA / JUDGMENT

Cao v. Chen

2022 BCSC 2083

COURT

Supreme Court of British Columbia

DECIDED

30 November 2022

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2022 BCSC 2083 Cao v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cao v. Chen,

2022 BCSC 2083

Date: 20221130

Docket: E100233

Registry: Vancouver

Between:

Weihong Cao a.k.a. Wei Hong Cao

Claimant

And

Yongchang Chen a.k.a. Yong Chang Chen and Chao Chen

Respondents

- and -

Docket: S194328

Registry: Vancouver

Between:

Chao Chen

Plaintiff

And

Yong Chang Chen also known as Yongchang Chen and Jie Chen

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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C.H.C. Law

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The Respondent/Defendant Yongchang Chen appearing on his own behalf:

Y. Chen

Place and Dates of Trial:

Vancouver, B.C.

October 12-15, 18-22, 25-29,

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Place and Date of Judgment:

Vancouver, B.C.

November 30, 2022

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Introduction

- [1] The Chen family are of a litigious nature. There are multiple proceedings in British Columbia ("BC") and The People's Republic of China ("China"). These reasons address two actions started in BC. The first proceeding is a family law action filed on January 22, 2010 between the claimant, Weihong Cao (the ex-wife), and the respondents Yongchang Chen (the ex-husband) and Chao Chen (Yongchang Chen's son from a previous marriage). I will refer to this action as the "Family Law Proceeding". To distinguish between the respondents, I will refer to Yongchang Chen as Mr. Chen and to Chao Chen by his full name.
- [2] The second action is a breach of contract action filed on April 10, 2019 by Chao Chen against Mr. Chen and Jie Chen (the "CC Action"). Jie Chen is Chao Chen's half sister and the eldest daughter of Ms. Cao and Mr. Chen. I will refer to Jie Chen by her full name.

- [3] At the commencement of this trial I was advised of another action commenced by Mr. Chen, using the name Chad Chen, on March 2, 2021 against Chao Chen, Meng Lu, Chao Chen's wife, and 097055 B.C. Ltd., Chao Chen's company (the "2021 Action"). In this action Mr. Chen alleges that he purchased certain properties which were placed in the names of Chao Chen or 097055 B.C. Ltd. Mr. Chen alleges there was a verbal trust agreement between himself and Chao Chen and that Chao Chen was aware that the properties were intended for Mr. Chen's other minor children. Mr. Chen further alleges that Chao Chen transferred 50 percent of certain properties to his wife, Meng Lu.
- [4] I have seized myself of the 2021 Action since it involves some of the same properties at issue in the Family Law Proceeding.
- [5] I will begin with an overview of the parties and their background. I will address the procedural background of the Family Law Proceeding, since it involved an earlier trial on the issue of the enforcement of a Chinese judgment. I will provide a brief description of the properties at issue in the two actions and a listing of the issues in the Family Law Proceeding. A critical issue to be addressed is the credibility of the parties and certain called witnesses. I will address this issue next, since it impacts the factual findings I will make. I will then address the issues in the Family Law Proceeding, followed by the issues in the CC Action.
- [6] The reasons reference both the Canadian dollar and the Chinese Renminbi ("RMB"). All currencies are in Canadian dollars, unless otherwise noted. The yuan sign ("¥") is used to denote RMB.

Overview of the Parties

- [7] Ms. Cao was born in February 1970 and is currently 52 years old. She was born in China. Ms. Cao speaks and understands only a little bit of English. Ms. Cao became a permanent resident of Canada on January 24, 2007 and arrived in Canada in May 2007. Ms. Cao has a vocational school certificate in accounting.
- [8] Mr. Chen was born in May 1954 and is currently 68 years old. He completed his elementary school education and graduated from driving school. Mr. Chen acted on his own behalf. His comprehension of oral and written English was limited. Both Ms. Cao and Mr. Chen testified through a Mandarin interpreter.
- [9] Mr. Chen and Ms. Cao were married on January 25, 1994, at Weifang, Shandong province, China. Mr. Chen and Ms. Cao have three children together: Jie Chen born August 1994; H.C., born April 2004; and J.C., born October 2005 (collectively, "the Children"). Mr. Chen and Ms. Cao separated on September 14, 2009. Mr. Chen filed a legal action seeking a divorce in China. After separation, they lived separately under the same roof until Ms. Cao and the Children moved to 6650 Wiltshire Street, Vancouver, ("6650 Wiltshire") in approximately May 2015.

- [10] Chao Chen was born in February 1982 in China and is currently 40 years old. Mr. Chen and Chao Chen's mother, Min Liu, divorced in 1992. Chao Chen's mother was granted custody of him. He attended a boarding school in China for a period of time and then attended a junior college in Jinan, the capital city of the Shandong province, from 1998 to 1999. In 2000 he moved to Beijing. From 2000 to 2003, Chao Chen testified that his work was advising businesses and facilitating connections, and generally "making friends". In February or March 2003, he moved to New Zealand to attend university; however, he primarily worked and studied only on a part-time basis. He returned to China in December 2006. Chao Chen testified that he is a business man. Chao Chen testified through a Mandarin interpreter although it was clear his command of English was vastly superior to the other parties.
- [11] Jie Chen is currently 28 years old. Upon arriving in Canada, she was enrolled in grade eight at a BC school. In 2013 or 2014, she attended the University of British Columbia and studied geology. She received her graduation certificate in May 2021. In May 2022, Jie Chen returned to China since Mr. Chen asked her to work for his company. She is waiting to get her work permit.
- [12] Mr. Chen, Ms. Cao, the Children, and Chao Chen immigrated to Canada on May 1, 2007. At that time, the couple were having marital difficulties. Ms. Cao testified that Mr. Chen had become involved with a woman, Guang Tan Yao, that worked for the company. I note that this was one of the witnesses that Mr. Chen called from China.
- [13] Coming to Canada, the plan was that Ms. Cao and the Children would live in Vancouver, where the Children would go to school, and to buy a property to live in. Later, the couple decided to purchase properties as investments. At issue in the Family Law Proceeding are a variety of properties purchased in BC.

Procedural Background of Family Law Proceeding

- [14] The Family Law Proceeding was commenced by way of a writ of summons and statement of claim filed on January 22, 2010 by Ms. Cao. Ms. Cao sought a divorce, sole guardianship and custody of the Children, maintenance and support for herself and the Children, division of family assets, and a trust claim respecting certain property in BC. As she began these proceedings before the Family Law Act, S.B.C. 2011, c. 25 [FLA] was introduced, the division of property is governed by the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]: FLA s. 252.
- [15] On March 30, 2010, Mr. Chen filed a statement of defence in this action in which he did not oppose a division of family assets situated in Canada, but claimed reappportionment in his favour. He took the position that if the BC court took jurisdiction, Ms. Cao should have sole custody of the Children, provided he have joint guardianship and specified access. He opposed maintenance or support for Ms. Cao, but he did not oppose the Children's primary residence being with Ms. Cao. He also agreed to pay child support on a monthly basis.

- [16] On March 30, 2010, Chao Chen filed his statement of defence in which he disputed that any of the properties registered in his name formed part of the family assets.
- [17] On June 9, 2010, Mr. Chen filed a counterclaim seeking a reapportionment of assets in Canada in his favour and declarations respecting Ms. Cao's assets on the basis of constructive trust, resulting trust, or express trust. In his pleadings, Mr. Chen set out that the Children's habitual residence has been BC since 2008 and 2009.
- [18] On June 28, 2010, Ms. Cao filed a statement of defence to the counterclaim opposing both joint guardianship and the division of assets in Canada being reapportioned to Mr. Chen.
- [19] During this time, Ms. Cao and Mr. Chen were also involved in a family law matter in China. On January 21, 2013, the People's Court of Fangzi District in Wei City, China gave reasons, which were upheld on an appeal to the Intermediate Court of Weifang City, China on June 10, 2013 (collectively the "Chinese Judgment"). A trial proceeded before me in May and November of 2019 on the issue of whether the Chinese Judgment should be recognized in BC ("First Trial"). I gave reasons, indexed at 2020 BCSC 735 (the "Reasons") on May 13, 2020. I made the following orders with respect to the enforceability of the Chinese Judgment:
- a) The Chinese divorce decree is recognized in BC;
 - b) The Chinese order that did not grant spousal support to Ms. Cao is recognized in BC;
 - c) The Chinese orders respecting custody and child support are not recognized in BC, with BC being the appropriate forum in which to determine any further issues, including custody and support, respecting the Children; and
 - d) BC is the appropriate forum in which to consider the claims respecting property situate in BC.
- [20] In respect to the issue of spousal support I made the following comment in my Reasons:
- [213] I would add that this finding does not preclude the claimant from making any arguments at the trial on the division of the British Columbia properties that the denial of spousal support is a relevant factor to be considered in the appropriate division of the British Columbia properties.
- [21] On March 24, 2016, Ms. Cao filed an amended notice of family claim, seeking the same relief as in the original writ of summons and statement of claim, and an order for the division of family property and certificates of pending litigation to be registered against five additional properties in BC.
- [22] On May 9, 2016, Chao Chen filed his response to the amended family claim. He took no position on the claims for divorce, parenting arrangements, or child and spousal support. He disagreed with the claims made respecting the properties he held in his name.

- [23] On May 12, 2016, a consent order granted by Master Muir (the "Muir Order") provided that Mr. Chen pay Ms. Cao \$6,000 per month for support commencing June 1, 2016 and on the first day of every month thereafter. The payment was without prejudice to either party's argument with respect to the quantum of support and to its characterization. The parties were represented by counsel when they consented to the Muir Order.
- [24] On August 22, 2017, Mr. Chen filed his response to the amended family claim. The response states it is being filed on behalf of Mr. Chen and Chao Chen, although Chao Chen had already filed a response on May 9, 2016. Mr. Chen's position was that a divorce had already been granted in China, child support and spousal support had been determined in China, and he disagreed with the orders sought with respect to property.

Properties at Issue

- [25] In the Family Law Proceeding there are eight properties at issue. They are divided between properties registered in the name of Mr. Chen and those registered in the name of Chao Chen.
- [26] The three properties registered under the name of Mr. Chen are (collectively, the "Three Properties"):
1. 721 Southborough Drive, West Vancouver ("721 Southborough") purchased on January 8, 2009, with an estimated appraised value of \$3.3 to \$3.5 million;
 2. 19459 Richardson Road, Pitt Meadows ("19459 Richardson") purchased on October 10, 2012, with an estimated value of \$3.8 million based on submissions by Ms. Cao. There was no appraisal evidence produced; and
 3. 610 Stewart Cassiar Highway, Prince Rupert ("610 Stewart") purchased on July 16, 2009, with an estimated value of \$310,000 based on submissions of Ms. Cao. There was no appraisal evidence produced.
- [27] The five properties registered under the name of Chao Chen are (collectively, the "Five Properties"):
1. 570 Southborough Drive, West Vancouver ("570 Southborough") originally purchased by Mr. Chen and then transferred to Chao Chen on November 11, 2009, with an estimated value of \$3.8 million based on a joint submission of counsel;
 2. 6200 Semlin Court, Richmond ("6200 Semlin") purchased on March 25, 2008, with an estimated value of \$1.9 million based on a joint submission of counsel;
 3. 11480 Granville Avenue, Richmond ("11480 Granville") purchased on April 9, 2008, with an estimated value of \$1.5 million based on a joint submission of counsel;
 4. 1064 Eyremount Drive, West Vancouver ("1064 Eyremount") purchased on October 30, 2008, with an estimated value of \$3.4 million based on a joint submission of counsel; and

5. 7575 Carnarvon Street, Vancouver ("7575 Carnarvon") purchased on November 13, 2009, with an estimated value of \$8.8 million based on a joint submission of counsel.
- [28] Ms. Cao submits that the Three Properties registered under the name of Mr. Chen are family assets. She submits that the Five Properties registered under the name of Chao Chen are held in trust for Mr. Chen and are family assets of Mr. Chen and Ms. Cao.
- [29] Mr. Chen appears to agree that the Three Properties registered in his name are family assets and has agreed that 721 Southborough should be transferred to Ms. Cao. His position on what should happen with 19459 Richardson and 610 Stewart is not entirely clear.
- [30] Chao Chen disputes that the Five Properties registered in his name are subject to any trust. He claims they are his properties and that he paid for them, obtained financing, and has continued to maintain them since their purchase.
- [31] Mr. Chen's position respecting the Five Properties is unclear. At different points in the trial he claimed that he could not recall who paid for the Five Properties, but on other occasions he claimed that he paid for them. These Five Properties are also subject to the 2021 Action, in which Mr. Chen alleges that the Five Properties, and other property as well, are being held by Chao Chen in trust and that Mr. Chen paid the purchase price for all the properties.
- [32] In the CC Action there are two properties at issue, the first being 6650 Wiltshire. This property was sold in late 2020 and the net proceeds of sale are currently being held in trust by counsel for Chao Chen. The second property is 3399 Deering Island Place, Vancouver ("3399 Deering Island"), to which Jie Chen claims a beneficial interest on the basis of a trust agreement between Chao Chen and Mr. Chen.

Issues in the Family Law Proceeding

- [33] The following issues arise:
1. What is Mr. Chen's income and should income be imputed to him?
 2. What is Ms. Cao's income and should income be imputed to her?
 3. For what time period should the retroactive child support be paid?
 4. What is the appropriate amount of retroactive child support that should be paid by Mr. Chen?
 5. What assets registered under the name of Mr. Chen are family assets?
 6. What are the value of the family assets?
 7. How should the family assets be divided?
 8. Are the Five Properties held in trust by Chao Chen for Mr. Chen?
 - a. If so, are they family assets?

- b. If so, how should they be apportioned between the parties?
- 9. Should there be an order relating to parenting time and ongoing child support made at this time?
- 10. Should an order for costs be made in the Family Law Proceeding?

Reliability and Credibility of the Parties and Witnesses

[34] Before I consider each of the specific issues in the Family Law Proceeding, I will address my findings on the credibility and reliability of the evidence of the parties and the witnesses. I begin with the applicable legal principles.

Legal Principles

[35] The factors to be considered when assessing credibility are usefully summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392. Justice Wilkinson has articulated these factors in the following questions:

- 1. Is the witness able to resist the influence of interest in modifying their recollection?
- 2. Does the witness' evidence harmonize with independent evidence that has been accepted?
- 3. Does the witness change their evidence during examination for discovery, direct examination and cross-examination, or is it otherwise inconsistent in their recollections?
- 4. Does the witness' evidence seem generally unreasonable, impossible, or unlikely?
- 5. What demeanour did the witness exhibit when testifying?

M.L. v. R.H., 2022 BCSC 1580 at para. 25.

[36] Such an assessment is aimed at considering whether the evidence is "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356, 1951 CanLII 252 (B.C.C.A.).

[37] Of some significance is that much of the trial concerned events that happened in China and customs that operated in that country. Further, much of the testimony was provided through the use of interpreters. Assessing credibility in this context, I am mindful of the comments of Justice Griffin in *Fu v. Zhu*, 2018 BCSC 9:

[39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact...

- [40] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.
- [41] As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.
- [42] On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.

I need to be aware that cultural differences and customs may be at play. I must not make any common-sense assumptions that are not grounded in the evidence or appropriately supported by judicial notice: *R. v. Pastro*, 2021 BCCA 149 at para. 40.

Mr. Chen

- [38] Mr. Chen was called as the first witness by Ms. Cao in the Family Law Proceeding. This allowed for Mr. Chen to be cross-examined by counsel and then provide some direct evidence of his own. He also took the stand as part of his own case. In total, Mr. Chen was on the witness stand for approximately 9.5 days. During this time Mr. Chen gave contradictory evidence many times.
- [39] There were many aspects of Mr. Chen's testimony that were troubling. First, the manner in which Mr. Chen gave his evidence was worrisome. In his direct evidence Mr. Chen was rambling, disjointed, and touched on many irrelevant issues. On many occasions he refused to answer questions by counsel, instead providing speeches, most of which were non-responsive to the questions posed.
- [40] Second, at both his discovery and at trial, Mr. Chen described his memory as poor and referenced losing his memory. By way of example, he could not recall that he divorced his first wife in 1992, whether he was a truck driver, nor whether Chao Chen was a student in New Zealand. He claimed he did not recognize his own bank statement and documents that had been listed on his own lists of documents. He went so far as to claim he suffers from amnesia and that his memory was so bad he was close to a collapse.

[41] Third, Mr. Chen refused to answer questions relating to documents that were photocopied. He claimed that he did not recognize photocopied documents, that photocopies were "useless", and that he needed to see original documents. This included copies of documents such as his own bank statement.

[42] Fourth, Mr. Chen took issue with his signature on many documents. He could not confirm it was his signature on the filed notice of civil claim in the 2021 Action that he filed as a plaintiff. He denied he signed a power of attorney between himself and Jie Chen dated April 27, 2015. Jie Chen confirmed that the power of attorney was signed. He also denied that his signature was on cheques payable to Ms. Cao. He claimed his signature had been forged on many of the corporate documents respecting the Chinese companies. He further claimed many documents were false and forged, including documents that had been listed on his own list of documents.

[43] Fifth, Mr. Chen repeatedly gave testimony that contradicted both his own testimony and other evidence. For example:

- Mr. Chen testified that he had very little to do with Chao Chen and did not have a good relationship with him from the time they came to Canada up to the present. Yet he agreed that he signed a power of attorney whereby Chao Chen appointed Mr. Chen as his agent in relation to his financial affairs on May 6, 2015.
- He claimed that after he immigrated to Canada he "basically" did not return to China and that he let Chao Chen handle all matters in China. He testified that over the past 16 years he has only returned to China for two or three months. Later during cross-examination, he stated that he had not been back to China for 16 years. On another occasion he claimed he had not been back to China for 20 years. This is contradicted by Mr. Chen's own passport and Ms. Cao's evidence that Mr. Chen frequently returned to China to work.
- He initially claimed he could not remember how he ended up purchasing properties in Canada and claimed he had "forgot". Yet later he testified that he had paid for all of the properties purchased in Canada.
- He initially claimed that he could not recall residing at 7575 Carnarvon, and later testified that he had lived there for a number of years.
- He claimed that he never gave the answers recorded in the certified discovery transcript.
- He initially testified he did not know who Shan Min Hou was and that a share transfer agreement to Mr. Hou was fake. He later testified that he had transferred the shares in the company to Mr. Hou.
- Jie Chen testified that her father told her that she could work for his company in China. She was in China at the time of the trial and was considering whether to work for her father's company. Mr. Chen testified that he does not have any company in China and that he denies he asked his daughter to work for his company. I accept Jie Chen's evidence over Mr. Chen's evidence.

· Mr. Chen denied that he had any further participation in the 2021 Action, but then agreed that he attended a summary trial that Meng Liu had brought.

· Mr. Chen claimed he sleeps on a cot and uses a cooking stove, producing photos in support of this claim. The evidence supports that he is living at 6200 Semlin and has been living there for many years. I note that 6200 Semlin was purchased for over \$1.2 million in March 2008.

[44] Sixth, Mr. Chen made a number of exaggerated claims. Mr. Chen claimed that the process of giving evidence was akin to being tortured. He claimed he was unable to answer questions since he was too tired and was on the verge of a breakdown while being cross-examined. He claimed that he "almost jump off a building" and that he was "about to die". He stated that: "I'm going to, like, kill myself as soon as I leave the door. You're forcing me - you're making me crazy. I hope to die now." On another occasion during cross-examination he claimed that he was having a mental breakdown. On a further occasion he claimed he felt "like dying". In my view, these dramatic outbursts were being used by Mr. Chen to avoid having to answer questions under cross-examination.

[45] In addition to his troublesome testimony, Mr. Chen exhibited further alarming behaviour. He made allegations against some of Chao Chen's witnesses, accusing one of being the head of organized crime, lying, and being a scammer. He led no evidence to support such serious allegations.

[46] Mr. Chen made reprehensible allegations against counsel acting for the other parties. His accusations against counsel included:

- a) lying to the Court;
- b) providing false evidence and fraudulent documents to the Court;
- c) trying to frame him;
- d) slander;
- e) having a mental breakdown;
- f) stealing his passport;
- g) stealing a bank account;
- h) generally being "despicable"; and
- i) generally breaking the law and engaging in "illegal stuff".

[47] He also swore at counsel and threatened to sue them.

[48] Mr. Chen claimed that he would be able to prove the various allegations he made. He did not do so and led no evidence to support the numerous allegations.

- [49] Mr. Chen further did not comply with a court order that I made. He was ordered on October 15, 2021 to provide the name and contact information for the "friend" he said was managing the rental of 721 Southborough. He never provided this information.
- [50] There were also other serious concerns respecting Mr. Chen's behaviour in court. This included his "bullying" behaviour towards some of the interpreters, making gestures when witnesses were testifying, and an incident where Mr. Chen grabbed Chao Chen during a court break and physically dragged him from the courtroom. These behaviours, and his refusal to properly answer questions posed by counsel, demonstrated a great deal of disrespect for the court process.
- [51] That said, at all times Mr. Chen showed respect towards me as the trial judge and attempted to follow my instructions to him.
- [52] These issues raised a substantial concern on the veracity and reliability of Mr. Chen's evidence. There is very little of Mr. Chen's evidence I can rely on unless corroborated by other witnesses or documents.

Witnesses Called by Mr. Chen

- [53] There were two challenges presented by Mr. Chen's calling of witnesses. The first challenge was that Mr. Chen had not provided notice in his trial brief that he was calling any witnesses. As a self-represented litigant, I agreed to allow him to call witnesses, so long as he gave reasonable notice to the opposing parties of their names, and provided will-say statements of their proposed evidence. Mr. Chen did provide the will-say statements, although just prior to the date the witnesses were scheduled to testify.
- [54] The second challenge was how Mr. Chen called his witnesses. On November 5, 2021, day 19 of the trial at 2 p.m., Mr. Chen had arranged for 11 individuals to be in a boardroom in Beijing to testify via video conferencing. All of the individuals were seated at a long table with their own microphone. They all had what appeared to be a prepared script in front of them.
- [55] I advised Mr. Chen that only one witness could give evidence at a time and the other individuals had to leave the room. Ultimately, Mr. Chen called five witnesses: Zhao Shili, Xiang Qian Chen, Tao Zhu, Gen Sheng Shui, and Guang Tan Yao.
- [56] Mr. Chen first called Zhao Shili. Mr. Chen initially sought to have Mr. Shili give evidence on behalf of three other individuals who could not make it. I refused to allow him to give evidence about another individual's knowledge.
- [57] Mr. Shili described himself as the legal consultant for the Shouyang Zhongshen Wei Ye East Bay Coal Mine Special Railway Line Company ("Special Railway Line Company"). He has held that position for a "few months." He has been a lawyer since 2012. Mr. Chen asked him to give evidence on this company's lawsuits and the decision from the Chinese court.

- [58] Mr. Shili commenced reading from a decision from a Chinese court involving a lawsuit between Chao Chen and Xiang Qun Chen. The court decision was dated May 15, 2020. Ms. Blake advised that the lawsuit has gone through the Chinese court and it is now at the retrial process.
- [59] Ms. Blake had the opportunity to cross-examine Mr. Shili; however, Mr. Forrester did not. The afternoon break was taken with the plan that Mr. Forrester would conduct his cross-examination of this witness after the afternoon recess. Mr. Shili was not present in the boardroom after the afternoon break. The explanation given by Mr. Chen was that he thought Mr. Shili was finished testifying and he told Mr. Shili he could leave. Immediate attempts to contact Mr. Shili and have him return failed.
- [60] Mr. Chen was directed to have Mr. Shili return to give evidence later in the trial. Mr. Shili never returned.
- [61] I put little weight on the evidence of Mr. Shili. He was not the lawyer for the Special Railway Line Company at the crucial times. He has no direct evidence to give on the key issues.
- [62] The second witness Mr. Chen called was Xiang Qian Chen. He explained he is the current executive director of the Special Railway Line Company. He was nominated into this position by the "great Chen Family" in May 2020. He is Mr. Chen's cousin. Xiang Chen confirmed that when Mr. Chen left China, Mr. Chen transferred the equity share of the company to other members of his family. This witness claimed that the family transferred all the money over to Canada. He stated that the extended family hoped to invest in the mining industry and real estate in Canada. He testified that the "family asset" had been sold by Chao Chen.
- [63] Xiang Chen testified that the original shareholders of Zhongsheng Guodian Investment Group Limited ("Zhongsheng Company") were Liang Zhi Chen, the witness's father, and Kun Jun Chen, the witness's uncle. He testified that the asset had been transferred to Chao Chen's first father-in-law and present father-in-law. Xiang Chen claims that the signatures of the original shareholders were forged by Zhi Guo Lu. The assets of the company were sold off in 2018. This witness completed his evidence and was cross-examined by counsel.
- [64] I am not persuaded that this witness's credibility was impeached or that he was misrepresenting the facts. The relevance of this witness's testimony will be canvassed when considering his evidence along with the other trial evidence.
- [65] The third witness Mr. Chen called was Tao Zhu, who described herself as working for the great Chen family for over 20 years as the finance manager. She started working for the Special Railway Line Company in 2000. She explained she started working for the great Chen family before the company was established, first working for the restaurant. She worked in a bookkeeping role at the Special Railway Line Company. Ms. Zhu testified that she was responsible for the transfer of money to Mr. Chen for his equity shares as well as the funds accumulated by the great Chen family.

- [66] Ms. Zhu produced a remittance form dated August 7, 2009 for \$50,000 US that she testified came from the great Chen family's company. She confirmed that money transfers were made between 2008 and 2013. During this time, Chao Chen was not in control of the Special Railway Line Company. He came many years later.
- [67] Ms. Zhu agreed that the money the employees were remitting to Canada was Mr. Chen's money.
- [68] Ms. Zhu testified that Mr. Chen was the initial owner and legal representative for the Special Railway Line Company, but later sold it. Ms. Zhu confirmed that she had never met Chao Chen. She confirmed that she sent wire transfers to Canada to accounts designated by Mr. Chen. She testified when she wired money to Chao Chen it was on Mr. Chen's instructions.
- [69] This witness could not distinguish whose money it was that was wire transferred, since her view was that the company's money was the great Chen family's money. She confirmed she was not sure where the money came from.
- [70] Ms. Zhu denied Ms. Blake's suggestion that she was fired by the Special Railway Line Company in 2013.
- [71] Mr. Forrester and Ms. Blake completed their cross-examinations of this witness.
- [72] Chao Chen submits that since Ms. Zhu is an employee of the Special Line Railway Company she is not unbiased. This is not a basis to reject the credibility and reliability of her evidence. In my view, Ms. Zhu's credibility was not challenged, but I was left with the impression that Ms. Zhu lacks any in-depth knowledge of the company's finances. She was a bookkeeper that followed the instructions she was given.
- [73] The fourth witness Mr. Chen called was Gen Sheng Shi who was the Special Line Railway Company's accountant. He has worked for the company for 20 years. He testified that from 2008 to 2013 he was involved in the money transfers. He testified that later on Zhi Guo Lu managed the company and sold off numerous company assets, but that the funds were not received by the company. Mr. Shi testified that between 2017 and 2018 individuals transferred out "4.33 million" from the company.
- [74] Mr. Shi agreed that Mr. Chen incorporated this company in 2004. Mr. Shi confirmed that many employees sent remittances. Mr. Shi testified it was not Mr. Chen who instructed that the remittances be made, but Lin Lin Chen. Mr. Shi described Lin Lin Chen as the "company's leader", starting in approximately 2008 or 2009. Lin Lin Chen is Mr. Chen's younger sister. Mr. Shi testified that in 2007 to 2009 he did not even know Chao Chen and Chao Chen was not involved with the Special Railway Line Company.
- [75] Mr. Forrester completed his cross-examination. Ms. Blake started her cross-examination and intended to continue after the afternoon recess. When the Court reconvened, Mr. Shi advised that he needed to finish so he could take a rest since he had been waiting for days to testify. He stated he would only answer questions for five more minutes. Ms. Blake

continued asking questions about a bank statement that had been produced. After five minutes Mr. Shi advised that "Five minutes is up" and he got up and left the video conference. Ms. Blake sought an order that the witness's entire evidence be disregarded on the basis that she was not able to complete her cross-examination.

- [76] The fifth and final witness Mr. Chen called was Guang Tan Yao. At the commencement of her evidence I instructed her that she would have to make herself available to answer the questions of not only Mr. Chen, but also the two lawyers. Ms. Yao agreed.
- [77] Ms. Yao testified that the company purchased three properties in Taiyuan and one property was put in Chao Chen's name. She claimed that she paid for the property, using her own money and a loan, but the title was not transferred to her. She claims she has started a civil action to address the delay in transferring the title.
- [78] She further testified that she worked for the great Chen family for over 20 years. She and Tao Zhu handled the money transfers. She testified the money that was transferred consisted of money to Mr. Chen for shares and money from the great Chen family. The money was transferred to accounts designated by Mr. Chen, including to Chao Chen's account.
- [79] Ms. Yao also gave evidence about a signature being forged in 2018 and using the company for collateral.
- [80] Ms. Yao confirmed that she understood that Mr. Chen was the founder of the Special Railway Line Company.
- [81] Nearing the end of Mr. Forrester's cross-examination, he suggested to the witness that she had a personal relationship with Mr. Chen, which she denied. Mr. Forrester then suggested she had an affair with Mr. Chen in 2006 and 2007, which she also denied. It was clear that the witness was upset when these questions were put to her.
- [82] At the end of the day this witness agreed to return the next day. She did not return the next day. Mr. Chen explained that she refused to attend for a number of reasons: she was experiencing significant stress, she had been awake for many nights waiting to testify, and she was insulted by Mr. Forrester's accusations. As a result, Ms. Blake was denied the opportunity to cross-examine this witness.
- [83] I place little weight on the witnesses Mr. Shili, Mr. Shi, and Ms. Yao, who refused to complete their cross-examination. Cross-examination is of "central importance in determining whether a witness is credible": *R. v. Osolin*, [1993] 4 S.C.R. 595 at 663, 1993 CanLII 54. Further, it assists the court in assessing the probative value of evidence, protects trial fairness, and supports the court in being informed of all the evidence pertaining to the issues: *Mayer v. Mayer*, 2012 BCCA 77 at paras. 80-81.

Ms. Cao

- [84] Overall, I find that Ms. Cao gave credible and reliable evidence. She provided straightforward evidence and conceded when asked questions outside of her own knowledge. I accept her evidence of her involvement in the businesses in China. I find two areas of Ms. Cao's evidence concerning.
- [85] Ms. Cao confirmed that she had provided full and accurate information about her income to the Canadian government when she filed her tax returns. Later in her direct evidence, when being asked about her 2015 tax return, Ms. Cao volunteered that she had declared income that was not hers. She claimed that the income was earned by a friend and that she claimed this income on her tax return to reduce her friend's taxes. She tried to distance herself from this by suggesting that it was an accountant who suggested this course. Ms. Cao should be aware that making a false declaration on an income tax return is an offence contrary to the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). As a taxpayer in Canada she is obligated to be honest when completing her tax returns.
- [86] In much the same fashion, she appeared to try and distance herself from the sworn evidence in her financial statement in which she stated she had expenses of just over \$600,000. She tried to claim that it was her lawyer's fault for making an error on the amount of her expenses. I note that the lawyer who was representing Ms. Cao, being Mr. James Chen, spoke Mandarin.
- [87] These two matters do lead me to question Ms. Cao's judgment, particularly when testifying about her own financial circumstances.
- [88] I also accept that Ms. Cao has limited knowledge of Chao Chen's financial and business affairs. She conceded such.

Witnesses Called by Ms. Cao

- [89] Ms. Cao called seven witnesses: Jie Chen; Aifeng Wang, a Chinese lawyer; Telfer Maynard, a realtor; Anthony Rivard, an appraiser; Joy Chiang, Mr. Forrester's paralegal; and Le Tang and Ziu Pei Wang, both friends of Ms. Cao.
- [90] Jie Chen presented as an individual who was telling the truth. I accept that she provided an honest account of her experiences. However, I am not persuaded that her evidence on Chao Chen's financial circumstances is reliable. It appears that Jie Chen had little knowledge of what Chao Chen's business affairs were. I do not say that in a critical fashion. At the time, Jie Chen was a teenager or young adult and no doubt engaged in her own educational pursuits and other interests.

- [91] I also accept that the evidence of Jie Chen does not support that she understood she had a beneficial interest in 3399 Deering Island. She took no steps to seek to have the legal title transferred to her. The first indication of any claim she was advancing against this property was when she filed the counterclaim in the CC Action in May 2021. I was not persuaded by her evidence in respect to her alleged beneficial interest in this property.
- [92] I had no concerns with the veracity and reliability of the evidence provided by Mr. Wang, Mr. Maynard, Mr. Rivard, Ms. Joy, Ms. Tang, and Ms. Wang. Their evidence was not sufficiently challenged on cross-examination. I accept that Mr. Wang attended at the Taiyuan Market Supervising Bureau and arranged to have copies made of the corporate records of Shanxi Zhong Sheng Wei Ye Company Limited ("Shanxi Company") that were filed in the government office.

Chao Chen

- [93] Chao Chen testified in a straight-forward manner and I find that he was responsive to the questions asked of him. I was concerned on a number of occasions when he gave evidence at trial that conflicted with other sworn evidence.
- [94] Chao Chen gave conflicting evidence at trial and in an affidavit regarding who paid his tuition fees in New Zealand. At trial, he testified the ¥760,000 came from his paternal grandmother and other relatives, but made no mention of his father. In an affidavit sworn on September 16, 2014, he swore that his father provided his tuition and living expenses of about ¥760,000. Chao Chen agreed his affidavit evidence was true. No explanation was given for this discrepancy.
- [95] At trial, Chao Chen testified that he did file tax returns in New Zealand. His discovery was put to him in which he testified that he did not file tax returns in New Zealand. Although, later in the same discovery, he claimed he had filed tax returns every year. Chao Chen never produced these tax returns.
- [96] It is also a concern that Chao Chen was unable to produce any documents supporting the income he earned in New Zealand. He was also unable to produce any land title documents confirming the sale of the New Zealand townhouse. Chao Chen has known since January 2010 of his involvement in the Family Law Proceeding. It appears that he did not take seriously his obligation to produce documentary evidence.
- [97] Chao Chen was asked to provide documents at his discovery conducted in November 2021. Chao Chen testified that he authorized a lawyer to try and obtain the documents back in November 2021. These records were not produced in the proceeding. Chao Chen's explanation for this is that he failed to provide the documents to his lawyer. This is an unsatisfactory explanation.

- [98] Chao Chen testified that the source of the funds to buy the Five Properties came from funds from the Special Railway Line Company. He also testified that some monies came from Hainan Baifucheng and other companies. This appeared to contradict his Affidavit #6 sworn September 16, 2014, in which he stated that he bought the Five Properties in 2009 with the funds he made from the Special Railway Line Company.
- [99] It is puzzling that Chao Chen testified that it was money from China that was used to purchase the properties in BC, yet the majority of the monetary transfers from China appear to start in 2009. He claims that there were earlier exchanges through a currency exchange company, but that there is no record of it.
- [100] Chao Chen testified that he had no direct knowledge and did not cooperate with his father in respect to the Chinese divorce proceeding. This was directly contradicted in his Affidavit #5 sworn on July 22, 2014, where he stated:
3. I have been personally involved in the Chinese family litigation between Yongchang Chen and Weihong Cao, and as such I have personal knowledge of the facts deposed to.
 4. My personal involvement included retaining a lawyer for Mr. Yongchang Chen, assisting the collection of documents, and discussing with Mr. Yongchang Chen and his lawyer Tao Ding. Sometimes, I acted as his agent to discuss the case with Mr. Tao Ding.

Chao Chen agreed the evidence in his affidavit was all true. This contradiction was also never addressed.

- [101] I also find Chao Chen's evidence respecting the Special Railway Line Company unbelievable. In particular, that it was his idea to form the company and that he provided the idea to his father. I prefer Ms. Cao's evidence that it was Mr. Chen who started this company and developed it.
- [102] I further find that Chao Chen's statement in his Affidavit #5 sworn on July 22, 2014 was misleading. He states:
13. My connections helped me to set up the Railway Special Line Company. I was the main shareholder (about 99.7%), and Mr. Yongchang Chen was a minor shareholder (about 0.3%).
 14. I gave 0.3% to Mr. Yongchang Chen because he was my father.
- [103] I accept that at the time the Special Railway Line Company was incorporated, Chao Chen was not a 99.7 percent shareholder. It was not until November 2007 that he obtained that percentage. I further accept that at no time did Chao Chen give Mr. Chen, his father, 0.3 percent. This raises a concern in my mind that Chao Chen is prepared to give incorrect evidence when it suits his needs.

[104] I am left with the impression that Chao Chen, much like his father, is prepared to be less than candid about his own financial affairs and deliberately failed to disclose relevant documents. This does not mean that I reject all of Chao Chen's evidence, but only that I will scrutinize it carefully.

Witnesses called by Chao Chen

[105] Chao Chen called three witnesses from China who attended via video conferencing: Bo Yang, Weijun Song, and Yang Shi.

[106] Bo Yang was born in 1969 and was 53 years old when testifying. He testified he first met Chao Chen at a party in Beijing in the latter part of 2000. He described their current relationship as "very close partners." He testified that he started doing business with Chao Chen in 2001.

[107] Weijun Song was born in 1970 and works and lives in Beijing. He is in the business of automobile reconstruction and repair. He described his relationship with Chao Chen as "good friends". They operate an automobile repair shop which started in 2000. They each own 50 percent. Mr. Song does the repair work and Chao Chen provides the funds. He agreed that between 2000 and 2007 they did not make much money, but in 2007 they began a business of acquiring second-hand cars and flipping them in Beijing, and after 2008 had increased their earnings. In around 2010, Chao Chen would have received about ¥30 million. In addition, Mr. Song and Chao Chen got involved in testing automobiles and accessories.

[108] Mr. Song testified that the records pertaining to the business were not available since his wife did the accounting and they got divorced in 2012. Mr. Song testified that his ex-wife controlled the company records up until 2012. Mr. Song was not able to explain why the records for this business since 2012 were also not available.

[109] Yang Shi was born in 1980 and is in the real estate business. He first met Chao Chen at the end of 2005. Chao Chen invested in his real estate business, a company called Beijing Sheng De Topde Investment Group Co. Ltd. Chao Chen became a shareholder in this company. Mr. Shi explained that he held 60 percent of the shares in this company for Chao Chen. Mr. Shi testified that since incorporation in 2008 to 2013 the company did two real estate projects. The first investment return distribution was ¥270 million and Chao Chen's share was ¥160 million.

[110] A bank account was produced and Mr. Shi confirmed that the money in this bank account belonged to Chao Chen.

[111] These witnesses' evidence was not significantly impeached on cross-examination. I note that Mr. Chen did make accusations against Mr. Yang during his testimony, but he led no evidence to contradict any of Mr. Yang's testimony. These witnesses, unlike some of Mr. Chen's witnesses, remained for cross-examination. They appeared to try to answer the questions posed of them honestly. The one area that I struggled to accept was the lack of

documents that Mr. Song testified about. It may be that up until 2012 his ex-wife has documents, but there was no explanation given for the lack of documentation since 2012. In my view, this is another example of Chao Chen's failure to obtain and produce documentation to support his claims of financial success in China.

[112] I turn now to consider the issues relating to the Family Law Proceeding.

Issue 1: What is Mr. Chen's Income and Should Income Be Imputed to Him?

Legal Principles

[113] A determination of Mr. Chen's income requires a consideration of ss. 16-20 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The Court of Appeal for British Columbia in *Vincent v. Vincent*, 2012 BCCA 186 at para. 35, set out a three-step process to determine a parent's Guidelines income. First, find the spouse's Line 150, now Line 15000, income. Second, make adjustments to that amount as required by Schedule III of the Guidelines. Third, and once these first two steps are complete, the court must examine ss. 17-20 of the Guidelines to determine whether any of the exceptions apply, and, if so, what effect they should be given.

[114] The party seeking to impute income bears the onus of showing, on a balance of probabilities and a rational and evidentiary basis, that income should be imputed: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 140.

[115] Section 18 of the Guidelines applies where a spouse is a shareholder, director, or officer of a corporation. If the court finds that a spouse's reported income does not fairly reflect the money available for child support payments, s. 18 allows the court to increase that spouse's income. The purpose of s. 18 is to allow the court to lift the corporate veil to ensure that all funds received as income by the payor parent fairly reflects all the funds reasonably available to pay child support: *Richardson v. Richardson*, 2013 BCCA 378 at paras. 54-56; *Andreassen v. Andreassen*, 2016 BCSC 1196 at para. 62.

[116] A factor in imputing income can include a party's pattern of spending: *Kim v. Hong*, 2013 BCSC 587 at para. 356, 359.

[117] Rule 5-1(28)(g) of the Supreme Court Family Rules [Rules] allows the court to attribute income to a party in an amount the court considers appropriate if that party has failed to comply with financial disclosure requirements and orders under the Rules. Section 19(f) of the Guidelines gives a court discretion to impute "such amount of income to a spouse as it considers appropriate" when a party has failed to make the required financial disclosure: *Sullivan v. Struck*, 2015 BCCA 521 at para. 71.

Position of the Parties

Position of Ms. Cao

- [118] Ms. Cao seeks an order of retroactive child support in the sum of \$217,161 based on an imputed annual income of \$750,000, resulting in a \$12,162 per month child support sum from September 14, 2009 to December 31, 2020, after the appropriate expenses and support already paid by Mr. Chen are deducted.
- [119] Ms. Cao's position is that since Mr. Chen failed to comply with court orders for disclosure, did not provide an updated financial statement, and provided incomplete, false, and misleading financial information, this Court should draw an adverse inference and impute an income that it finds appropriate, pursuant to s. 23 of the Guidelines.
- [120] Ms. Cao further submits that over the years Mr. Chen has made many purchases and payments suggesting a lavish lifestyle and the ability to pay hundreds of thousands of dollars when he wants. She submits that this supports that Mr. Chen is concealing vast amounts of assets and income.

Position of Mr. Chen

- [121] Mr. Chen's position is that he has worked very hard since he arrived in Canada but he has only earned \$900,000, and that other money he has received was borrowed from family members in China or received from his friends and lovers.

Analysis

- [122] On May 12, 2015, there was a consent order made by Master Muir that provided:
2. The Respondent, Yongchang Chen, AKA Yong Chang Chen, will pay to the Claimant the sum of \$6,000.00 Canadian dollars per month for support commencing June 1, 2016 and on the first of every month thereafter until further order or written agreement of the parties.
 3. The noted \$6,000.00 support payment is without prejudice to either party's argument with respect to the quantum of support and is without prejudice as to the characterization of support.
- [123] Ms. Cao claims that the monthly support payments were not always made.
- [124] There is no dispute that Mr. Chen had an obligation to pay child support. The issue is the amount and how to quantify it.
- [125] The evidence on what income Mr. Chen earned between 2009 and 2020 was woefully lacking. The only financial statement from Mr. Chen was sworn on October 13, 2017, and was marked as an exhibit at trial. Mr. Chen was not able to recognize his signature on the sworn financial statement. He even suggested it was not his signature. I note the 2017 financial statement was filed when Mr. Chen had counsel acting on his behalf.

[126] I find that Mr. Chen did swear the 2017 financial statement and did sign it. The financial statement sets out that commencing in 2016, Canada Rockies agreed to pay Mr. Chen a salary of \$48,000. His financial statement states he expected to receive that sum in 2017 and going forward until Canada Rockies was in a position to pay more. Mr. Chen further asserts that:

In light of my low income, I pay most of my expenses from loans obtained from my friends and associates. My compensation from Canada Rockies is entirely dependent upon what happens with the mine. To date, the company has not made any money and in fact, as is seen from the company's financial statements, it is significantly in debt. The company deficit is very high.

[127] Ms. Cao demanded that Mr. Chen produce an updated financial statement. He failed to do so. This is in violation of R. 5-1(18) of the Rules.

[128] The tax information produced was that his Line 150, now Line 15000, income was:

Year

Income

2009

\$739

2010

\$1

2011

\$1

2012

\$1,087

2013

\$0

2014

\$0

2015

\$163.13

2016

\$48,000

- [129] Clearly, these tax returns are not accurate for the following reasons. Mr. Chen testified that he had made \$1.2 million from Canada Rockies, which is not reflected in the tax returns up until 2016. As noted above, he also referred to receiving \$900,000. A letter dated December 15, 2016, from Jie Chen to Canada Revenue Agency on behalf of Victoria Geo Survey Ltd., states that the company is expecting annual mining revenue of \$230,000. Mr. Chen also concedes that he has received rental income from properties in BC. There is no rental income claimed on any of his tax returns.
- [130] There were no tax returns produced by Mr. Chen for 2017 to 2021.
- [131] It is beyond doubt that Mr. Chen received income that vastly exceeds what is disclosed in his tax returns, although not likely in Canada based on Ms. Cao's evidence. Ms. Cao testified that she was not aware of Mr. Chen earning income in Canada in any substantial amount. She is not aware if Mr. Chen ever made any income from Canada Rockies.
- [132] The only income Ms. Cao is aware of Mr. Chen earning in Canada is rental income. The evidence supports that 721 Southborough has always been rented. Ms. Cao believes this property rents for \$4,000 a month. In addition, 19459 Richardson has been rented over the years. Ms. Cao believes the rent was approximately \$2,000 a month.
- [133] I find that it is next to impossible to determine what Mr. Chen actually earned. He failed to provide proper financial disclosure and refused to answer questions about his earnings at trial. He failed to make full and frank disclosure both in documents and during his trial evidence, many times claiming that he simply could no longer remember or recall.
- [134] In these types of circumstances, one approach is to look at a party's personal spending patterns as a way of determining what money was or is available for child support.
- [135] Ms. Cao submits that Mr. Chen should be imputed income from September 2009 to December 2020 of \$750,000 annually. There was no evidence led to support this figure. Ms. Cao submitted that Mr. Chen's claim that he has no income and is poor should not be accepted considering Mr. Chen has been able to pay fixed expenses such as mortgages, has made many purchases that suggest a "lavish lifestyle", and has the ability to pay hundreds of thousands of dollars whenever he wishes.
- [136] There is some support for this submission. For example:
- At one time, Mr. Chen owned a boat. Estimates of the boat's value differ, from Mr. Maynard being told Mr. Chen paid \$450,000 to Jie Chen thinking it was purchased for \$200,000.
 - The ability to pay the purchase price of \$1.5 million for 721 Southborough in January 2009.
 - The purchase for Jie Chen of a Ferrari, for which Ms. Cao says Mr. Chen funded \$330,000 of the purchase price in 2014.
 - Deposits in Mr. Chen's BC bank accounts of amounts in the millions of dollars.

· For some periods, Mr. Chen was paying the mortgage on 6650 Wiltshire at a cost of approximately \$9,500 a month, and on 19459 Richardson of approximately \$5,600 a month.

[137] There were wire transfers made to the Children. It was unclear from the evidence exactly how much was transferred to the Children. Ms. Cao testified to knowledge of the following amounts:

- approximately \$400,000 to Jie Chen in 2012 and 2013;
- approximately \$200,000 to J.C. in 2012; and
- approximately \$600,000 to H.C. in 2012 and 2013.

[138] Ms. Cao testified that these monies were not used by her or the Children and the monies were transferred into Mr. Chen's accounts.

[139] Mr. Chen's evidence is that he was able to access these funds by borrowing from his relatives and his "lovers".

[140] The evidence supports that after Mr. Chen moved to Canada, he continued to be involved in business in China. Ms. Cao testified to overhearing Mr. Chen conducting business on the phone in their shared home.

[141] The evidence further supports that since separation Mr. Chen has made financial contributions to Ms. Cao in the amount of approximately \$1.8 million. I note that if one divides the \$1,818,111 in support that Ms. Cao accepts she has received from Mr. Chen from September 2009 to December 2021, that amounts to payments of approximately \$13,368.46 per month. This supports that Mr. Chen was receiving substantial sums of money in order to fund these payments.

[142] This is countered by Mr. Chen's evidence that he is currently very poor, cannot afford to buy clothing, owns an old second-hand vehicle, and is no longer capable of working. This may be Mr. Chen's current situation and may impact any future child support order, but I am not persuaded that this was Mr. Chen's past situation.

[143] I note Mr. Maynard's testimony that in 2011 Mr. Chen was looking to buy multiple properties worth millions of dollars and, at least to Mr. Maynard, he presented as a very wealthy individual. Further support for that is the evidence that when flying Ms. Cao and the Children to China for holidays, Mr. Chen would always purchase business class tickets.

[144] I am persuaded that Mr. Chen has had access to funds over the years and that those funds have primarily come from China. I am not convinced that these funds are loans from "relatives and lovers" as Mr. Chen asserts.

[145] The issue to be addressed is whether Mr. Chen's income should be imputed at \$750,000 from September 2009 to December 2020.

[146] Mr. Chen made no submissions on what his income was during this period of time. He made no submissions on whether his income should be imputed at \$750,000, nor any other amount.

[147] In light of the impossibility of calculating Mr. Chen's income, his lack of disclosure of key documents that would assist in determining his income, and his total lack of cooperation in answering questions relating to his income, I will accept the numbers presented by Ms. Cao and impute an income of \$750,000 annually for Mr. Chen for the years 2009 to 2021.

Issue 2: What is Ms. Cao's Income and Should Income be Imputed to Her?

[148] Ms. Cao says she has not worked in BC and is unable to work since her English is poor. Her tax returns show limited income earned, except in 2015.

[149] It is not entirely clear to me whether in 2015 Ms. Cao received approximately \$42,000 in commission income from selling water purifiers. She claims she did not. It does appear that Ms. Cao does have some potential to work in businesses requiring Mandarin language skills.

[150] I accept that Ms. Cao has been the primary caregiver for the Children in the past. I am not persuaded that any income should be imputed to her for the past, but I see no reason why Ms. Cao cannot secure some type of occupation to assist in paying child support in the future.

Issue 3: What Time Period Should the Retroactive Child Support be Paid and For How Many Children?

Legal Principles

[151] The Supreme Court of Canada recognized in *D.B.S. v. S.R.G.*, 2006 SCC 37, that retroactive child support orders are neither "rare" nor "exceptional": at paras. 5, 37. An assessment of retroactive child support is based on an analysis of four factors: the reasonable excuse for why support was not sought earlier, the conduct of the payor parent, the circumstances of the child, and the potential hardship occasioned by a retroactive award: *D.B.S.* at paras. 94-116. However, "none of these factors is decisive" and the court maintains significant discretion in determining retroactive child support: *D.B.S.* at para. 99.

[152] The Court in *D.B.S.* also provided that if a recipient is entitled to a retroactive award, the general rule is that the award should go back to the date that the recipient party provided effective notice to the payor, but no more than three years prior to formal notice being given, unless the payor had engaged in blameworthy conduct: at paras. 118-132. Notice does not require the recipient to take legal action; all that is required is that the topic be broached: at para. 121.

Analysis

- [153] I find retroactive child support appropriate in this case. First, Ms. Cao did not unreasonably delay her pursuit of child support. She claimed child support in her initiating pleading, being the writ of summons filed on January 22, 2010, shortly after the couple separated. Though Ms. Cao delayed in making an application for support until the parties appeared before Master Muir, and the Muir Order was made in May 2016, Ms. Cao had not ceased her pursuit of child support. As I set out in these Reasons, Ms. Cao was engaged in a family law dispute in China since 2009 that included a claim for child support. Ms. Cao's delay was not an unreasonable one that would have caused Mr. Chen any uncertainty as to whether Ms. Cao was seeking child support: D.B.S. at para. 104.
- [154] Second, Mr. Chen's behaviour fits the "expansive view" of blameworthy conduct that courts are encouraged to take: D.B.S. at para. 106. It is not solely egregious conduct, but any conduct that "privileges the payor parent's own interests over his/her children's right to an appropriate amount of support": D.B.S. at para. 106. Mr. Chen did not provide financial disclosure to Ms. Cao, leaving her unaware of the level of support the Children were entitled to. Further, once the Muir Order was provided, Mr. Chen missed support payments.
- [155] The third and fourth criteria, being the circumstances of the children and the potential hardship occasioned by a retroactive award, do not require consideration in this case. As set out below, Ms. Cao admits that Mr. Chen has already paid a significant amount of child support resulting in an overpayment.
- [156] Finally, I note that Mr. Chen did not dispute his obligation to pay retroactive child support.
- [157] Since I have already found Mr. Chen's conduct to be blameworthy, the presumptive three-year limit does not apply. As such, I find that the time period for payment of child support by Mr. Chen began on the date of separation, September 2009, and continued until the time the two younger children moved in with Mr. Chen in December 2020.
- [158] Ms. Cao submits that from September 2009 until July 2015, she and Mr. Chen lived in a shared-parenting arrangement. In July 2015, Ms. Cao and the Children moved into 6650 Wiltshire.
- [159] Ms. Cao testified that the Children have "always been with [her]". There was no evidence presented to contest this.
- [160] The evidence supports that from September 2009 to June 2015, when Mr. Chen was in the Lower Mainland of BC, he lived under the same roof as Ms. Cao and the Children. Ms. Cao concedes they were in a shared-parenting arrangement. From July 2015 to November 2020, the Children all lived with Ms. Cao in 6650 Wiltshire. Mr. Chen did not live with them on a full-time basis. It appears that he paid for all costs associated with the houses they lived in up until approximately December 2020, when 6650 Wiltshire was sold. After that, the two youngest children began living with Mr. Chen. As of the date of the trial, they remained

living with Mr. Chen while Ms. Cao stayed at a friend's house.

[161] Jie Chen turned 19 years old in August 2013. She then commenced her university studies in 2013 or 2014. It appears that she only attended part time since she only received her graduation certificate from UBC in May 2021. It was not clear to me on the evidence why Jie Chen took so long to complete her degree and whether there were periods of time she was not attending university. I note that Mr. Chen did not submit that Jie Chen ceased to be a child of the marriage while she was attending university. He did not contest his responsibility to pay child support for the Children.

[162] I find that Mr. Chen owed child support for all of the Children up until December 2020.

Issue 4: What is the Appropriate Amount of Retroactive Child Support that Mr. Chen Should Pay?

[163] I note that on income over \$150,000 per year, the court may choose an amount that differs from Table support, based on the approach in s. 4(b) of the Guidelines. There were no submissions made that anything other than the Table support should be awarded.

[164] I am not persuaded that I should deviate from the Table support amount in this case. As such, the amount of child support owed by Mr. Chen will be based on an imputed income of \$750,000 annually from September 2009 to December 2020. The claimant submits that for three children, this amounts to a sum of \$12,162 per month. She claims that the sum owed is \$1,975,272. That is not correct.

[165] The correct amount is \$1,647,958. This amount is based on shared parenting from September 2009 to June 2015, and then with Ms. Cao having the Children living with her until December 2020:

Period

Months

Monthly Support

Total Support for Period

September to December 2009

4

\$12,028

\$48,112

2010

12

\$12,028

\$144,336

2011

12

\$12,028

\$144,336

2012

12

\$12,208

\$146,496

2013

12

\$12,208

\$146,496

2014

12

\$12,208

\$146,496

January 2015 to June 2015

6

\$11,361

\$68,166

July 2015 to December 2015

6

\$12,208

\$73,248

2016

12

\$12,208

\$146,496

2017

12

\$12,162

\$145,944

2018

12

\$12,162

\$145,944

2019

12

\$12,162

\$145,944

2020

12

\$12,162

\$145,944

TOTAL

\$1,647,958

[166] I will first address Ms. Cao's calculation of the retroactive child support. Ms. Cao submits that the amount of retroactive child support owed is \$1,975,272, as set out in Schedule 1 of her closing submissions. The period September 2009 to December 2020 is a 136-month period. Using Ms. Cao's \$12,162 per month estimation, this should have amounted to a figure of \$1,654,032 owed. I note three calculation errors in Schedule 1 of Ms. Cao's closing submissions:

- a) Ms. Cao claimed \$151,944 of child support for each year. Based on Ms. Cao's estimation of \$12,162 per month, the annual amount should have been \$145,944. It is not clear to me where the \$151,944 figure came from.
- b) Ms. Cao appears to claim child support for the entirety of 2009, a total of \$151,944. Support should only be claimed for the four-month period between September 2009 and December 2009. The amount based on \$12,162 per month should be \$48,648.

- c) Ms. Cao claims a full year payment of \$151,944 for the six-month period of January 2015 to June 2015. The same error is made for the period from July 2015 to December 2015. The amount, based on \$12,162 per month, should be \$72,972 for each six-month period.

[167] These errors contributed to Ms. Cao's retroactive child support claim of \$1,975,272. The correct amount, as set out in para. 165 above, is \$1,647,958.

[168] Ms. Cao concedes that Mr. Chen has already made payments of \$1,818,111. Ms. Cao sets out these payments in Schedule 1 of her closing submissions. The \$1,818,111 consists of:

- Support cheques paid by Mr. Chen to Ms. Cao totalling \$423,480;
- An estimate of the housing and Children's expenses paid by Mr. Chen totalling \$619,360;
- An estimate of the family travel expenses paid by Mr. Chen totalling \$57,000; and
- Mortgage payments made at various times being credited to Mr. Chen, totalling \$718,271. It is not clear on the evidence how some of these monthly payments were calculated nor why they were attributed to Mr. Chen. However, I accept Ms. Cao's admission that these are expenses she received from Mr. Chen.

[169] It would appear based on Ms. Cao's own calculations that Mr. Chen has overpaid child support and therefore there is no retroactive child support owed. Using the correct amount of child support payments owed, and deducting the support Ms. Cao acknowledges she received, Mr. Chen has overpaid child support by \$170,153. This overpayment will be addressed when considering the apportionment of the family assets, and potentially on the issue of costs.

[170] Prior to considering Issues 5, 6, and 7, I will summarize the evidence respecting the Three Properties and Canada Rockies.

Relevant Facts Relating to the Three Properties and Canada Rockies

610 Stewart

[171] Ms. Cao testified that Mr. Chen purchased a property up near the border of Alaska prior to their separation. The purpose was for a vacation home. She claims that renovations were made to this property. Ms. Cao never visited this property.

[172] Mr. Chen testified that this property was purchased on or about July 16, 2009, it has no mortgage on it, and he stills owns it. Mr. Chen described the property as being about 80 kilometres from Alaska and very remote.

721 Southborough

- [173] This property was purchased on or about January 8, 2009, for the sum of \$1,500,000. Ms. Cao testified that it was purchased for investment purposes. Ms. Cao was not aware of this property until 2013 when she was going through the divorce proceedings. Ms. Cao testified that it was purchased by Mr. Chen using money he received from the Shanxi Company.
- [174] Mr. Chen agreed that there was no mortgage on this property and claimed that this house was paid for by cash. Mr. Chen confirmed that this property was rented out.
- [175] Mr. Chen agreed this property was a joint property of his and Ms. Cao. He also claimed that this property was his and he was willing to transfer it to Ms. Cao.

19459 Richardson

- [176] This property was purchased on or about October 25, 2012. It was registered in the name of Mr. Chen. He still owns it. He initially testified that he could not recall where the money came from to purchase this property. He then testified that he believes the funds to purchase it were sent over from China. He testified that there was a million-dollar mortgage on this property. Ms. Cao did not visit this property before it was purchased, but she did live in the property after it was purchased. Mr. Chen told her that it was a farm with a lake on it. After it was purchased, the carpets were replaced and the walls were painted. Mr. Chen and Ms. Cao would take the Children there to spend the weekends. The purpose of the purchase was for investment.
- [177] Mr. Chen lived on this property for a period of time. Then Chao Chen lived on the property after getting married; Ms. Cao believes that was in 2016 or 2017.
- [178] With respect to the mortgage on the property, Mr. Chen provided an RBC Homeline Plan statement dated September 2021 that confirmed a \$60,000 line of credit and two mortgage loans for \$818,050.53 and \$286,607.81, for a total outstanding balance of \$1,164,658.34. The monthly payments are \$5,147 which Mr. Chen continues to make. Mr. Chen claims that the money used to pay the mortgage comes from a relative in China who sold their own house.
- [179] Mr. Chen testified that he is earning no rent from this property although a friend of his lives there and looks after the property.

Canadian Rockies International Investment Group ("Canada Rockies")

- [180] Ms. Cao testified that Mr. Chen asked her to try and locate a mine to invest in. Ms. Cao had a friend whose family wanted to sell a mine. Mr. Chen and Ms. Cao purchased the mine in June 2007. It was a gold mine. The cost was \$1 million. It was purchased using money from China.
- [181] Mr. Chen testified that on June 8, 2007, he caused Canada Rockies to issue half of the shares in this company to Chao Chen. Mr. Chen testified that Chao Chen never paid any money for these shares. Mr. Chen's explanation was that Chao Chen was managing the finances. Mr. Chen testified that Chao Chen removed himself from the company. Chao Chen agreed that

he transferred his shares back to Mr. Chen. As of the trial, Mr. Chen was the 95 percent shareholder with his niece, Zi Yang, holding five percent. She was transferred the five percent on September 1, 2012 and did not pay for the shares. Ms. Zi plays no role in running the company.

[182] Ms. Cao was not aware at the time that 50 percent of the shares in Canada Rockies were issued to Chao Chen. She agreed with Mr. Chen's testimony that Chao Chen never paid "a penny" for his shares. Ms. Cao understands that the current status of this company is that it is not making any profit.

[183] Mr. Chen confirmed that the mine was purchased from a friend of Ms. Cao. He claims that the purchase of the mine was "his downfall." He claims he worked at the mine for 15 years.

[184] Ms. Cao testified to a brochure that Mr. Chen had sent when he was trying to sell Canada Rockies. In the brochure, it references that the company was also involved in the jade business and potentially the natural gas industry.

Issue 5: What Assets Registered Under the Name of Mr. Chen are Family Assets?

Legal Principles

[185] As previously noted, the FRA applies to the division of property in this case. The FRA presumptively gives each married spouse an equal interest in the family assets in existence as at a triggering event, which in this case is January 21, 2013, being the date of the divorce in China. This presumptive equal division is subject to reapportionment on the grounds of fairness.

[186] The FRA defines family assets in s. 58(2) as property owned by one or both spouses and "ordinarily used by a spouse or a minor child of either spouse for a family purpose". Section 58(3) provides that:

... the definition of family asset includes the following:

- (b) if property would be a family asset if owned by a spouse, property
- (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or
- (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;
- (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
- (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;

- (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse

[187] Where family assets remain in existence at trial, the value of those assets may be considered as of the trial date if it is not unfair to do so: *Blackett v. Blackett*, 63 D.L.R. (4th) 18 at 22, 1989 CanLII 239 (B.C.C.A.).

Position of the Parties

Position of Ms. Cao

[188] Ms. Cao submits that the Three Properties are family assets and that they should be 100 percent reappportioned to her, or in the alternative, she seeks a family compensation order pursuant to the FRA.

[189] Ms. Cao submits that Canada Rockies is a family asset and that it should be 100 percent reappportioned to her, or in the alternative, she seeks a compensation order pursuant to the FRA. She further seeks an order that she be granted the controlling interest in Canada Rockies and be appointed as a director.

Position of Mr. Chen

[190] Mr. Chen agreed that Canada Rockies is a family asset. Mr. Chen stated a number of times that he wanted to "give everything to Weihong". He testified on numerous occasions that he was prepared to transfer Canada Rockies to Ms. Cao and that he did not want a penny from the sale of this company.

[191] Mr. Chen also testified he was prepared to transfer title of 721 Southborough to Ms. Cao.

Analysis

[192] All of the Three Properties were purchased prior to the triggering event, the divorce in China on January 21, 2013. Two of the properties, being 610 Stewart and 721 Southborough, were purchased prior to the parties separating in September 2009.

[193] I find that the money used to purchase these Three Properties came from money earned in China. I accept that Ms. Cao contributed both directly and indirectly to the Chinese companies. There was no suggestion made by Mr. Chen that these were not family assets. To the contrary, he was prepared to give to Ms. Cao all of his shares in Canada Rockies, as well as at least one of the Three Properties registered under his name.

[194] I find that the Three Properties and Canada Rockies are family assets.

Issue 6: What is the Value of the Family Assets?

Value of 721 Southborough

- [195] The only appraisal evidence tendered at this trial was respecting this property. Anthony Rivard was qualified to give opinion evidence on the valuation of real estate in the Lower Mainland. Mr. Rivard was not able to access the interior of the property; as such, the appraisal was based on an exterior viewing of the property. Of particular importance was that he was unable to determine if the property had a view. Mr. Rivard estimated the value of this property at \$3.3 to \$3.5 million as of October 2021.
- [196] Mr. Chen was of the view that it should be valued higher than the appraised value based on the assessment value. He was of the view that the property had a minimum value of \$4 million. Mr. Rivard did not agree with this based on comparable sales in the same market area.
- [197] In light of the expert evidence, I am prepared to accept the value of 721 Southborough at the \$3.5 million figure. I note that the appraiser did not gain access to this property and conceded the price may be higher if the property has a view.
- [198] This property is not encumbered by any mortgage.

Value of 19459 Richardson

- [199] The valuation of 19459 Richardson is more difficult since no appraisal evidence was tendered. The assessed value of this property in 2021 was \$3,885,000. The Royal Bank of Canada has a line of credit and mortgage against this property with an outstanding amount, as of September 2021, of \$1,164,658.34.
- [200] Case law establishes that using the assessed value is not always reflective of market value, however, I was presented with no other evidence of the value of this property. For the purposes of these Reasons, I will assign a value for 19459 Richardson of \$4 million.

Value of 610 Stewart

- [201] There is no appraisal evidence to support the value of 610 Stewart. The 2021 assessed value for this property was \$310,300. It is located in a very remote area and the marketability of this property is unclear. I will assign a value of \$310,000 for this property.

Value of Canada Rockies

- [202] Ms. Cao testified that Mr. Chen has been trying to sell Canada Rockies for the past five years and that Mr. Chen had asked her to help him find a buyer. Ms. Cao testified that she did find a purchaser for Mr. Chen, but Mr. Chen wanted \$32 million for the company. She says the other party withdrew because the price was too high. Ms. Cao testified that she thought the company was worth between \$8 and \$10 million.

- [203] Mr. Chen testified that he lost money investing in this company and that it is now bankrupt. He claimed that the company owes over \$80,000 in tax. He claims that he does not have the money to pay the taxes.
- [204] Ms. Cao testified that the company imported equipment from China with a value of \$2 to \$3 million. Mr. Chen claimed that some of the company's equipment had been stolen and other pieces of equipment had been abandoned in the mountains. He produced photographs of large pieces of equipment that he describes as broken down and that appear to be vandalized.
- [205] Mr. Chen testified that he invested very little money into this company, but that he borrowed most of it from the bank. He testified that the total amount made from this company was \$1.2 million. He later claimed he received only \$900,000. Mr. Chen disagreed that the company was profitable. He also claimed that there was a court case involving the company, although it was not clear what court case he was referring to.
- [206] There is little evidence to support the value of Canada Rockies. It appears that it is presently not operating. At least some of the assets, such as the large mining trucks and equipment, are wasting away somewhere up north. Mr. Chen apparently believed at some point in time in the past five years that Canada Rockies had some value and he attempted to sell it. It remains unclear to me if this company maintains any mining rights or leases of potential value. As such, I am not able to determine the value of the shares in Canada Rockies.

Issue 7: How Should the Family Assets be Divided?

- [207] The starting point under the FRA is equal division of family assets: *Kim v. Hong*, 2013 BCSC 587 at para. 252.
- [208] The FRA provides in s. 65 for judicial reapportionment of property if equal division of family assets would be unfair, having regard to a number of factors. A party seeking reapportionment has the onus of proving that equal division would be unfair.
- [209] Section 65 reads:

Judicial reapportionment on basis of fairness

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,

- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[210] Of most significance is s. 65(1)(e) and (f) of the FRA, in that Ms. Cao is not going to receive any spousal support and is clearly in need of such support. She has very limited work experience in BC and her English language skills are minimal. She has recently suffered from health issues that required her to return to China for specialized care. She is currently 52 years old. She may have some job prospects in the future, but has not yet obtained any employment.

[211] I am also convinced that Mr. Chen has access to Chinese assets that Ms. Cao has been deprived of. The extent of the Chinese assets remains unclear to me. It also remains unclear based on the evidence before me what monies Mr. Chen continues to access in China. It is clear that Mr. Chen has benefitted from renting some of the Three Properties and he has kept the rent for himself.

[212] In BC, Ms. Cao would have been entitled to an award of spousal support. As a result of my Reasons, I held that the Chinese Judgment should be recognized, which deprived her of any spousal support in China and in BC. In light of that decision, I recognized that Ms. Cao would be entitled to raise the issue of her loss of spousal support when considering the appropriate division of the BC properties. In my view, it would be unfair to equally divide all of the family assets in BC.

[213] In light of Mr. Chen's concession that he agrees that 721 Southborough should be transferred to Ms. Cao, the likelihood that Mr. Chen continues to have access to assets in China, and the fact that Ms. Cao did not receive any award of spousal support in China and she will not receive it in BC, I am prepared to allocate 100 percent of 721 Southborough and 19459 Richardson to Ms. Cao. Ms. Cao will be responsible for the Royal Bank of Canada line of credit and mortgage against 19459 Richardson. It appears that if she is able to sell 19459 Richardson at my assigned value of \$4 million, she will be left with equity of approximately \$2.8 million.

[214] In my view, the remaining family assets should be divided on a 50/50 basis. If Mr. Chen wishes to keep 610 Stewart, he must reimburse Ms. Cao for 50 percent of its value. I place that at \$155,000, being 50 percent of the assessed value of \$310,000. In light of the finding I have made on the overpayment of child support, I find that this payment can be offset against the overpayment of child support made by Mr. Chen. This results in a reduction in the amount of overpayment of child support from \$170,153 to \$15,153, with 610 Stewart remaining registered in Mr. Chen's name.

- [215] There is no reason why Ms. Cao should also get 100 percent of Mr. Chen's share of Canada Rockies. I find that they are each entitled to 50 percent. On the evidence before me it is not clear what, if any, value Canada Rockies has. It also appears it may have some outstanding debts. I direct that 50 percent of the shares held in Canada Rockies by Mr. Chen be transferred to Ms. Cao, being 47.5 percent of the company's total shares.
- [216] Ms. Cao requested that the Court appoint her a director of Canada Rockies. No authority is provided for this request. This Court has the authority to appoint directors upon application in some circumstances under s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. However, business remedies are not generally available under the FRA: *Wang v. Sun*, 2021 BCSC 2123 at paras. 175-176. A party should make an application under the BCA. In addition, I did not have the proper materials before me to make such an order.
- [217] Mr. Chen and Ms. Cao can decide what to do with this company once Ms. Cao is a shareholder. As a shareholder of Canada Rockies, each has rights under the relevant incorporating statutes that they may exercise if a director acts in a manner that is oppressive or prejudicially unfair to one or more shareholders: see, for example, BCA s. 227.
- [218] On a final note respecting the family assets, Mr. Chen, in his submissions, argued that he should be assigned to supervise the money that Ms. Cao receives. His submission is that he has a great deal of business and property investment experience and, unless he is managing the money, allowing Ms. Cao to control the money she receives will push her and Jie Chen to the "darkness of evilness". Although it was not clear what Mr. Chen meant, I see no reason why Ms. Cao should be under the domination of Mr. Chen in the future. She is entitled to make her own decisions concerning what she will do with the properties which will be transferred to her.
- [219] I will next consider issue 8, the trust claims advanced by Ms. Cao against Chao Chen. To do so, I will first consider the evidence respecting the financial circumstances of Mr. Chen and the Chinese companies, Chao Chen's financial circumstances, the evidence respecting each of the Five Properties, and the applicable legal principles. I will also provide a summary of the parties' positions and consider the two sub-issues that arose as part of the parties' submissions. I will then conclude with my analysis of Ms. Cao's trust claim.

Financial Circumstances of Mr. Chen and the Chinese Companies

- [220] Mr. Chen's evidence on his and the Chinese companies' financial circumstances was the most confusing evidence of this trial. A challenging aspect is that all of the corporate documents were in Mandarin, and the parties did not agree as to the authenticity nor admissibility of many of the corporate records. There were allegations and accusations made by all parties that certain corporate records were fraudulent and forgeries. As a result, it is extremely difficult to ascertain the truth.

[221] I further note that there was a great deal of evidence led on the ongoing litigation in China over the Chinese companies. A number of times I had to remind the parties that I am not dealing with issues relating to the ongoing dispute in China over the ownership of the various Chinese companies and the alleged misconduct of Chao Chen, of his wife, and of his maternal relatives. These issues will be for the Chinese courts to determine.

[222] I will make some findings of fact based on the evidence before me. I will deal with the evidence surrounding the three Chinese companies that I am prepared to accept. I will indicate where I cannot decide because of a lack of evidence or conflicting evidence.

[223] The three Chinese companies are as follows (collectively, the "Chinese Companies"):

1. Zhongsheng Company;
2. Special Railway Line Company; and
3. Shanxi Company.

[224] I will first provide an overview of the parties and other witnesses' evidence of the Chinese Companies and Mr. Chen's financial circumstances.

Evidence of Ms. Cao

[225] Ms. Cao was not able to give any detailed information on the income that Mr. Chen earned. She believes that he earned a large income based on their lifestyle while living in China and in BC. She was also unable to give any direct evidence on where the money came from to purchase the various properties in BC. Her understanding was that it came from the Chinese Companies, but Mr. Chen did not discuss these matters with her. She was able to give some evidence on the acquisition of the Chinese Companies.

[226] At the time of the marriage, Ms. Cao testified that Mr. Chen was working as a driver at a textile company in Weifang City.

[227] Ms. Cao explained that later, while still in Weifang, Mr. Chen was operating a coal based electrical company. In 1997, the couple moved to Beijing. Upon their arrival in Beijing, a new company was registered, being Zhongsheng Company. This company expanded into a coal mining business. The coal aspect of the business was in the Shanxi province.

[228] In 2005, Ms. Cao claims the money used to purchase the company called Special Railway Line Company came from Zhongsheng Company. There was confusing evidence given by Ms. Cao since she testified that the signature of "Chen Yongchang" on the application for incorporation of the Special Railway Line Company did not belong to Mr. Chen. Ms. Cao claims that Mr. Chen was the chairman of the board of directors and the general manager for the Special Railway Line Company. She denies that Chao Chen was the person who incorporated this company.

- [229] While living in Beijing, Ms. Cao assisted in managing a restaurant that the family owned. After the two younger children were born, Ms. Cao primarily stayed home to look after them.
- [230] It appears that the Shanxi Company was incorporated on July 12, 2004. Ms. Cao testified the Shanxi Company was a subsidiary of Zhongsheng Company. Ms. Cao understood that Mr. Chen was the legal representative of the Shanxi Company. Ms. Cao gave evidence of her understanding, which was also supported by certain corporate records, that the Shanxi Company became the 98 percent shareholder of Special Railway Line Company in August 2004. On August 15, 2005, a charter amendment by the Special Railway Line Company occurred to change the incorporation capital to ¥35 million (approximately \$5,740,000) and amending the percentage shareholding of Shanxi Company to 99.7 percent.
- [231] On July 16, 2006, there was a further share transfer agreement, transferring Shanxi Company's 99.71 percent equity in the Special Railway Line Company to Shanmin Hou. Ms. Cao testified that Mr. Chen did not disclose this transfer to her. According to the corporate records, there was a further transfer from Shanmin Hou to Chao Chen on November 15, 2007 for ¥34.9 million. Ms. Cao was not aware that such a transfer was made. The corporate documents for the Special Railway Line Company show that Chao Chen then became the legal representative. Ms. Cao testified that she was not aware that this had happened.
- [232] Ms. Cao disputes that Chao Chen had anything to do with the incorporation of the Special Railway Line Company and disputes that Chao Chen was the founder of it. She denies that Chao Chen had anything to do with the business of this company throughout 2004 and 2005. Ms. Cao testified that she believes that Mr. Chen continues to be highly involved in the management of the Chinese Companies on the basis that, up until 2015, she sometimes overheard his business calls at the home.

Evidence of Mr. Chen

- [233] As I have already noted it is difficult to discern Mr. Chen's evidence since he provided contradictory evidence on many occasions throughout the trial.
- [234] Mr. Chen refused to give any reliable evidence on what income he earned and on what happened to all of the family assets in China. He further gave confusing evidence on the ownership of the Chinese Companies.
- [235] I do accept his evidence, since it is corroborated in the corporate records and confirmed in the evidence of other witnesses, that he transferred his interest in the Chinese Companies before he came to Canada. I also accept his evidence that the Special Railway Line Company originally belonged to him and that he transferred it to Shanmin Hou.
- [236] What is not clear on Mr. Chen's evidence is the amount of money he received for transferring his shares in this company. He was not able to, or not prepared to, disclose the amount of money he received, how he received it, and over what period of time.

Evidence of Xiang Qian Chen

[237] Xiang Qian Chen is Mr. Chen's cousin. He testified that when Mr. Chen left China, he transferred the equity share of the Special Railway Line Company to other members of his family. This witness confirmed that Mr. Chen sold his shares to Shanmin Hou. Mr. Hou was described by Xiang Chen as someone in "a high management" position. This witness was not sure if Chao Chen had any involvement in the Special Railway Line Company but testified that Chao Chen did not invest any money.

Evidence of Chao Chen

[238] I accept that Chao Chen has given contradictory and confusing evidence on his involvement in setting up the Special Railway Line Company. In his examination for discovery he claims he did not recall who started the company, stressing that he is not certain whether his father incorporated the company in 2004 or not. At trial, he testified that the company was incorporated "in layers", the first "layer" being set up by him and Mr. Chen, and the second "layer" by an individual named Tinghong Li, but later adding that the company was created by Tinghong Li and Shanxi Company. When confronted with the discrepancy Chao Chen maintained that he could not remember the details of how the company was started.

[239] The evidence supports that when those two companies were incorporated, being 2004 and 2005, Chao Chen was studying in New Zealand.

[240] In Affidavit #5, sworn July 22, 2014, Chao Chen asserted that his connections helped him set up the company and that he was the 99.7 percent shareholder and he "gave" Mr. Chen 0.3 percent of the shares. When confronted with Affidavit #5, Chao Chen claimed it was true, and that Shanmin Hou transferred the shares to him in November 2007. He also admitted on cross examination that he did not pay money for the 99.7 percent share in the Special Railway Line Company, but instead paid through his work for the company, despite having no recollection during his examination for discovery as to what he paid for them, if anything.

[241] Chao Chen's evidence eventually settled on the assertion that Lin Li Chen, Mr. Chen's younger sister, at some point arranged for Mr. Chen to transfer 97.7 percent of his shares in Special Railway Line Company to Shanmin Hou, and that Shanmin Hou transferred those shares to Chao Chen in November 2007. I note that in his cross-examination by Mr. Chen, Chao Chen claimed not to know Shanmin Hou.

[242] Chao Chen did testify that he remembered receiving ¥28 million (approximately \$3.472 million) when transferring his share to his uncle, Xiangjun Chen, in April 2009.

Financial Circumstances of Chao Chen

[243] Ms. Cao was unable to give any direct evidence about the businesses that Chao Chen had in China. Her evidence was limited to her knowledge of Chao Chen moving to New Zealand to study and her understanding that Mr. Chen sent him money for living expenses. She also testified that after Chao Chen returned from overseas, she assisted Mr. Chen in helping him obtain training, or unpaid employment, at the factory of a company called Futian, in Beijing. She testified that friends at Futian gave her and Mr. Chen feedback on Chao Chen's employment. Apart from this, she admitted to having little knowledge about Chao Chen's financial affairs.

[244] Chao Chen and the witnesses he called gave evidence about the various businesses that Chao Chen was involved with in China. They include:

- a) Hainan Baifucheng Investment Co. Ltd. ("Hainan Baifucheng"), which partnered with a public company to develop Olympic Garden projects in three cities. His witnesses testified that Chao Chen invested ¥7 million in 2005 and that shares were held on behalf of Chao Chen;
- b) Beijing Trendy Cuisine Management Co. Ltd., which was involved in the sale of furniture and was an agent of a manufacturer. Chao Chen was reported to hold 30 percent, and then later 42 percent, of the shares;
- c) Beijing Changping Yuntong Automobile Repair Shop ("Automobile Repair Shop"), an automobile shop started by Chao Chen and his friend in 2007. Chao Chen was reported to own 50 percent of the Automobile Repair Shop; and
- d) Tongyu Wanlong Municipal Waste Disposal & Environmental Technologies Copool, Ltd., a waste disposal, cleaning, and electric generating company that Chao Chen and a business partner incorporated in 2018.

[245] Chao Chen and his witnesses testified to different sums of money that Chao Chen received from his various business in China:

- 2007-2011: ¥30 million;
- 2007: ¥58 million;
- 2011: ¥68 million; and
- 2008-2013: ¥160 million.

[246] Chao Chen testified that between 2000 to 2011 he received no more than ¥50 million from the Hainan Baifucheng investment. From 2007 to 2011, he received no more than ¥30 million from the Automobile Repair Shop. From his investment with Mr. Yang he received between ¥47 to ¥48 million.

[247] In addition, Chao Chen was making mortgage payments on properties registered in his name. As of November 2009, the mortgage payments would have been approximately \$13,000 a month. It is not entirely clear where the money came from to pay the mortgages. It appears, like Mr. Chen, sums were transferred from China into Chao Chen's bank accounts in BC. The source of that money was not clear, since Chao Chen did not produce any records for bank accounts in his name in China.

[248] What is clear is that Chao Chen had to come up with a great deal of cash in 2008 and 2009 to pay for the Five Properties. A summary of the cash amounts are:

- March 2008: \$404,790.77 plus a \$65,000 deposit for a total of \$469,790.77 for 6200 Semlin.
- April 2008: \$230,736.24 plus a \$40,000 deposit for a total of \$270,736.24 for 11480 Granville.
- October 2008: \$505,115.43 plus a \$87,500 deposit for a total of \$592,615.43 for 1064 Eyremount.
- November 2009: \$5,538,067.73 plus a \$380,000 deposit for a total of \$5,919,288.40 for 7575 Carnarvon.
- November 2009: paid his father back in RMB for 570 Southborough. Chao Chen testified that he did not have enough Canadian funds to pay his father the \$2.4 million so he decided to send RMB to his designated account.

[249] Chao Chen's evidence is that the money came from the Special Railway Line Company to pay for the Five Properties. What is confusing is that Chao Chen also testified that he paid no money for the acquisition of this company in November 2007, but received ¥28 million (approximately \$3.5 million) when he sold the shares in April 2009 to his uncle, Xiangjun Chen. Chao Chen never made clear how his "participation" in the company and connections he claimed to bring in resulted in this \$3.5 million gain.

Evidence Respecting the Five Properties

[250] I will canvass the evidence respecting each of the Five Properties.

6200 Semlin

Evidence of Ms. Cao and Jie Chen

[251] Jie Chen testified that the family moved to 6200 Semlin after moving out of a rental apartment in Richmond. Chao Chen lived with them at 6200 Semlin for about one year before returning to China.

[252] Ms. Cao testified that she attended an open house and viewed this property. It was a newly built house. Chao Chen was not with her for the viewing, but this property was registered in Chao Chen's name because she could not speak or read English and Mr. Chen suggested that Chao Chen deal with the realtor, Zhao Mei Chu. I note that on the contract of purchase and sale the name of the realtor is Kady Xue. It was her understanding that Mr. Chen paid the purchase price. She disputes that Chao Chen had any money since he had just returned

from studying overseas.

Evidence of Chao Chen

- [253] Chao Chen testified that he found this property. He was driving around Richmond, saw the for sale sign on the property, and contacted the realtor, Kady Xue. He viewed the property on March 2, 2008, with Ms. Xue. He entered into a contract of purchase and sale for this property dated March 2, 2008. Chao Chen recalls Mr. Chen and Ms. Cao were in China at this time. Chao Chen identified his signatures on the contract of purchase and sale. The purchase price was \$1,278,000 with a \$65,000 deposit. He wanted to purchase this property for several reasons: it was in Richmond where many Chinese people gather, it was in a good neighbourhood, and the house was a new construction.
- [254] Title to this property was registered in the name of Chao Chen on March 25, 2008. The vendors were the builders.
- [255] In order to purchase this property Chao Chen obtained a mortgage from Royal Bank on March 25, 2008, in the amount of \$830,700. According to the purchaser's statement of adjustments, the amount needed to complete the purchase was \$404,790.77. Chao Chen testified that he paid this amount. The monies came from money sent to him from China.
- [256] Chao Chen referenced a bank draft from his HSBC account and a bank account statement to show that he paid for the \$65,000 deposit.
- [257] Chao Chen produced a signed residential tenancy agreement between Shantong Zhu, Mr. Chen's girlfriend, as tenant and Chao Chen, as landlord, dated June 1, 2016. The tenancy was for one year commencing June 1, 2016 for rent of \$3,500 a month. Chao Chen testified that he received at least three to six months' rent from Ms. Zhu.
- [258] Chao Chen produced a second signed residential tenancy agreement between himself as landlord and Mr. Chen, as tenant, for this property dated June 1, 2017. Chao Chen testified that he received one month's rent of \$2,500 from his father.

Evidence of Mr. Chen

- [259] This was the first property Mr. Chen purchased in Canada. He disagreed that this property belongs to Chao Chen. He claimed that Chao Chen handled the property and its purchase, including having the property put in his name, because Mr. Chen and Ms. Cao did not know English. Mr. Chen stated he could not recall who provided the money. He explained that Chao Chen had some money and he had some money and that these are "family affairs", but later claimed that he paid the whole amount.

- [260] Mr. Chen testified that he lived at this property with his family for "quite some time". Mr. Chen agreed that he later lived at 6200 Semlin with Ms. Zhu. Mr. Chen would not answer the question whether Ms. Zhu had rented this property, suggesting that Ms. Zhu should be asked. He did initially testify that his girlfriend had signed a "living agreement" with Chao Chen and that she owed rent to Chao Chen. He later testified that he was not sure if rent was paid.
- [261] Mr. Chen denied signing the residential tenancy agreement with Chao Chen and alleged that it was a fake. Mr. Chen questioned why he would rent the property from Chao Chen when it was his property.
- [262] On March 17, 2021, Chao Chen filed a notice of civil claim against Mr. Chen seeking an order that Mr. Chen move out of this property. Mr. Chen testified that he did not receive this document. Yet, on April 6, 2021, Mr. Chen filed a response to civil claim. He claimed that it was not him who responded and denied that he signed the response to civil claim.
- [263] In October 2021, Mr. Chen was still residing at 6200 Semlin.

570 Southborough

Evidence of Chao Chen

- [264] On September 18, 2008, Chao Chen signed a contract to purchase 570 Southborough for \$2,400,000, with a deposit of \$110,000. Chao Chen testified that Mr. Chen located this property and that he became involved when Mr. Chen agreed to sell it to him. It was noted on the contract of purchase addendum that "seller will allow the buyer to register his father's name (YONG CHANG CHEN) on the property title on the completion day." Chao Chen explained that his father wanted to purchase the property and obtain a mortgage. There was a second contract to purchase the property by Mr. Chen dated December 19, 2008. The price was negotiated to \$2,300,000 with a deposit of \$111,500. Chao Chen testified that he paid the deposit.
- [265] Chao Chen testified that there was a TD mortgage obtained and that the outstanding amount due of \$1,085,730.34 was paid by Mr. Chen. The title was registered in Mr. Chen's name on December 19, 2008.
- [266] On November 25, 2009, Chao Chen testified that his father transferred this property to him. The purchaser's statement of adjustments sets out that an amount of \$10 was paid. Chao Chen testified that this arrangement was made because Mr. Chen needed money. Chao Chen did not have any Canadian dollars so he arranged to send RMB to Mr. Chen's designated account in China.

Evidence of Ms. Cao

- [267] This property was purchased on December 29, 2009, and registered in Mr. Chen's name. Ms. Cao testified that she went to view 570 Southborough before the completion date. There was no discussion with Mr. Chen that it was being purchased by Chao Chen. Ms. Cao understood that Mr. Chen paid for this property. She testified that the house was purchased for investment purposes. The house was initially rented out, but in 2013 or 2014 it was shut down because there was a marihuana grow-op. It has remained vacant since.

Evidence of Mr. Chen

- [268] In November 2009, the property was transferred by Mr. Chen to Chao Chen. Mr. Chen testified that he cannot recall this and he denied his signature was on the Form A transfer. He later testified that Chao Chen first signed a contract about this property. He further testified that this property was transferred to Chao Chen and he recognized his signature on the Certificate as to GST-Exempt Used Residential Property Transferor is Not a Builder document.
- [269] Mr. Chen testified that he could not recall who paid for this property, but agreed that this property belongs to Chao Chen.

11480 Granville

Evidence of Chao Chen

- [270] Chao Chen testified that he was driving around Richmond and he saw 11480 Granville. He called the realtor, Sophia Cai, and asked to see the property. Chao Chen testified that he spoke to the realtor alone. He decided to buy the property because it was large and conveniently located. On March 2, 2008, Chao Chen signed a contract of purchase and sale for this property for a price of \$845,000, with a \$40,000 deposit.
- [271] Title was registered in Chao Chen's name on April 3, 2008. Chao Chen obtained a mortgage from the Bank of Montreal in the amount of \$591,500. After the payment of the deposit and the mortgage, the sum of approximately \$230,000 was owed. Chao Chen paid that sum by way of a bank draft from his HSBC account.
- [272] Chao Chen testified that the money used to pay for this property came from money that had been transferred from China to his HSBC account.
- [273] Chao Chen produced two notices of civil claims dated September 23, 2015, in which the plaintiffs, as tenants, sued Chao Chen as the owner of the property. The plaintiffs alleged on January 3, 2015 they slipped and fell due to the accumulation of water on the premises. The action was settled by way of consent order in July 2021, with Chao Chen to pay payment of \$200,000 by December 22, 2021. The agreement was that the settlement funds would be paid out of the sale of the property.

Evidence of Ms. Cao

- [274] Ms. Cao testified that she went and looked at this property twice with Mr. Chen prior to its purchase. It was farmland. She understood it was purchased by Mr. Chen for investment. She found out during the divorce proceeding that it was registered in the name of Chao Chen. After the completion date, Mr. Chen and Ms. Cao went and did a little bit of cleaning on the inside of the old house on the property. Mr. Chen would also sometimes park mining vehicles, trucks, and store tools on this property. That was the only use Ms. Cao made of the property.
- [275] She believes the property was once rented out, but it is now vacant. She believes it was boarded up in 2020.

Evidence of Mr. Chen

- [276] Mr. Chen initially testified that he could not recall whose funds were used to purchase this property. Mr. Chen later testified that this property was purchased using his money and that he let Chao Chen handle the property, including renting it out. He testified that he was the one that hired the realtor. Mr. Chen agreed that the property was registered in Chao Chen's name and that Chao Chen had the right to manage it.

1064 Eyremount

Evidence of Chao Chen

- [277] Chao Chen testified that he first viewed 1064 Eyremount alone with the realtor, Sophia Cai. The second time, Mr. Chen was present. The third time, the seller's realtor was present.
- [278] The contract of purchase and sale dated September 9, 2008, shows Mr. Chen as the buyer. The purchase price was \$1,750,000, with a deposit of \$87,500 and an additional \$100,000 for furniture. Chao Chen testified that he had to go back to China, so he authorized his father to sign the contract for him.
- [279] Chao Chen retained Ronald Yip, a lawyer, to act on his behalf. Chao Chen obtained the mortgage from the Bank of Montreal for \$1,295,000. He signed the mortgage documents at the Canadian embassy in China on October 28, 2008. The outstanding amount owed was \$505,115.43, which Chao Chen paid by way of a bank draft from his Bank of Montreal account.
- [280] The property was registered in Chao Chen's name on October 30, 2008.

Evidence of Ms. Cao

- [281] Ms. Cao testified that she learned that this property was registered in Chao Chen's name in 2009 during the divorce proceedings. Prior to that, she believed that Mr. Chen was the registered owner. Ms. Cao testified that this property was purchased without a home inspection being done and needed some repairs once purchased; however, it came fully

furnished. The purpose of the purchase was for investment. The house was not rented out, but just used over the weekends. She had no discussions with Mr. Chen on who was paying for this property and was not aware that Chao Chen was paying for it.

Evidence of Mr. Chen

[282] Mr. Chen testified that he cannot recall whose funds were used to purchase this property.

7575 Carnarvon

Evidence of Chao Chen

[283] Chao Chen testified that he found 7575 Carnarvon when Sophia Cai, the realtor, drove him around in Southlands. He saw it a second time with Ms. Cai and again a third time with Ms. Cai, his cousin, Zi Yang, Mr. Chen, and Mr. Chen's friend.

[284] The contract of purchase and sale is dated September 4, 2009 and is signed by Chao Chen. This property was purchased in November 2009 and registered in the name of Chao Chen. Chao Chen explained that his cousin signed the purchaser's statement of adjustments, since he had given her a power of attorney. He was often back in China and needed someone he authorized to deal with his bank accounts, transfer vehicles, and deal with real estate transactions.

[285] Chao Chen testified that through the assistance of Yang Zi he paid the deposit of \$380,000. The remainder of the purchase price of \$5,539,288.40 came from Chao Chen. He arranged for Yang Zi to get a bank draft from his HSBC bank account.

Evidence of Ms. Cao and Jie Chen

[286] Ms. Cao testified that she understood that the title was registered in Mr. Chen's name. She believes the money to purchase this property came from the Chinese Companies. Ms. Cao testified that after it was purchased, the family lived in the property sometime prior to 2013. The carpet was replaced and the walls were painted. Ms. Cao confirmed that no rent was paid to Chao Chen to stay at this property. Her view was that she would not pay rent since it was "our own property".

[287] Jie Chen testified that they then moved to 7575 Carnarvon after living at 6200 Semlin. They lived there for almost two years. Chao Chen was not living with them. He was spending most of his time in China. Jie Chen testified that she believed Mr. Chen owned the property.

Evidence of Mr. Chen

[288] Mr. Chen initially testified that he could not recall who paid the funds to purchase this property. Mr. Chen then testified that he paid for the purchase of this property. He changed his testimony again and testified as follows:

As to how that property was paid for, whether the money came out of my account or from some other people's account, I can't recall now.

[289] In 2013, Mr. Chen listed this property as his address on his driver's licence.

[290] Mr. Chen testified that after this property was purchased the whole family moved in, and they remained there for several years. Mr. Chen testified that they moved out to give Chao Chen and his then girlfriend a place to live. Mr. Chen testified that Chao Chen later gave the property to his wife.

[291] Mr. Chen testified that Chao Chen later agreed that he could use this property after 6650 Wiltshire was sold.

Legal Principles

[292] Section 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 provides:

23 (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title

[293] This section creates a rebuttable statutory presumption that persons registered on the title of the property are presumed to hold its legal and equitable interest. The burden is on the party seeking to challenge the state of title to prove otherwise: *McInerney v. Laass*, 2015 BCSC 1708 at para. 45.

[294] The presumption can be displaced by equitable principles including the enforcement of an agreement between the parties to prevent unjust enrichment if the face of the title is upheld: *McInerney* at para. 46.

[295] Where a property has been purchased in the name of another it will prima facie result to the person or persons in proportion to the money actually contributed: *Kahlon v. Kahlon*, 2009 BCSC 779 at para. 10.

[296] For an express trust to be settled, the trust property must first be vested in the trustee(s). Second, the "three certainties" must be established on the evidence: the certainty of intention, the certainty of subject matter, and the certainty of objects.

[297] In *Bankruptcy of Taylor Ventures Ltd. (554925 B.C. Ltd.)*, 2004 BCSC 1612, Justice Burnyeat described the three certainties as follows:

[33] Regarding "Certainty of Intent", it must be established that there was a clear intent to create a trust (*Re Ont. Worldair Ltd. (1983)*, 45 C.B.R. (N.S.) 116 (Ont. H.C.), *aff'd* (1983), 48 C.B.R. (N.S.) 112 (Ont. C.A.) and the language used by the settlor must be imperative (*Re Allan Realty of Guelph Ltd. (1979)*, 29 C.B.R. (N.S.) 229 (Ont. S.C.)). As well, the intention of the settlor of the trust must be ascertained at the time of the settling of the property transferred upon the trustee: *Re New Home Warranty of British Columbia Inc. (2002)*, 33 C.B.R. (4th) 257

(B.C.S.C.). For the trust to be valid, the certainty of intent must be made known to the trustee: *Re New Home Warranty of British Columbia Inc.* (2000), 29 C.B.R. (4th) 232 (B.C.S.C.).

[37] Regarding "Certainty of Subject Matter", a trust can not be established if the subject matter of the alleged trust is undefined: *Robinson, Little & Co. (Trustee of) v. Manitoba (Min. of Labour)*, (1986), 61 C.B.R. (N.S.) 221 (Man. C.A.).

[42] Regarding "Certainty of Object", the beneficiaries must be clearly identified as must the way in which the property is to be applied: *Bank of Nova Scotia v. Societe General (Canada) et al* (1988) 68 C.B.R. (N.S.) 1 (Alta. C.A.). As well, there must be no uncertainty as to whether a person is a beneficiary: *Re Allan*, supra. If a description of a class of beneficiaries is used, the description must be certain and it must be possible to ascertain who are the members of the class and the total membership in the class: *Re Eron Mortgage Corp.* (1999), 10 C.B.R. (4th) 257 (B.C.S.C.).

[298] In *Pecore v. Pecore*, 2007 SCC 17 at paras. 20-22, Justice Rothstein described resulting trusts in the following terms:

20 A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner.: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

21 Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters' Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because "the father was under a moral duty to advance his children in the world": A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 575 (emphasis added).

22 In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Re Mailman Estate*, [1941] S.C.R. 368, at p. 374; *Niles v. Lake*, [1947] S.C.R. 291; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 451; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see *Sopinka et al.*, at pp. 105-6.

[299] The burden of proving the existence of an express trust rests on the party asserting its existence: *McInerney* at para. 36.

- [300] Certainty of intention is a question of fact. In the absence of formal documentation creating a trust, the court may infer an intention to create a trust from the surrounding circumstances. Evidence of what the parties intended, what they actually agreed upon, and how they conducted themselves will be considered: *McInerney* at para. 40.

Position of the Parties

Position of Ms. Cao

- [301] Ms. Cao submits that the Five Properties are family assets held in trust by Chao Chen for Mr. Chen and therefore they should be equally apportioned between herself and Mr. Chen.
- [302] Ms. Cao's theory is that Mr. Chen decided to divorce her in 2007 and started on a path to divest himself of assets using his son as an accomplice. He arranged to have monies he had earned in China transferred to his son so that Chao Chen could purchase properties in BC. His plan was to have his son hold the properties in his name until he had completed the divorce proceedings with Ms. Cao.
- [303] In support of this theory, Ms. Cao points to the 2021 Action in which Mr. Chen claims that "he purchased a number of properties", which include the Five Properties, that were being held in trust by Chao Chen, Meng Lu, and 097055 B.C. Ltd. As she points out, this is contradicted in Mr. Chen's statement of defence in the Family Law Proceeding in which he states that the Five Properties belong to Chao Chen and that he has never been the legal or beneficial owner of them.

Position of Mr. Chen

- [304] Mr. Chen's position was hard to discern. His closing submissions were rambling, disjointed, and on many occasions, he attempted to refer to matters which he had not testified to.
- [305] I have tried to discern Mr. Chen's position by reviewing his direct testimony. Mr. Chen testified that a lot of the properties were purchased, some belong to the extended family, and some to him. He says he purchased all those properties, I believe he was referring to the ones in Chao Chen's name, himself. Mr. Chen claims that a number of the properties that were purchased for the "extended family", he then gave to Chao Chen to manage.
- [306] In looking at the totality of Mr. Chen's evidence, it appears that he is claiming that the Five Properties either belong to him or to his extended family.

Position of Chao Chen

- [307] Chao Chen submits that all Five Properties are registered in his name and have been at all material times. He has produced bank records evidencing that he had the funds to purchase them. He argues that he and his witnesses have testified that he had the independent means to afford them.

[308] Chao Chen submits that Ms. Cao has the onus of proof and she has failed to discharge that onus and failed to adduce sufficient evidence to substantiate her claims.

Sub-Issues to be addressed

[309] Two sub-issues arose respecting the trust claims. They are:

- a. Are various corporate records obtained from a Chinese governmental agency for the Special Railway Line Company and other corporate records admissible; and
- b. Is Chao Chen estopped from alleging further income sources for the purchase of the Five Properties.

Sub-Issue 1 - Admissibility of the Corporate Records

Position of Ms. Cao

[310] Ms. Cao submits that all of the parties seek to enter into evidence some of the corporate records from China. She argues that all of the corporate records the parties seek to have admitted should be entered as exhibits at trial on the basis that the documents are admissible for the following reasons:

- a. the documents are authentic; and
- b. the documents are not hearsay; or
- c. in the alternative, if the documents are hearsay, they fall within the hearsay exception, being either or both of the business records exception or they are admissible as hearsay using the principled approach set out in *R. v. Khan*, [1990] 2 S.C.R. 531.

Position of Chao Chen

[311] Counsel for Chao Chen did not admit to the authenticity of the documents, however, in his cross-examination, Chao Chen appeared to acknowledge the authenticity of several of these documents. Chao Chen's position is that none of the witnesses who attended the trial established that the documents fall within the concept of "business records" as an exception to hearsay.

Analysis

[312] The evidence supports that the various corporate records were filed with a government agency in China. Ms. Cao testified that she obtained some of the corporate records from her divorce lawyer in China in 2009, who obtained them from the business registries and bureau from the government. Mr. Wang testified that he obtained the records for the Special Railway Line Company from Taiyuan Market Supervising Bureau and the Taiyuan Administrative Verification and Approval Bureau. Mr. Wang confirmed that he had no knowledge of who created the documents, when they were created, and whether the person who created the documents had personal knowledge of the events.

[313] The first step in the analysis is one of authentication. The legal principles on authentication of documents was recently considered by Justice Giaschi in *Oswald v. Start Up SRL*, 2020 BCSC 205:

[13] The need to authenticate documents was addressed in *Slough Estates Canada Ltd. v. Federal Pioneer Ltd.*, [1994] O.R. (3d) 429 (O.C.).

57 It is a fundamental prerequisite to the admissibility of any document that the document be authenticated by the party tendering it in evidence. A document does not become evidence merely upon production; some testimony or other evidence must be adduced to authenticate it: *Scougall v. Stapleton* (1986), 12 O.R. 206 at pp. 209-10 (C.A.); Ewart, *Documentary Evidence in Canada* (1984) at p. 33; Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992) at pp. 46, 950-52; Schiff, *Evidence in the Litigation Process*, 4th ed. (1993), vol. 2 at pp. 1068-71.

58 A document may be authenticated by admissible evidence sufficient to establish that the document is genuine, such as identification of the document by its author or someone who observed the author create or sign the document. A mere purported signature or statement of authorship on the document's face is insufficient, as both are inadmissible hearsay: *Thompson v. Thompson* (1902), 4 O.L.R. 442 at pp. 446-47 (C.A.); *Russell v. Fraser* (1865), 15 U.C.C.P. 375 (C.A.); Schiff, *Evidence in the Litigation Process*, supra, at pp. 1070-71.

59 There is a reason for this. Documents are disclosed by litigants because they are in their possession and appear on their face to be relevant. However, without some independent evidence of their authenticity -- they may have been surreptitiously put into files or been improperly filed -- the fact that they are shown in an affidavit on production by the opposite party does not make them admissible as evidence.

[14] The Court of Appeal in *British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111, noted that authentication requires proof the document is what it purports to be. This is normally done by testimony from the maker of the document but threshold authenticity can also be established by circumstantial evidence.

[65] Under the rules of evidence, documents (real evidence) must be authenticated, that is the documents must be proved to be what they purport to be before they may be admitted into evidence. To establish threshold authenticity, the author or creator of a document is typically called as a witness to attest that he or she made the document and what the document was intended to be. Threshold authenticity, however, may also be established by circumstantial evidence: David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2012) at 96.

[15] The Ontario Court of Appeal in *R. v. C.B.*, 2019 ONCA 380, also recently stated that authentication requires some evidence the documents sought to be admitted are what they purport to be but the Court noted that the threshold is a low one:

[65] Authentication is the process of convincing a court that a thing matches the claim made about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.

[66] At common law, authentication requires the introduction of some evidence that the item is what it purports to be.: R. v. Donald (1958), 1958 CanLII 470 (NB CA), 121 C.C.C. 304 (N.B. C.A., at p. 306; R. v. Staniforth (1979), 11 C.R. (3d) 84 (Ont. C.A.), at p. 89; R. v. Hirsch, 2017 SKCA 14, 353 C.C.C. (3d) 230, at para. 18. The requirement is not onerous and may be established by either or both direct and circumstantial evidence.

[314] I am satisfied of the authenticity of the documents based on direct and circumstantial evidence. As noted above, this requirement is not onerous and has been established as follows:

- the documents bear the stamp showing they were filed with a governing agency in China;
- Mr. Wang testified to retrieving copies of the documents from the relevant government office in China;
- some of the documents bear the signature and fingerprints of either Mr. Chen or Chao Chen; and
- there was no suggestion that the documents were anything but as indicated on the face of them.

[315] The next step of the analysis is whether the documents are hearsay, and if so, are they admissible under the business records exception or under the principled approach to the admission of hearsay.

[316] First, dealing with the business records exception, the Evidence Act, R.S.B.C. 1996, c. 124 states:

Admissibility of business records

42 (1) In this section:

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

"document" includes any device by means of which information is recorded or stored;

"statement" includes any representation of fact, whether made in words or otherwise.

(2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if

(a) the document was made or kept in the usual and ordinary course of business, and

- (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.
- (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
- (4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.
- (5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.

[317] Discussing a similar provision that allows for the admissibility of business records under the Canadian Evidence Act, R.S.C. 1985, c. C-5, the Court of Appeal for British Columbia in *R. v. Jahanrakhshan*, 2013 BCCA 128 at para. 12, approved of the following rationale for the existence of the provision:

It would appear that the rationale behind that section for admitting a form of hearsay evidence is the inherent circumstantial guarantee of accuracy which one would find in a business context from records which are relied upon in the day to day affairs of individual businesses, and which are subject to frequent testing and cross-checking.

[318] Oswald sets out at para. 17 that for a document to be admitted into evidence under the business records exception of the Evidence Act, the party tendering the document must prove all of the elements in s. 42, namely, that the document was:

- a) made contemporaneously;
- b) by someone having a personal knowledge of the matters being recorded;
- c) by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business; and
- d) that the matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business.

Cambie Surgeries Corporation v. British Columbia (Attorney General), 2018 BCSC 859, at para. 16.

[319] The courts have found that business records such as "ledger accounts, time-cards, pay-roll records, and other routine commercial records" can be admitted as business records: Oswald at para. 22.

- [320] The documents that Ms. Cao sought to have admitted are listed in Schedule A to these Reasons. The documents that Chao Chen sought to have admitted were marked for identification as Exhibit P. Some of the documents are included in Schedule A and are marked with #. The remaining documents are listed in Schedule B to these Reasons. The documents that Mr. Chen sought to have admitted were marked for identification as Exhibit II. The two documents are included in Schedule A, being the Third Shareholders Meeting Resolution dated September 1, 2009, and the Shareholdings Transfer Agreement dated July 16, 2006, both marked with an * on Schedule A.
- [321] I note all of the documents were in Mandarin and had been translated by a certified translator.
- [322] The documents sought to be admitted here are ones that are typical business records that are kept in the usual and ordinary course of any business. Certain documents, like business licences and applications to register a corporation, are ones required by governmental agencies, whereas others, such as some of the share transfers agreements, are ones that have been signed by either Mr. Chen or Chao Chen.
- [323] I note that Chao Chen submitted that the corporate records that Ms. Cao attempted to admit were of the same nature as the corporate records that Chao Chen sought to have admitted in support of his argument that he owned the Special Railway Line Company. The only difference is that Chao Chen only produced records from this company after he became the majority shareholder and not the prior records.
- [324] If I am wrong on the business records exception, I find that on the principled approach to the admission of hearsay, these records have the necessary indicia of necessity and reliability to be admitted: *R. v. Mapara*, 2005 SCC 23 at para. 15. I find that these corporate records existed as evidence by their filing with the Chinese Government agencies. I accept that Ms. Cao is unable to call all the creators of the documents, although in some instances the signatories to many of the documents were before the Court.

Sub-Issue 2 - Is Chao Chen estopped from alleging further income sources for the purchase of the Five Properties?

Position of Ms. Cao

- [325] Ms. Cao submits that up until the First Trial, both Chao Chen and Mr. Chen took the position that the proceeds in China from the sale of the Special Railway Line Company were found by the courts in the Chinese Judgment not to be family assets. Thereafter, Chao Chen took the position in various pleadings and other documents that he bought the Five Properties from funds which he made from the Special Railway Line Company.
- [326] Ms. Cao suggests that Chen Chao fabricated his affidavit evidence to tailor it to the Chinese Judgment and then submitted that the sole source of funds for the purchase for the Five Properties came from the sale of the Special Railway Line Company.

- [327] At this trial, Ms. Cao submits that Chao Chen is now claiming that the source of the funds for the purchase of the Five Properties includes funds from other business activities in China.
- [328] Ms. Cao argues on the doctrine of res judicata that Chao Chen is barred from advancing a position contrary to the position he took at the First Trial. In the alternative, she submits that Chao Chen is estopped from proving additional sources of funds for the purpose of the Five Properties because he made a judicial admission that he cannot or should not be allowed to now withdraw. She claims it is unjust to allow Chao Chen to take a different position.

Analysis

- [329] The principle of res judicata has the objective to achieve finality in litigation. It requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 18. The doctrine of res judicata originates from the idea that a dispute once judged upon with finality is not subject to relitigation.
- [330] The concept of issue estoppel is defined as any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be re-tried in a subsequent suit between the same parties: *Danyluk* at para. 24. The preconditions for the operation of issue estoppel are:
1. that the question has been decided;
 2. that the judicial decision which is said to create the estoppel was final; and,
 3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Danyluk at para. 25.

- [331] Ms. Cao argues that the three preconditions have been met.
- [332] In my view, there was no finding made in the Chinese Judgement or the First Trial that the source of the funds to purchase the Five Properties came from the Special Railway Line Company. As I noted in my Reasons at para. 63: "The claims against C. Chen in this action are only with respect to properties situate in British Columbia that were not adjudicated on by the Chinese Courts." The question of the source of the funds remains an issue not yet decided, leading to this trial.
- [333] The doctrine of res judicata and issue estoppel cannot operate as a bar to restrict the evidence of Chao Chen in this proceeding.

[334] Ms. Cao further submits that Chao Chen has made an admission that the Special Railway Line Company is the sole source of the funds to purchase the Five Properties. She claims that Chao Chen has not met the test to allow the withdrawal of the admission.

[335] She claims that the admission was made in the following documents:

- In a notice of application filed by Chao Chen on September 16, 2014, in the Facts section at paras. 7, 16-25, and 22-22, Chao Chen asserted that the source of funds from the Special Railway Line Company was used to purchase all of his assets in BC.
- In Affidavit #6 of Chao Chen made on September 16, 2014, Chao Chen stated under oath at para. 10: "I brought all of the 5 properties in 2009 with funds I made from the Railway Special Line".
- In oral submissions, Ms. Blake, as counsel for Chao Chen at the application of Ms. Cao to adjourn the trial, submitted that the source of the funds to buy houses came from China.
- In a notice of application filed by Mr. Chen on July 17, 2017, in the Facts section at paras. 23-27, Chao Chen stated he had purchased the properties with funds he earned from the Special Railway Line Company and the ownership of that company had been decided by the Chinese Judgment.

[336] The issue is whether statements made in notices of applications, affidavits, and in oral submissions of counsel come within the ambit of an admission that requires the consent of the parties or an application to court to withdraw.

[337] In my view, such statements do not.

[338] I note that Ms. Cao referred to the decision in *Advantage Helicopters Inc. v. Heliponents, Inc.*, 2012 BCSC 1938 [Advantage Helicopters] for the test on an application to withdraw an admission. That case involved an application by a plaintiff to withdraw admissions made in a response to a notice to admit prior to the trial: *Advantage Helicopters* at para. 2.

[339] Rule 9-6 of the Rules sets out that an admission made in a response to a notice to admit, a deemed admission under subrule (2), and an admission made in a pleading, petition, or response to a petition can only be withdrawn by consent or with leave of the court.

[340] A pleading is defined in Rule 1-1 as follows: "means a notice of family claim, a response to family claim, a counterclaim and a response to counterclaim".

[341] None of the documents in which Ms. Cao asserts the admissions were made come within the definition of a pleading.

[342] In *Sidney N. Lederman, Michelle K. Fuerst, Hamish C. Stewart, Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022) at para. 19.2 it says:

A formal admission may be made: (1) by a statement in the pleadings or by failure to deliver pleadings; (2) by an agreed statement of facts filed at the trial; (3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by the opposing counsel with the intention that the statements be relied on by the judge; (4) by a letter written by a party's solicitor prior to trial; or (5) by a reply or failure to reply to a request to admit facts. The Manitoba Court of Appeal stated that "[e]xtreme care and clarity is required before describing discovery evidence as a formal admission," and that such evidence is generally used as an informal admission by the opposing party. A formal admission of fact, as distinct from an admission of law, cannot be withdrawn except with leave of the court or the consent of the party in whose favour it was made

[Footnotes Removed. Emphasis added.]

[343] None of the documents that Ms. Cao relies upon as containing the admissions come within the above definition of a formal admission.

[344] I note that it would make the litigation process completely unwieldy if every statement made in notices of application, in affidavits, or in submissions made by counsel to chambers judges were elevated to a formal admission for which either consent or a formal application to withdraw has to be made. The hearing of any trial would grind to a halt as counsel submitted that facts in affidavits or allegations made by counsel were now elevated to the status of an admission. That cannot possibly be correct.

[345] I find no basis for the assertion that Chao Chen needs to apply to withdraw any admissions made in the documents referenced above. As such, there is no need to consider the test for the withdrawal of an admission, since no such admission has been made.

[346] That, however, does not detract from the issue of whether Chao Chen has given inconsistent evidence in an affidavit he swore prior to trial and in the trial. As I have addressed in the credibility section of these Reasons, inconsistent sworn evidence may well impact the credibility and reliability of the evidence given.

Issue 8: Are the Five Properties Held in Trust by Chao Chen for Mr. Chen, and, if so, Are They Family Assets? If so, How Should They be Apportioned Between the Parties?

[347] In the amended notice of family claim, Ms. Cao asserts that Chao Chen holds the Five Properties in trust for Mr. Chen and that they are family assets of Ms. Cao and Mr. Chen.

[348] The crucial issue is whether Chao Chen provided any value for the Five Properties. The evidence is clear on 6200 Semlin, 11480 Granville, 1064 Eyremount, and 7575 Carnarvon that the monies to fund the deposits and the purchase price came from bank accounts owned by Chao Chen and, for some properties, mortgages obtained by Chao Chen. This is not disputed by Ms. Cao. Ms. Cao argues that the monies in these BC bank accounts came from money transferred from China by Mr. Chen from the sale of family assets in China.

- [349] There was no evidence presented to substantiate this assertion except for Ms. Cao's belief that this is where the money came from and the suggestion that Mr. Chen must have provided the funds because Chao Chen could not have earned the money to fund these purchases.
- [350] I am not persuaded that Ms. Cao has met her burden of establishing that Chao Chen gave no value for the properties on the evidence before me. She further has not established that Chao Chen was acting as a fiduciary and holding the properties for Mr. Chen. Something more is needed than Ms. Cao's bare assertion. Mr. Chen was of no assistance in supporting this claim, since his evidence was either contradictory or absent on the source of the funds for the purchases of these four properties.
- [351] In addition, the evidence supports that Chao Chen has been paying the mortgages on 6200 Semlin, 11480 Granville, and 1064 Eyremount for many years. Further, he has been paying the maintenance for these properties. There is no evidence that since 2008 there has been any ongoing transfers of monies from Mr. Chen to Chao Chen to assist in paying the mortgages or for the maintenance of these properties.
- [352] On the evidence before me, Ms. Cao has not met her burden of establishing that any trust existed. As such, Chao Chen is not obligated to return these properties to Mr. Chen and Ms. Cao has no claims against these properties.
- [353] The evidence respecting the purchase of 570 Southborough is that Chao Chen paid the deposit and Mr. Chen obtained a mortgage and paid the outstanding purchase price. The property was registered in Mr. Chen's name until November of 2009, when it was transferred to Chao Chen for \$10. Chao Chen testified that he paid his father the equivalent of \$2.4 million in RMB to a designated account in China. Chao Chen failed to provide evidence of this payment.
- [354] However, the only evidence before me is Chao Chen's testimony that he paid his father in China. This is further supported by Mr. Chen's evidence that "570 Southborough belongs to Chao Chen". In light of this evidence, I am not persuaded that Chao Chen held 570 Southborough on a trust basis. As such, Ms. Cao has no claim to this property.

Issue 9: Should There Be an Order Relating to Parenting Time and Ongoing Child Support Made at this Time?

Position of the Parties

Position of Ms. Cao

[355] Ms. Cao objects to the parenting time being decided since it has never been at issue. She claims that Mr. Chen had acceded to the issue of custody until just prior to this trial. She has not had adequate time to prepare a report with the views of the Children. She submits that this issue should be determined at a later date, if necessary. She further submits that the issue of child support, since the younger children began living with Mr. Chen in December 2020, should also be dealt with at a later time.

Position of Mr. Chen

[356] Mr. Chen sought to obtain custody of the two younger children. He produced text messages from his two younger children saying that they would be happy to live with their father.

Analysis

[357] The situation at the time of trial was that the younger children were residing with Mr. Chen on a full-time basis. This has been the situation since 6650 Wiltshire was sold in approximately December 2020.

[358] I agree with the submissions of Ms. Cao that the issue of future parenting time for the younger children should be determined in a separate hearing, if necessary. The children are of ages, currently 17 and 18 years old, that they should be involved in the decision of where they should reside and how much time they should spend with each parent. There are other important considerations, such as where the children will be attending school and what is in their best interests, to be analyzed.

[359] If there is going to be an application heard, the views of the Children should be provided. It is not appropriate for their views to be provided to me through the parents. They should be provided through an impartial independent third party. A Views of the Children report should be obtained. The costs of this report should be shared equally between Ms. Cao and Mr. Chen. If Mr. Chen refuses to cooperate, Ms. Cao can proceed to initially obtain a report and can then seek reimbursement for the costs.

[360] I will permit Ms. Cao and her counsel to choose the author of the Views of the Children report since I see little likelihood that Mr. Chen will cooperate in this process.

[361] The issue of the payment of child support from January 1, 2021 to date, and any ongoing child support, is also adjourned. The parties have leave to set down an application before me to address these outstanding issues.

Conclusions on the Family Law Proceeding

[362] For ease of reference, I will summarize the conclusions I have reached.

[363] For purposes of child support, Mr. Chen's imputed income is \$750,000 annually from September 2009 to December 2020.

[364] The amount of retroactive child support is \$1,647,958.

[365] The amount of support payments made by Mr. Chen to Ms. Cao totals \$1,818,111.

[366] As a result, Mr. Chen has overpaid child support in the amount of \$170,153.

[367] Ms. Cao owes Mr. Chen the sum \$170,153 for the overpayment of support.

[368] The following properties are family assets:

1. 721 Southborough Drive, West Vancouver, having a legal description of:

Parcel Identifier: 010-310-703

Lot 20 Block 26 Capilano Estates Plan 7896

District Lot CE, Group 1

New Westminster Land District

2. 19459 Richardson Road, Pitt Meadows, having a legal description of:

Parcel Identifier: 001-175-238

Lot 1 Section 10 Township 40

New Westminster District Plan 68997

3. 610 Stewart Cassiar Highway, Prince Rupert, having a legal description of:

Parcel Identifier: 015-625-524

District Lot 6692 Cassiar District

[369] I have reapportioned 100 percent of 721 Southborough and 19459 Richardson to Ms. Cao. She will be responsible for any existing mortgages registered against these properties.

[370] 610 Stewart will be divided equally between Mr. Chen and Ms. Cao. I find the value of the property to be \$310,000. Mr. Chen has two options as to how to proceed in dividing the property equally:

- a) He may choose to maintain ownership of 610 Stewart and buyout Ms. Cao's share, being \$155,000. However, as Ms. Cao owes Mr. Chen \$170,153 for the overpayment of child support, this will result in a reduction of her amount owing to a total of \$15,153; or
- b) He may sell 610 Stewart and the net proceeds of sale will be divided equally between Mr. Chen and Ms. Cao. Ms. Cao's portion will be put towards the \$170,153 she owes Mr. Chen for overpayment of child support. If Ms. Cao's portion of the net proceeds of sale exceeds \$170,153, that money will be paid to her.

- [371] Ms. Cao is entitled to 50 percent of the shares held by Mr. Chen in Canada Rockies.
- [372] All issues relating to parenting time for H.C. and J.C., retroactive child support from January 2021, and future child support are adjourned.
- [373] If the parties cannot agree on parenting time, I order a Views of the Children report to obtain the views of H.C. and J.C. on issues relating to parenting time, contact, and parental responsibilities. The costs of the Views of the Children report should be paid equally by Mr. Chen and Ms. Cao. If Mr. Chen refuses to pay, Ms. Cao should pay for it initially and can then seek reimbursement from Mr. Chen.
- [374] I anticipate that Mr. Chen will not cooperate in selecting the assessor of the Views of the Children report. Ms. Cao will provide a name for the assessor of the Views of the Children report to Mr. Chen. If Mr. Chen objects to this name, he must give written notice of such objection within four weeks of being advised of the name and the parties can apply before me to have an assessor appointed. If he does not provide a written objection, Ms. Cao is free to engage that assessor.
- [375] The assessor will give a copy of the completed report to Ms. Cao, Mr. Chen, and the Court.

Issue 10: Assessment of Costs of the Family Law Proceeding

- [376] I will be seeking further submissions from the parties in respect to the costs of the Family Law Proceeding, including the costs associated with the First Trial on the issue of the recognition of the Chinese Judgment.
- [377] I would like to hear from counsel and Mr. Chen on a schedule for written submissions and, considering that Mr. Chen is unlikely to prepare any written submissions, a time to hear supplementary oral submissions.
- [378] I request that counsel schedule a case planning conference within 60 days of these Reasons being pronounced to discuss this issue.
- [379] I will now consider the CC Action.

CC Action

- [380] This action primarily concerns a loan agreement that was allegedly entered into between Chao Chen and Mr. Chen on March 1, 2015 (the "Loan Agreement") for the lending of monies, and an addendum on April 30, 2018 (the "Addendum") dealing with Mr. Chen's breach of the Loan Agreement. A further issue was raised by Jie Chen respecting a claim she has to a property, being 3399 Deering Island, that had been registered in Chao Chen's name and which he sold in February 2017.

Overview of Litigation

[381] On April 10, 2019, Chao Chen filed a notice of civil claim suing Mr. Chen and Jie Chen. He also filed certificates of pending litigation against the following properties:

- a) 19459 Richardson;
- b) 721 Southborough; and
- c) 6650 Wiltshire.

[382] The CC Action claimed that Chao Chen had loaned money to Mr. Chen pursuant to a Loan Agreement in 2015 for the purpose of purchasing a property, being 6650 Wiltshire. As a result, Chao Chen asserted a constructive trust or resulting trust over 6650 Wiltshire. Further, the claim asserted that Mr. Chen had used some of the loan money to pay the mortgage, property taxes, and maintenance fees on two properties: 19459 Richardson and 721 Southborough. Chao Chen also asserted a constructive trust or equitable mortgage over these properties.

[383] On September 15, 2020, Chao Chen obtained a default judgment as a result of Mr. Chen's failure to file and serve a response to civil claim within the time allowed. The default judgment ordered Mr. Chen to pay to Chao Chen damages to be assessed.

[384] On October 29, 2020, Ms. Cao applied to be added as a party in the CC Action and to have the default judgment against Mr. Chen set aside. I dismissed that application, see reasons indexed at 2020 BCSC 2050, and made the following orders in the CC Action:

1. the application of Ms. Cao to be added as a party and to set aside the default judgment was dismissed;
2. I seized myself of the CC Action and all applications;
3. the CC Action and the Family Law Proceeding would be tried together with the evidence in each proceeding admissible as evidence in the other;
4. the trial of the two actions would commence on April 26, 2021 for 30 days; and
5. costs granted to Chao Chen against Ms. Cao in any event of the cause.

[385] On January 13, 2021, Jie Chen filed a response to civil claim denying that she breached the Loan Agreement, that she was liable in debt, and that she had been unjustly enriched. She claimed she was the legal owner of an undivided half interest in 6650 Wiltshire, and she did not hold that interest in trust.

[386] On May 19, 2021, Jie Chen filed a counterclaim asserting a beneficial interest in 3399 Deering Island, pursuant to an agreement between Chao Chen as trustee and Mr. Chen as Jie Chen's legal guardian.

[387] On August 4, 2021, Chao Chen filed a response to counterclaim claiming that Jie Chen "made up the story" and denying the existence of any agreement.

Relevant Facts

Loan Agreement and Addendum

[388] The Loan Agreement is dated March 1, 2015. The parties to the Loan Agreement are Mr. Chen as borrower and Chao Chen as lender. Jie Chen is not a signatory to the Loan Agreement. Chao Chen testified that Mr. Chen told him that he had reached an agreement with Ms. Cao and he was purchasing 6650 Wiltshire and needed to borrow some money. Chao Chen agreed to lend him the money. Chao Chen confirmed his signature on the Loan Agreement. He confirmed his father's signature and thumbprint was also on this document. Chao Chen claims that the Loan Agreement was signed in Vancouver in 2015.

[389] The Loan Agreement provided the following salient terms:

- Chao Chen loaned Mr. Chen ¥8 million (equivalent to \$1.5 million), to be paid within 30 days of signing the Loan Agreement;
- The term of the loan was five years from March 1, 2015 to February 28, 2020;
- Mr. Chen agreed to pay lump sum interest of \$1,000,000 to a bank account assigned by Chao Chen;
- The purpose of the loan was the purchase of 6650 Wiltshire with the ownership of this property being registered under Mr. Chen and Jie Chen;
- Mr. Chen agreed he would not provide the property to any third party financial institution other than to the bank as security. Should the property become the subject of a lien or court execution due to Mr. Chen's legal dispute, Mr. Chen shall make a lump sum payment of \$1,000,000 to Chao Chen; and
- Any dispute shall be resolved through friendly consultation or discussion or third party mediation. If the consultation or mediation fails, a legal action may be taken to the local People's court where Chao Chen's household registration is recorded.

[390] Chao Chen testified that the \$1.5 million he gave to Mr. Chen was comprised of \$80,000 he arranged himself and \$1,420,000 borrowed from his wife, Meng Lu. The payee on the bank draft was Canada Rockies International and the date was March 23, 2015. Chao Chen testified that his father told him that he could not receive the money in a personal capacity, so he asked that the money be paid to his company. Chao Chen claimed that his wife flew from Beijing to drop off the money.

[391] Chao Chen testified that Mr. Chen and Ms. Cao did not reach an agreement and, as a result, a certificate of pending litigation was registered against 6650 Wiltshire by Ms. Cao on or about March 24, 2016. This then resulted in the Addendum being signed on April 30, 2018. The Addendum was signed by Chao Chen and Mr. Chen in the presence of Mr. Chen's mother.

[392] The Addendum provided the following salient terms:

- Mr. Chen admitted that he had violated clause 5 of the Loan Agreement and 6650 Wiltshire was currently frozen with a certificate of pending litigation and that the property was frozen as a result of Mr. Chen's personal reasons;
- Mr. Chen agreed to pay \$1 million to Chao Chen by June 1, 2018 as a result of the breach of contract. The principal of ¥8 million was to be paid by February 28, 2020;
- Mr. Chen guaranteed that even though the property was registered under the name of Mr. Chen and Jie Chen, it was not gifted to Jie Chen and Mr. Chen had complete ownership and may ask Jie Chen to withdraw from the title certificate at any time;
- Mr. Chen guaranteed that if he failed to pay the \$1 million to Chao Chen by June 1, 2018, Mr. Chen would agree to transfer 6650 Wiltshire to Chao Chen as a compensation payment for the penalty and the principal;
- Chao Chen agreed to personally assume the bank mortgage and other expenses associated with the property; and
- Any dispute would be filed in the Supreme Court of BC.

6650 Wiltshire

[393] This property was purchased on April 21, 2015. It was registered in the name of Mr. Chen and Jie Chen. Ms. Cao agreed that the property should be registered in that fashion. She wanted a place where she could live with the Children. Mr. Chen was registered on title because he was to pay the mortgage. The first mortgage was from HSBC Bank Canada.

[394] Ms. Cao testified that in 2015 she wanted to move into her own property and live separate from Mr. Chen. So, the two of them discussed that he would purchase a property for her worth around \$5 million. This property was purchased for \$3.6 million and she wanted Mr. Chen to give her an additional \$1.4 million. He did not agree. The settlement discussions were not successful.

[395] Jie Chen testified that Mr. Chen initially was purchasing this house for her mother, but changed his mind and did not want to put this property under Ms. Cao's name. He would only agree to put Jie Chen's name on title. She understood it was her father's money that was used to purchase this property. After the CC Action was commenced, Mr. Chen called Jie Chen and told her that he did not borrow money from Chao Chen to purchase this property.

[396] Mr. Chen gave conflicting evidence on whether he borrowed money from Chao Chen to purchase 6650 Wiltshire. On day three of the trial, he provided the following testimony:

Q Okay. And you did not borrow any money from your son to purchase the Wiltshire Street property, did you?

A I have borrowed money from him, and with all the borrowed money I purchased the property. I have borrowed all the funds in order to purchase the property for her.

A I'm asking you to confirm that you did not borrow money from your son to purchase the Wiltshire Street property.

A I have borrowed money.

Q From who, sir?

A From my son. Use the property as a collateral.

Q Well, your son -- we're in court partly to deal with the issue of your son having sued you and your daughter, Jie Chen, stating that he loaned you the money to buy Wiltshire.

A Yes.

Q Right. And he didn't loan you that money, did he?

A Yes, he did.

[397] Later on the same day of trial, he testified that he believed he borrowed the money from Meng Liu, his ex daughter-in-law.

[398] On day 23 of the trial, Mr. Chen changed his evidence and testified that all of the money used to purchase this property was his.

[399] After 6650 Wiltshire was purchased, Ms. Cao lived there with the children. Mr. Chen did not live there with them. The mortgage was not paid by Mr. Chen and, as a result, the HSBC Bank of Canada commenced foreclosure proceedings on August 20, 2019.

[400] Ms. Cao borrowed money and registered a second mortgage against the property. The amount of the second mortgage was \$300,000. Mr. Chen paid off this mortgage. Ms. Cao agrees Mr. Chen should be given credit for paying off this second mortgage as part of his support obligations to her.

[401] On January 23, 2020, an order nisi was made and ultimately the property was sold. The net proceeds of the sale are currently being held by Chao Chen's counsel.

[402] On December 7, 2021, I ordered the sum of \$60,000 be paid from Mr. Chen's share of the net proceeds to Ms. Cao to assist her with living expenses during the trial. Ms. Cao agrees that this sum should be treated as support paid to her by Mr. Chen.

3399 Deering Island

Evidence of Chao Chen

- [403] Chao Chen testified that Mr. Chen signed the contract of purchase and sale for 3399 Deering Island on June 3, 2011. He testified that Mr. Chen told him he wanted them to always be neighbours and wanted to purchase a property beside 7575 Carnarvon. On the contract of purchase and sale the buyers were listed as Mr. Chen and Jie Chen. Chao Chen testified that he did not know why Jie Chen's name was handwritten on the contract of purchase and sale. Chao Chen also signed the contract of purchase and sale. The deposit of \$150,000 was paid by Mr. Chen.
- [404] Chao Chen testified that Mr. Chen told him that his funds were tight and since he had already paid the deposit and he did not want it confiscated, Mr. Chen invited Chao Chen to get a loan and purchase the property.
- [405] On June 15, 2011, there was an assignment agreement whereby Mr. Chen assigned the property to Chao Chen for one dollar. Mr. Chen could not recall this.
- [406] Chao Chen testified that he obtained a mortgage from TD Bank for \$1,435,000. Chao Chen testified that he obtained three bank drafts from BMO, HSBC, and TD Bank to purchase this property. He claimed that he arranged to have money transferred from China to his account in Canada from Wu Dajun's security company. The property was registered in Chao Chen's name.
- [407] This property was placed in the name of Chao Chen and he ultimately sold it on February 27, 2017 for \$3,650,000. After the payment out of the TD Bank mortgage, the net amount paid to Chao Chen was \$3,328,295.35. Chao Chen paid tax for the increased value of the property in the amount of just over \$310,000.

Evidence of Ms. Cao and Jie Chen

- [408] Ms. Cao went to view this property with Mr. Chen before it was purchased. At the time, Mr. Chen wanted a place to moor his boat. Mr. Chen told her that he would put Jie Chen's name on the title to the property. Ms. Cao's understanding was that the house was being purchased for Jie Chen.
- [409] Ms. Cao testified that she visited this property frequently when they were living nearby at 3308 Deering Island (another property not subject to this litigation). Ms. Cao testified that Mr. Chen's boat was moored there all the time. This was supported by Jie Chen's evidence.
- [410] Jie Chen testified that her father told her that he wanted to purchase this property for her and that he wanted to park his boat for free. She visited this property many times. Jie Chen testified that her father was paying for this property and that she was the registered owner. She was aware that it was purchased in her name.

[411] The original purchase documents had the names of Mr. Chen and Jie Chen. Jie Chen testified that she did not sign the contract of purchase and sale and that she recognized that her signature was in her father's handwriting. Jie Chen testified that she did not see the addendum dated June 8, 2011 that provided:

Buyer and seller agree to delete Chen Yongchang and Chen Jie, buyers, from the contract, and to add Chen Chao as the sole buyer.

[412] Jie Chen was not aware that Chao Chen's name was substituted for her name as the buyer of this property. She believed that the property was being purchased in her name.

[413] Jie Chen had never seen the Bare Trust Agreement and Agency Agreement respecting this property, which is discussed below.

[414] Jie Chen was not aware that the property was registered in Chao Chen's name and sold by him.

Evidence of Mr. Chen

[415] Mr. Chen testified that this house was purchased for his oldest daughter, although he stated he "can't recall what happened then". He also testified that it was not being purchased for Jie Chen. His evidence was that he wanted Chao Chen to do this but he did not tell Chao Chen to do this. Mr. Chen later testified that Chao Chen agreed that this house was purchased for Jie Chen. He testified that he cannot recall paying the deposit of \$150,000. Mr. Chen confirmed that he moored his boat there.

[416] Mr. Chen also denied his signature was on the addendum to the purchase contract in which the buyer and seller agreed to delete Mr. Chen and Jie Chen from the contract and add Chao Chen as the sole buyer.

Evidence of Telfer Maynard

[417] Telfer Maynard testified on behalf of Ms. Cao. He has been a realtor since 2008 and assisted Mr. Chen with the transaction for 3399 Deering Island. Mr. Maynard testified that Mr. Chen told him he was looking to buy a property with a dock to moor his boat, but was looking to make multiple purchases.

[418] Mr. Maynard testified that Mr. Chen wanted to register his purchases in other people's names, which he assumed was for tax reasons, family reasons, or for transferring money from China. Mr. Chen would instruct which name to put on the documents. Mr. Maynard does not recall whether he dealt with Jie Chen.

[419] There was an initial contract of purchase and sale dated April 18, 2011, with Chao Chen as the buyer. Mr. Maynard testified that he put Chao Chen's name on this document because Mr. Chen would have told him to. Mr. Maynard believed that at the time he thought that Mr. Chen's proper name was Chao Chen.

- [420] Mr. Maynard testified to a revised contract of purchase and sale dated June 3, 2011, in which Mr. Chen was the purchaser. He agreed that he typed in Mr. Chen's name as Yong Chang Chen. He did not write Jie Chen's name on this contract.
- [421] Mr. Maynard confirmed that the \$150,000 deposit was paid, but he could not recall if it was paid on the date of the first contract, being April 18, or the second contract, being June 3.
- [422] On June 15, 2011, a contract of purchase and sale addendum was signed by Mr. Chen, Jie Chen, and the seller, deleting Mr. Chen and Jie Chen as purchasers and adding Chao Chen as the sole buyer. Mr. Maynard could not recall the circumstances surrounding the addendum.
- [423] On June 15, 2011, Chao Chen contacted Mr. Maynard and told him to send the house contract to his email address. Chao Chen then stated on the same date at 6:28 p.m.:
- Could you please make a abandon for my father to transfer his name to me tonight!Because he out of town tomorrow morning! It is for the TD bank mortgage
- [424] Mr. Maynard advised that both would have to sign. Chao Chen advised that it needed to be done that night, since Mr. Chen was leaving very early in the morning. Mr. Maynard does not recall ever meeting Chao Chen.
- [425] Mr. Maynard understood that Mr. Chen was purchasing the house and that the funds came from China. He did not understand that Chao Chen was the source of the funds, however he did not know who provided the funds, as that was handled by a lawyer.

The Trust Agreement and Legal Accounts

- [426] In the file of Mona Chan, the conveyancing lawyer acting for Chao Chen, a document titled Declaration of Bare Trust and Agency Agreement (the "Trust Agreement") was located. It is undated and only bears Chao Chen's signature. The essential terms are as follows:
- Chao Chen is appointed a nominee, agent, and bare trustee over 3399 Deering Island to hold on behalf of Jie Chen;
 - Chao Chen has no beneficial or equitable interest in the property;
 - Any benefit, profit, or advantage arising from the property vests in Jie Chen; and
 - Chao Chen will not transfer or sell the property at any time without the consent of Jie Chen.
- [427] In addition, there were three legal accounts dated June 30, 2011, addressed to Chao Chen in the conveyancing file. They were:
- Statement of account for the contract of purchase and sale of 3399 Deering Island in the amount of \$1,960;
 - Statement of account for the sale of 3399 Deering Island from the sellers to Chao Chen in the amount of \$1,971.20; and

· Statement of account for Trust Agreement between Chao Chen and Jie Chen with respect to 3399 Deering Island in the amount of \$1,176.

[428] The first two legal accounts were paid out of the proceeds of the purchase price. It is not clear if the third legal account was paid. The third account sets out that the services provided were:

3.0 hrs Meeting and discussion with client(s); preparation of Bare Trust Agreement; and to all other matters in connection herewith:

[429] Mr. Chen was shown the Trust Agreement but he testified that he did not know about this matter. Mr. Chen denied placing Chao Chen's signature on this document. He later testified that he thought this agreement was valid. Chao Chen testified that he did not recall signing this document at the lawyer's office, he only met Mona Chan on three occasions, and he never paid the statement of account for the Trust Agreement. He had no recollection of signing a trust agreement for Jie Chen regarding the property.

Issues

[430] The evidence and submissions raise the following issues:

1. Should the default judgment against Mr. Chen be set aside?
2. What damages should be assessed against Mr. Chen?
3. How should the net proceeds from the sale of 6650 Wiltshire be distributed?
4. Does Chao Chen have any claim against Jie Chen or against any other properties?
5. Does Jie Chen have a beneficial interest in 3399 Deering Island?
6. What costs should be awarded in the CC Action?

Issue 1: Should the Default Judgment Against Mr. Chen be Set Aside?

[431] Jie Chen takes the position that there were never any funds advanced under the Loan Agreement and that the Loan Agreement and Addendum were "fabricated as part of an ongoing efforts by [Mr. Chen] and [Chao Chen] to unlawfully obstruct" the Family Law Proceeding. As such, she submits that Chao Chen's claim in respect to the Loan Agreement should be dismissed.

[432] I am not persuaded that I should exercise my discretion and set aside the default judgment based on Jie Chen's assertion that it is a fabrication. Mr. Chen did deny that his signature was on the Loan Agreement and Addendum and yet on a number of occasions during the trial he admitted that he had borrowed money from Chao Chen.

[433] Mr. Chen has never sought to have the default judgment set aside. I see no basis to have it set aside. I note that it was filed in September 2020 and it is now over two years since it was filed. It is clear Mr. Chen had notice of it and he has decided not to make an application to set it aside.

[434] The default judgment against Mr. Chen remains, with the only issue being what damages should be assessed against Mr. Chen.

Issue 2: What Damages Should be Assessed Against Mr. Chen?

[435] The evidence of Mr. Chen that Chao Chen lent him money and the evidence of Chao Chen supports that a loan was made. In support of the loan is the bank draft from Meng Liu to Canada Rockies. It is clear from the totality of the evidence that Canada Rockies was Mr. Chen's company. The timing of the bank draft accords with the need to advance the funds to purchase 6650 Wiltshire.

[436] Chao Chen seeks damages to be assessed at \$1.5 million for the principal of the loan, and interest at \$1 million or, in the alternative, at 5 percent from the date on the bank draft of March 23, 2015.

[437] In light of all of the evidence in this case, I am not persuaded that Chao Chen should receive the sum of \$1 million in interest on the loan. I am of the view that he is entitled to interest on the monies loaned and will order that Mr. Chen pay interest from March 23, 2015 to date at 5 percent.

Issue 3: How Should the Net Proceeds from the Sale of 6650 Wiltshire be Distributed?

[438] At the time of the sale of 6650 Wiltshire, Mr. Chen and Jie Chen were registered as joint tenants. They are each entitled to 50 percent of the net proceeds from the sale. As mentioned previously, net proceeds from the sale are currently being held in trust by counsel for Chao Chen, less the \$60,000 I ordered be distributed to Ms. Cao as support. Jie Chen is entitled to her half, to be paid to her immediately. Mr. Chen should receive his half, with the \$60,000 already deducted. However, Mr. Chen's share shall not be distributed to him, but shall remain in trust and paid out as follows:

1. To pay any costs awarded to Ms. Cao in the Family Law Proceeding;
2. To pay any costs awarded to Chen Chao in the Family Law Proceeding if ordered to be paid by Mr. Chen; and
3. To pay the judgment in the CC Action.

Issue 4: Does Chao Chen Have Any Claim Against Jie Chen or Against Any Other Properties?

[439] Chao Chen sued Jie Chen in the CC Action on the basis that she was a joint owner of 6650 Wiltshire. There were no submissions advanced that Chao Chen has any claim against Jie Chen arising from her ownership.

- [440] Chao Chen also claims that some of the funds that were lent to Mr. Chen were used to pay various costs for 19459 Richardson and 721 Southborough. There was no evidence led to support such a claim.
- [441] As a result of these Reasons, 19459 Richardson and 721 Southborough will become Ms. Cao's. Ms. Cao seeks a cancelation of the certificates of pending litigation registered against them.
- [442] Generally, once an action is dismissed, related certificates of pending litigation persist until all appeals have been exhausted regarding the underlying action: *Land Title Act* s. 254; *Berthin v. Berthin*, 2018 BCCA 57 at paras. 32, 44.
- [443] However, this Court has inherent jurisdiction to cancel a certificate of pending litigation that fails to meet the threshold criterion under s. 215 of the *Land Title Act*, which states:
- 215 (1) A person who has commenced or is a party to a proceeding, and who is
- (a) claiming an estate or interest in land,
- may register a certificate of pending litigation against the land
- [444] To register and maintain a certificate of pending litigation against land, a party must claim an interest in that land, and this interest must be supported by pleadings that assert that interest: *Bilin v. Sidhu*, 2017 BCCA 429 at paras. 54-55; *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 9. If the pleadings do not assert that interest, the certificate of pending litigation may be cancelled because "essentially, it was improperly registered from the start": *Bajwa v. Singh*, 2016 BCSC 916 at para. 20.
- [445] Determining if this threshold criterion has been met does not include a consideration of the merits of the pleadings, only that, if proven, they are capable of supporting the claim to the interest in land: *Xiao v. Fan*, 2018 BCCA 143 at para. 27; *Nouhi* at para. 30.
- [446] In his notice of civil claim, Chao Chen sought a declaration of a constructive trust or equitable mortgage over 19459 Richardson and 721 Southborough. He claimed that Mr. Chen used portions of the loan funds to pay various fees on these properties. Chao Chen pled that Mr. Chen's use of these funds amounts to conversion.
- [447] Chao Chen did not adequately plead the requisite elements of the tort of conversion in his notice of civil claim: *Li v. Li*, 2017 BCSC 1312 at para. 214. His notice of civil claim does not set out any interest in 19459 Richardson and 721 Southborough. As such, the requirements of s. 215 of the *Land Title Act* were not met. The certificates of pending litigation against 19459 Richardson and 721 Southborough are cancelled.
- [448] I also note that Chao Chen's claim of a constructive trust under unjust enrichment is also inadequately pled. Since it is not expressly addressed, Chao Chen's claim is presumed to be for a remedial constructive trust: *BNSF Railway Company v. Teck Metals Ltd.* 2016 BCCA 350 at paras. 54. Pleadings for a remedial constructive trust based on unjust enrichment

must set out the elements of unjust enrichment, as well as the causal connection to the property and the inadequacy of monetary damages: Nouhi at para. 47. Chao Chen's notice of civil claim makes no mention of the inadequacy of monetary damages. As such, his pleadings do not adequately claim an interest in land based on a constructive trust.

Issue 5: Does Jie Chen have a Beneficial Interest in 3399 Deering Island?

- [449] As I understand it, Jie Chen claims that Mr. Chen provided funds to Chao Chen to purchase 3399 Deering Island in trust for her. However, submissions on this claim were unclear. For completeness, I will address how Jie Chen's claim to 3399 Deering Island as an express trust, a resulting trust, and under contract, all fail.
- [450] As set out above, s. 23(2) of the Land Title Act creates a rebuttable statutory presumption that persons registered on the title of the property are presumed to hold its legal and equitable interest, but that the presumption can be displaced by equitable principles: McInerney at para. 46. The burden is on Jie Chen to establish that an express trust exists: McInerney at para. 36.
- [451] On the evidence before me, I am not satisfied that Jie Chen has met the onus of establishing the existence of a trust. Jie Chen has not proven on a balance of probabilities first, that there was certainty of intention to create a trust, and second, that the property vested in the trustee.
- [452] First, Jie Chen has failed to show Mr. Chen's intention to create a trust. There is some evidence to support that there was some instruction given to Mona Chen, by someone, to draft the Trust Agreement. I note that the legal account is not clear who attended the three-hour meeting and provided instructions. Chao Chen denies that he did so. His evidence is that he attended and was presented with some documents which he signed, but that he did not meet and discuss the documents with any lawyer. Who provided the instructions to the lawyer, why the Trust Agreement was signed, and the circumstances of Chao Chen signing it are all shrouded in mystery.
- [453] The one person who could have provided insight is Mona Chan, the lawyer who drafted the Trust Agreement, but she was not called at trial. Chao Chen interacted with Ms. Chan on three occasions, including attending at her office, but it is unclear when this occurred. Counsel for Ms. Cao advised that Ms. Chan had not practiced law for some time and he had not been able to locate her.
- [454] Chao Chen further denies that he agreed that he held the property for Jie Chen's benefit.
- [455] The Trust Agreement was never signed by Mr. Chen. Mr. Chen gave conflicting evidence as to his intention at the time 3399 Deering Island was purchased. There is insufficient evidence before me to establish the required certainty of intention of Mr. Chen as the claimed settlor of the expressed trust.

- [456] Second, and irrespective of Mr. Chen's intention, Jie Chen has failed to show that the trust property vested in Chao Chen as a trustee. The evidence establishes that Chao Chen paid for the majority of 3399 Deering Island, through both a mortgage and three bank drafts. I am not convinced on the evidence before me in this trial that the money came from Mr. Chen. Mr. Chen's only contribution to 3399 Deering Island appears to be the \$150,000 deposit. As a result, Jie Chen has not made out a claim for an express trust.
- [457] This lack of evidence also defeats Jie Chen's claim for a resulting trust. When title to a property is in one party's name, but that party gave no value for the property, there is a presumption of a resulting trust: *Pecore v. Pecore*, 2007 SCC 17 at para. 20. The evidence shows that Chao Chen gave most, if not all, of the value for the purchase of 3399 Deering Island, making further analysis of a resulting trust unnecessary.
- [458] For completion, I also note that the Trust Agreement is not a contract between Jie Chen and Chao Chen. A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration": *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 35, quoting *Scotsburn Co-operative Services Ltd. v. W.T. Goodwin Ltd.*, [1985] 1 S.C.R. 54 at 63, 1985 CanLII 57.
- [459] Jie Chen did not sign the Trust Agreement. She testified that she had not seen the agreement and her evidence does not support that she understood she had a beneficial interest in 3399 Deering Island until she expressed so in her May 2021 counterclaim. She gave no evidence on any consideration paid and paid no money for the purchase of 3399 Deering Island. The required contractual elements are absent.
- [460] As such, I am not persuaded that Jie Chen has any claim to the proceeds of sale of 3399 Deering Island and her counterclaim is dismissed.

Issue 6: What Costs Should be Awarded in the CC Action?

- [461] I make the same order respecting costs as in the Family Law Proceeding. The parties should prepare written submissions but the schedule for the written submissions and any supplementary oral submissions shall be addressed at a case planning conference. I request that counsel schedule a case planning conference within 60 days of these Reasons being pronounced to discuss this issue.

Conclusion on the CC Action

- [462] The following orders are made:

1. Chao Chen is entitled to judgment against Mr. Chen in the amount of \$1.5 million with interest at 5 percent calculated from March 23, 2015.
2. Chao Chen's claim against Jie Chen is dismissed.
3. The counterclaim of Jie Chen is dismissed.

4. The certificates of pending litigation filed on April 10, 2019, on 19459 Richardson and 721 Southborough are cancelled as they fail to comply with s. 215 of the Land Title Act.
5. The total net proceeds from the sale of 6650 Wiltshire, with accrued interest ("Net Proceeds"), shall be split equally between Mr. Chen and Jie Chen.
6. Jie Chen's share of the Net Proceeds shall be paid to her immediately out of the trust account of counsel for Chao Chen.
7. Mr. Chen's share of the Net Proceeds, which deducts the \$60,000 payment made to Ms. Cao, shall remain in the trust account of counsel for Chao Chen.
8. The following payments are directed to be paid out of Mr. Chen's share of the Net Proceeds:
 - a) any costs awarded to Ms. Cao in the Family Law Proceeding;
 - b) any costs awarded to Chao Chen in the Family Law Proceeding if ordered paid by Mr. Chen; and
 - c) the judgment in the CC Action.
9. Counsel will schedule a case planning conference within 60 days of these Reasons being pronounced.
10. The signature of Mr. Chen on the form of the order is dispensed with. Counsel for the plaintiff shall serve a copy of the filed order on Mr. Chen by regular mail to 6200 Semlin Court, Richmond, BC.

"Forth J."

Schedule A

Documents Relating to Zhongsheng Company

Description

Signed

Dated

Application for Company Establishment Registration

Mr. Chen as legal representative

Corporate Legal Person Business License

Seal of Industry and Commerce Administrative Bureau, Jinzhong Municipality

July 12, 2004

Curriculum Vitae of Corporate Legal Representative

Signed by Mr. Chen

Company Shareholders (Initiators) List

No signature; Mr. Chen listed as one of the shareholders

First Shareholder Meeting Minute

Mr. Chen and others

July 1, 2004

Share Transfer Agreement

Signed by Mr. Chen and another

March 2, 2005

Share Transfer Agreement

Signed by Chikai Gao and Ixaojin Gong

March 2, 2005

Basic Information

Shareholders, Initiators Capital Contribution Situation

No signature; Mr. Chen listed as one of the shareholders

Third Shareholders Meeting Resolution

Signed by Mr. Chen and others

May 25, 2008

Documents relating to the Shanxi Company

Shareholders (Initiators) List

Company seal affixed

Share Transfer Agreement

Signed by Xiaojin Gong and Kunjun Chen

May 25, 2008

Third Shareholders Meeting Resolution*

Signed by Mr. Chen and others

September 1, 2009

Documents Relating to Special Railway Line Company

Application for Company Establishment Registration

Prepared by State Administration for Industry and Commerce of China

Application for Company Establishment Registration

Signed by Mr. Chen and another

September 1, 2004

Corporate Shareholders (Initiator) Register

Mr. Chen listed as Legal Representative

Corporate Shareholders (Initiator) Register

Tinghong Li listed

Fund Contribution Agreement

Signed by Tinghong Li

August 31, 2004

Company Change Registration Application

Signed by Mr. Chen

August 16, 2005

Amendments to Articles of Incorporation

Signed by Mr. Chen

Resolution of the Second Shareholders' Meeting

Signed by Mr. Chen and another

August 15, 2005

Company Amendment Registration Audit Form

Seal of company

Corporate Legal Person Business License

June 26, 2006

Company Change Registration Application

Signed by Mr. Chen

July 15, 2006

Shareholdings Transfer Agreement*

Signed by Mr. Chen and another

July 16, 2006

Shareholder (Initiator) Funding Situation #

Mr. Chen and Chao Chen listed as shareholders

Company Change Registration Application

Signed by others

April 27, 2009

Share Transfer Agreement #

Signed by Chao Chen and Mr. Chen

April 24, 2009

Share Transfer Agreement #

Signed by Mr. Chen and another

November 15, 2007

Company Change Registration Application

Signed by Shanmin Hou

November 20, 2007

Share Transfer Agreement #

Signed by Chao Chen and another

November 15, 2007

Schedule B

All Documents Relating to Special Railway Line Company

Description

Signed

Dated

Resolution of the First Shareholders' Meeting

Signed by Shanmin Hou & Tinghong Li

November 16, 2007

Amendment to the Articles of Association

Signed by Mr. Chen and Chao Chen

November 16, 2007

Resolution of the Second Shareholders' Meeting

Signed by Chao Chen Mr. Chen

November 17, 2007

Amendment to the Articles of Association

Signed by Xiangqun Chen and Ziangyang Chen

April 26, 2009

Resolution of the First Shareholders' Meeting

Signed by Mr. Chen, Chao Chen, and others

April 26, 2009

Resolutions of the Second Shareholders' Meeting

Signed by Xiangqun Chen & Xiangyang Chen

April 27, 2009

Notice on Account Settlement

Seal

December 25, 2009

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