

CANADA / JUDGMENT

Lux v. Lux

2023 BCSC 1435

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1435 Lux v. Lux

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lux v. Lux,

2023 BCSC 1435

Date: 20230817

Docket: E191750

Registry: Vancouver

Between:

Jaime Lynn Lux

Claimant

And

Steven Robert Lux

Respondent

And

Noverra Capital Corporation

Intervenor

Corrected Judgment: The text of the judgment was corrected at paragraphs 25, 118, 124, 125, 126, 154, 161, 162, 207, 277, 279, and 281 on October 6, 2023.

Before: The Honourable Justice Majawa

Reasons for Judgment

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The Respondent, appearing in person:

S. Lux

Counsel for Noverra Capital Corporation:

D.A. Garner

Place and Dates of Trial:

Vancouver, B.C.

January 3-6, 9-13, 2023, and March 6-10, and 27, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2023

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OVERVIEW

- [1] This family law matter concerns two young and accomplished business people who, despite their commendable ability to come to an agreement in respect of the parenting of their two children and the division of some of their property, have been unable to come to an agreement in respect of remaining and significant financial matters. The claimant, Jaime Lux, and the respondent, Steven Lux, were 43 and 46 years of age at the time of trial, respectively. They are each part owners of successful businesses that commenced operations during the course of their marriage. The main issues before me involve the valuation and division of the parties' business interests and the calculation of the parties' income for support purposes.
- [2] The parties began to live together in a marriage-like relationship in or around April 2008 and were married on April 2, 2011. They separated on December 30, 2018, but continued to reside in the former matrimonial home until June 26, 2019. There are two children of the marriage, who were ten and eight years old at the time of trial. Pursuant to a detailed parenting plan agreed to by the parties, the parties have shared equal parenting time with the children since Ms. Lux moved from the former family home in June 2019.
- [3] The parties have already distributed the net sale proceeds from the sale of the former matrimonial home and there are no funds remaining to be distributed. In June 2020, the parties executed an agreement that provided for the final equal division of the remaining bank accounts, jointly held unsecured debts, credit cards, and remaining furniture and chattels. On November 16, 2020, the parties entered into an interim consent order that provided for child and spousal support payable by Mr. Lux to Ms. Lux (the "2020 Interim Order"). The 2020 Interim Order was made subject to variation at trial.

- [4] The trial of this matter was originally scheduled to commence on September 13, 2021. That trial was adjourned and it came on for hearing before me commencing on January 3, 2023. There was insufficient time to complete the trial and it continued on March 6, 2023, and concluded on March 27, 2023, after a total of 15 days of trial. Ms. Lux was represented by counsel throughout; Mr. Lux decided to represent himself.
- [5] This matter requires the resolution of three main issues and a large number of sub-issues. The summary of my conclusions on the main issues is found in the following paragraphs, and the detailed discussion of those findings and conclusions as well as the determination of the myriad of sub-issues is found in the remainder of these Reasons for Judgment.
- [6] The first issue I must determine is the division of the parties' assets. Resolution of this issue will require determining the fair market value of the parties' business interests. It is common ground that Mr. Lux will be required to pay a compensation payment to Ms. Lux in order to equalize the parties' assets; however, both the amount to be paid and the way in which the assets will be divided are contested.
- [7] I have determined that Mr. Lux will be required to make a \$1,562,764 compensation payment to Ms. Lux to equalize the family assets. I have determined that distributive tax consequences are to be accounted for and that they are best addressed by effecting the equalization payment through a butterfly transaction. The equalization payment is to be made within four years of this order and I have ordered that interest accrue to incentivize Mr. Lux to make the full payment as soon as possible. The parties are at liberty to come to an agreement on a different method to make the equalization payment.
- [8] The next issue I must determine is the parties' income for support purposes. Resolution of this issue requires determining whether the parties' income should be calculated with reference to the pre-tax income available in their respective businesses, which in turn requires this Court to determine whether the parties have the ability to control distributions from those businesses. The amount of child support to be paid will flow from the determination of the parties' incomes.
- [9] I have determined that Ms. Lux has the ability to control distributions from her business to a limited extent and that her 2022 income should be calculated with reference to her company's pre-tax income. Given Mr. Lux's minority shareholding and the particular circumstances of the shareholders' rights and responsibilities, I have determined that Mr. Lux does not have access to the pre-tax income of his main corporate interest for the purposes of support. As a result of my findings, Mr. Lux has overpaid child support pursuant to 2020 Interim Order. This overpayment is to be credited to the equalization payment that Mr. Lux must make to Ms. Lux.

- [10] The final issue I must determine is whether Ms. Lux is entitled to spousal support and if so, in what amount and for how long. For the reasons given below, I have determined that Ms. Lux is not entitled to spousal support on either a compensatory or non-compensatory basis. Consequently, Mr. Lux is entitled to reimbursement for the spousal support payments he made pursuant to the interim order. This amount is also to be credited against Mr. Lux's liability for the equalization payment.

THE DIVISION OF ASSETS

- [11] As mentioned at the outset, some of the parties' assets have already been divided upon agreement of the parties. The parties agree that the family property that has not yet been divided should be divided equally pursuant to s. 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], with the exception that Ms. Lux has asserted that a portion of her RRSPs and TFSA should be considered excluded property pursuant to s. 85(1) of the FLA and should not be subject to equal division.
- [12] The disagreement is in respect of the value of the parties' corporate interests. The parties jointly retained Gary Mynett, a certified business valuator, to provide his expert opinion on the value of these corporate interests. As will be discussed later, Mr. Mynett prepared a number of reports and supplemental reports due to the adjournment of the first trial date and in response to information provided by the parties following circulation of the reports. Mr. Mynett's latest report values the parties' interests as of February 28, 2022, (the "Valuation Date").
- [13] Ms. Lux solely retained Keith Jensen to prepare a report, which she refers to as a "Stub Period Report", that purports to account for an increase in value in Mr. Lux's corporate interests between the Valuation Date and December 31, 2022, which was a few days before this trial commenced. The admissibility of the Stub Period Report is at issue and will be discussed later in these Reasons.
- [14] Mr. Lux essentially accepts Mr. Mynett's conclusion with respect to the value of Ms. Lux's corporate interests, although he does make some arguments in support of a finding that her corporate interest should be valued at the higher end instead of the mid-point of the range provided by Mr. Mynett. The value of Mr. Lux's corporate interests is highly contested.

Corporate Interests

Ms. Lux's Corporate Interests

- [15] Ms. Lux owns 50% of the shares of Simetra Ventures Ltd. ("Simetra"). The other 50% of Simetra's shares are owned by her current business partner, and former co-worker, Alan Linsley. Simetra is a holdings company and was incorporated in 2017 by Ms. Lux and Mr. Linsley for the purpose of making business acquisitions and providing management consulting services.

[16] Through a series of transactions, Simetra acquired Mantech Enterprises Inc. ("Mantech") on November 30, 2018, almost exactly one month before the parties separated. A significant portion of Ms. Lux's capital contribution was sourced from Mr. Lux's corporate interests. Mantech is a manufacturing company that makes automation equipment for the paper and pulp industry, as well as various other metal components for local manufacturing companies in the Lower Mainland. Mantech has been in operation since 1995. Simetra's business operations are governed by a shareholders' agreement dated September 1, 2018, (the "Simetra SHA").

Mr. Lux's Corporate Interests

[17] Mr. and Ms. Lux own 100% of the shares of a holdings company called Triquest Holdings Corporation ("Triquest"). Mr. Lux is Triquest's majority shareholder, its operating mind, and its manager. Triquest owns 1/3 of the shares of Noverra Capital Corp. ("Noverra") and 1/3 of the shares of Noverra Enterprises Inc. ("NEI"). The other 2/3 of Noverra and NEI are owned equally by Omar Ladak, via his holding company OMI Holdings Corp. ("OMI"), and Suzanne Boyd, via her holding company Pineapple Holdings Corporation ("Pineapple"). Mr. Ladak and Ms. Boyd are spouses.

[18] Noverra was incorporated in 2008. It is in the business of acquiring operating companies in the industrial and residential construction industries. Noverra's business is to identify mid-sized private, cash-producing businesses, to provide consulting services including financial and strategic leadership to them, and to acquire such businesses to hold and operate in the usual course. Noverra invests in subsidiaries with a long-term investment horizon. Operating companies that are of most interest to Noverra are owner-managed businesses whose owners are looking to retire. Noverra is continuously seeking to identify and make new business acquisitions. Noverra's business operations are governed by a shareholders' agreement dated June 19, 2018, (the "Noverra SHA").

[19] As of the Valuation Date and the date of trial, Noverra had three wholly owned subsidiaries: Brighter Mechanical Ltd. ("Brighter"); Troy Forming Concrete Inc. ("Troy"); and Thorpe Design, Inc. ("Thorpe"), collectively "the Subsidiaries".

[20] Brighter is a mechanical re-piping company located in Vancouver, British Columbia and was founded in 1988. It provides re-piping services for multi-family residential buildings whose plumbing systems require replacement. Noverra acquired Brighter in December 2017 through the execution of a shotgun provision in the then existing shareholder agreement. Prior to acquisition by Noverra, 50% of Brighter was owned by Mr. Lux, Mr. Ladak and Ms. Boyd and the other 50% was owned by arm's length parties.

[21] Troy was founded in 1991 and is a Colorado-based construction company engaged in excavation, concrete forming, and water/sewer installation services for large production residential construction in the Denver area. Noverra acquired sole ownership of Troy on August 31, 2018.

- [22] Thorpe was founded in 1986 and it grew into the largest residential fire protection company operating in Northern California. Thorpe designs and installs fire sprinkler systems in various types of buildings. Noverra acquired an 85% ownership stake in Thorpe in December 2015. On January 3, 2020, Thorpe acquired Victory Fire Protection Inc. ("Victory") which was amalgamated with Thorpe shortly after acquisition, with the amalgamated entity continuing to do business as Thorpe. In June 2021, Noverra acquired the remaining 15% that was being held by Thorpe's former president.
- [23] Mr. Lux, Mr. Ladak, and Ms. Boyd operate Noverra and the Subsidiaries together as directors. All of them draw management fees from Noverra through their respective holding companies (Triquest, OMI, and Pineapple).
- [24] NEI is owned equally by Mr. Lux, Mr. Ladak, and Ms. Boyd through their respective holding companies. It was incorporated in September 2008; at that time, it was called Noverra Capital and Consulting Partners. It changed its name to NEI during its 2021 fiscal year. Between September 2008 and early 2018, NEI provided management and consulting services. In 2021, NEI formed a wholly-owned subsidiary, Weisshorn Insurance Ltd. ("Weisshorn"). As I understand it, NEI is currently effectively a holding company.
- [25] Weisshorn was incorporated in Barbados in 2021 as a Class 1 captive insurance company to insure the risks undertaken by Noverra and the Subsidiaries. Weisshorn received capital funding of [monetary amount] from NEI in 2021. In 2022, NEI received and retained a similar amount from Noverra, which had in turn received the funds from its operation of the Subsidiaries. As will be discussed later, the original intent of Weisshorn's operations has not yet been fully recognized. As at the Valuation Date, it had not yet commenced operations.

The Expert Evidence of Valuation

The Joint Valuator's Reports

- [26] Mr. Mynett was retained jointly by the parties in March 2020 to value their respective interests in Simetra and Triquest, and in the years since, Mr. Mynett has prepared a number of reports. As I understand it, the first set of reports used a valuation date of April 30, 2020. Those reports are not in evidence before me.
- [27] On June 3, 2021, Justice Milman ordered an updated valuation of the parties' interests in Simetra and Triquest as of February 28, 2021, (the "February 2021 Valuation Date Order"). Mr. Mynett's resulting reports valued Triquest and Simetra as of February 28, 2021, on July 21, 2021, and July 28, 2021, respectively. Shortly thereafter, Ms. Lux discharged her then counsel and successfully applied to adjourn the trial scheduled to commence on September 13, 2021. It is likely the trial would have been adjourned in any event as Ms. Lux suffered a significant brain injury in late August 2021, which would not have permitted her to participate in a trial the following month.

- [28] The trial was rescheduled to commence on January 3, 2023. On April 4, 2022, Mr. Lux sought an order that Mr. Mynett prepare an updated opinion of the fair market value of the parties' interests in Simetra and Triquest as at February 28, 2022 (i.e. the Valuation Date). Ms. Lux also sought an order for an updated report but took the position that the valuation date should be June 30, 2022. On April 4, 2022, Milman J. ordered that Triquest and Simetra would be valued as of February 28, 2022, (the "February 2022 Valuation Date Order").
- [29] On the same day, Mr. Mynett also prepared two reports valuing Triquest at the Valuation Date: one in which he provided his opinion on the en bloc fair market value of Triquest (the "October Triquest En Bloc Report") and the other using the formula found in the Noverra SHA (the "Noverra SHA Formula Report"). The October Triquest En Bloc Report provides that the en bloc fair market value of Mr. Lux's interest in Triquest is \$4,200,000 to \$4,800,000, with a midpoint valuation of \$4,500,000. The Noverra SHA Formula Report valued Mr. Lux's interest in Triquest as being \$890,000. It is not contested that at the date of trial, Triquest has a shareholder loan of \$777,196 owing to Mr. Lux, that this amount is family property, and that it must be equally divided between the parties. In his testimony at trial, Mr. Mynett described the valuation of Mr. Lux's interest in Triquest, which is effectively 1/3 the value of Noverra, as being extremely complex given the nature of Noverra's business. In order to determine the value of Mr. Lux's interest, Mr. Mynett valued Noverra, each of the Subsidiaries, NEI, and Weisshorn individually.
- [30] Also on October 13, 2022, Mr. Mynett prepared a report valuing Simetra on the Valuation Date (the "October 2022 Simetra Report"). The October 2022 Simetra Report provides that the fair market value of Simetra is between \$80,000 and \$370,000 with a mid point of \$225,000.
- [31] Following the release of the reports issued in October, the parties made a number of submissions to Mr. Mynett in respect of those reports.
- [32] Mr. Mynett issued a supplemental report dated December 31, 2022, in respect of Triquest's value (the "Triquest Supplemental Report"). The Triquest Supplemental Report provides that the en bloc value of Mr. Lux's interest in Triquest as at the Valuation Date is \$3,900,000 to \$4,700,000, with a midpoint valuation of \$4,300,000.
- [33] Mr. Mynett also issued a supplemental report of Simetra's fair market value dated December 31, 2022, (the "Simetra Supplemental Report"). This report values Ms. Lux's interest in Simetra as at the Valuation Date as being between \$370,000 and \$640,000 with a midpoint of \$505,000. It is uncontested that there is an outstanding shareholder loan owing to Ms. Lux in the amount of \$564,335 and that it is family property, and is subject to equal division between the parties.

Keith Jensen's Involvement and the Stub Period Report

- [34] As mentioned, Ms. Lux tendered a report prepared by Mr. Jensen which purports to opine on an increase in the fair market value of Triquest in the period between the Valuation Date and the date of trial. It is necessary to briefly set out the history of how Mr. Jensen became involved in this litigation.
- [35] In the early stages of these proceedings, Noverra sought intervenor status. On November 18, 2019, the parties entered into a consent order before Milman J. Noverra was granted leave to intervene for the purposes of responding to disclosure requests made of Noverra by Ms. Lux, to present evidence with respect to those disclosure requests, and to seek confidentiality and sealing orders to protect Noverra's business interests. It does not appear that an order has been made to amend the style of cause accordingly. Counsel for Noverra appeared on a number of occasions during the course of this trial to speak to matters that involved the production of its documents. In my view, it is appropriate that the style of cause be amended to reflect Noverra's status as an intervenor and I order as such.
- [36] On November 29, 2019, the parties entered into another consent order before Milman J. (the "Confidentiality Order"). Among other things, the Confidentiality Order provided that Noverra would disclose documents to Mr. Mynett and that any documents designated by Noverra as confidential were to be treated as confidential. Confidential documents were not to be made available or disclosed to Ms. Lux. Rather, Noverra's confidential documents were only to be viewed by Ms. Lux's counsel and her professional advisor. Given Mr. Lux's role in Noverra, no restrictions were placed on the disclosure of confidential information to him.
- [37] The Confidentiality Order also permitted Noverra to redact confidential information from Mr. Mynett's report and only permitted Ms. Lux to review the redacted report with her professional advisors and counsel. The parties' counsel and their professional advisors were permitted to view Mr. Mynett's unredacted report. The Confidentiality Order also provided that all parties were to confirm destruction of the confidential material upon termination of this action and after any appeals are complete.
- [38] On December 6, 2022, the Confidentiality Order was varied by consent to permit Ms. Lux's full participation in the trial. The varied order permitted Ms. Lux to hear confidential information and to view confidential documents at discovery and trial. It prohibited Ms. Lux from retaining or copying any confidential documents.
- [39] Given the restrictions the Confidentiality Order placed on Ms. Lux's ability to properly instruct counsel, she retained Mr. Jensen to advise her on Mr. Mynett's report and to review the confidential documents disclosed by Noverra. Like Mr. Mynett, Mr. Jensen is a certified business valuator and has been qualified as an expert by this Court in the past. In addition to his role as an advisor, Mr. Jensen prepared a report opining on Mr. Lux's income for support purposes. As mentioned earlier, he also prepared the Stub Period Report.

- [40] Mr. Jensen's Stub Period Report is dated January 2, 2023, the day before this trial commenced. It provides that Triquest's pro rata interest in the increase in Noverra's value during the stub period of March 1, 2022, to December 31, 2022, is \$2,200,000. Mr. Jensen opines that the total en bloc value of Mr. Lux's interest in Triquest as at December 31, 2022, a few days before this trial began, is \$6,500,000. He comes to this conclusion by adding the value determined in his Stub Period Report to the mid-point value found by Mr. Mynett in the Triquest Supplemental Report as at the Valuation Date.

The Admissibility of Mr. Jensen's Stub Period Report

- [41] By the time this trial commenced in January 2023, the Valuation Date used by Mr. Mynett in his reports was some ten months old. Ms. Lux tendered Mr. Jensen's Stub Period Report in an effort to provide a valuation of Triquest closer to the date of trial. Mr. Lux objected to the admission of the Stub Period Report for a number of reasons. I also had concerns that Mr. Mynett's reports valued the parties' corporate interests as of a date 10 months before the trial commenced. I further expressed my concern that admission of the Stub Period Report would only serve to bridge that gap in respect of the value of Triquest as of the Valuation Date, but not Simetra. I reserved my decision on the admissibility of the Stub Period Report and directed the parties to proceed with the examination of Mr. Jensen by way of voir dire.
- [42] When it became apparent that the trial would not conclude on January 13, 2023, as originally scheduled, I directed the parties to make their best efforts to come to an agreement to have Mr. Mynett provide an updated report on the values of both Triquest and Simetra with a valuation date closer to the date of trial. I provided the parties with leave to seek directions in the event that they could not agree on an approach to update the valuations.
- [43] The trial was adjourned on January 13, 2023, and was scheduled to continue on March 6, 2023. The parties were unable to come to an agreement on the approach to update Mr. Mynett's reports. On February 16, 2023, the parties appeared before me and I ordered them to jointly instruct Mr. Mynett to prepare a stub period calculation of the change in fair market value of the parties' interests in Triquest and Simetra, as at September 30, 2022. Although I suggested that the updated report could be something similar in scope to the Stub Period Report prepared by Mr. Jensen, I was explicit in ordering that the exact methodology used was to be in Mr. Mynett's discretion. Further, I ordered that Mr. Mynett may wish to consider other changes that, in his opinion, could have impacted fair market value, including, without limitation, material changes in the subject companies' discretionary cash flows and the economic environment since the original Valuation Date.

- [44] Mr. Mynett did not complete an updated valuation of the parties' corporate interests because he was not provided joint instructions consistent with his retainer. Both parties blame the other for this. Mr. Lux asks that I draw an inference against Ms. Lux on the basis that she prevented an updated valuation of Triquest because it would have resulted in a lower value than that as of February 28, 2022. I am not willing to make such a finding on the evidence before me.
- [45] However, on the affidavit evidence before me, it appears that Ms. Lux bears significant responsibility for Mr. Mynett not being in a position to prepare an updated report. In correspondence with Mr. Mynett, Ms. Lux maintained her position that Mr. Mynett prepare an updated report in a manner similar to Mr. Jensen's Stub Period Report. She continued to take this position despite Mr. Mynett's clear statement that such a report would not achieve the parties' objective of obtaining an updated valuation conclusion, and that such an approach would not be defensible given the significant changes in the economy between February 28, 2022, and September 30, 2022. While it is questionable as to whether Mr. Mynett could have prepared an updated valuation report in time for the resumption of trial on March 6, 2023, and the state of Noverra's document disclosure in respect of the updated report is not clear to me, in my view, the roadblocks erected by Ms. Lux increased the likelihood that such a report could not be prepared.
- [46] Given that the parties were unable to obtain an updated report from Mr. Mynett, I must determine whether Mr. Jensen's Stub Period Report is admissible in these proceedings. For the reasons that follow, I have determined that it is not.
- [47] The starting point is R. 13-3(2) of the Supreme Court Family Rules, B.C. Reg. 169/2009, which provides for expert opinion evidence on financial matters to be presented by means of a jointly appointed expert, unless the court otherwise orders, or the parties otherwise agree. Pursuant to R. 13-4(5), once a joint expert is appointed, they are the only expert who may give evidence on that issue, unless the parties agree or the court orders otherwise. There is no dispute that Mr. Mynett was retained as the jointly appointed expert in respect of the valuation of the parties' corporate interests. Given that Mr. Lux does not agree to the admissibility of Mr. Jensen's report, the only way in which it is admissible is with leave of this Court.
- [48] Ms. Lux argues that the Stub Period Report is necessary to provide a fair valuation of the companies given the material changes that have likely occurred since February 28, 2022, and thus, the report is necessary for a fair trial. I agree that R. 13-4(7) provides me with discretion to admit the evidence of an additional expert at trial if I am satisfied that the evidence is necessary to ensure a fair trial; however, I am not satisfied that the admission of the Stub Period Report will enhance the fairness of this trial. It is noteworthy that Ms. Lux argues that material changes are likely to have occurred since the Valuation Date and that an updated report of the "companies" is required for a fair trial, and yet she only proposes to admit a report with an updated valuation date for Triquest and not Simetra. In my view, fairness would require an updated valuation of both parties' corporate interests, an objective

that this Court tried to accomplish by encouraging and ordering the parties to obtain an updated valuation of both companies from the jointly retained expert.

- [49] I am also not satisfied that it would be appropriate to dispense with the Rules of Court requiring parties to prepare and serve expert reports in accordance with the terms set out therein. Ms. Lux submits that the requirements of Rules 13-4(6) and 13-4(7) should be dispensed with, as it is in the interests of justice to admit the Stub Period Report.
- [50] Rules 13-4(6) and 13-4(7) govern the procedures relating to additional experts. Rule 13-4(6) states that a party wishing to apply for leave to adduce an additional expert report must serve the report on all parties within 21 days after receipt of the report. As noted above, R. 13-4(7) provides that additional expert evidence requires consent of the parties or leave of the court.
- [51] Rule 13-7(1)(a) relates to expert evidence at trial generally, and provides that it may not be introduced at trial unless the expert evidence has been served in accordance with R. 13-6, or unless the court otherwise orders. Rule 13-6(3) states that an expert's report must be served at least 84 days before the scheduled trial date, unless the court otherwise orders. Finally, R. 13-7(6)(c) allows the court to dispense with these Rules if the interests of justice require it.
- [52] The Stub Period Report was signed and served on Mr. Lux the day before the trial commenced on January 3, 2023. Considering that the Stub Period Report opines on the value of the companies to December 31, 2022, I accept that it was prepared and served as soon as reasonably practicable and within 21 days of receiving the report, in accordance with R. 13-4(6). However, this cannot stand as a reason to dispense with the service requirements of R. 13-6(3), which requires service at least 84 days before trial. If this was allowed, in each case where a valuation was required, a party could submit an updated valuation to the date of trial, on the date of trial, without needing to comply with the Rules. Such a practice would obviously frustrate the other side's ability to respond to such reports. This cannot, in my view, be consistent with the interests of justice. Accordingly, I decline to exercise my discretion to dispense with the service requirements pursuant to R. 13-7(6)(c).
- [53] When counsel for Ms. Lux originally tendered the Stub Period Report in January 2023, she argued that the oral reasons given in conjunction with Milman J.'s February 2021 and 2022 Valuation Date Orders in which the valuation date was set as February 28, 2021 and 2022, respectively, supported her position that Mr. Jensen's Stub Period Report was necessary and should be admitted. However, at the time counsel tendered the report, she did not have the transcript of Milman J.'s oral reasons for either of those orders. Counsel eventually obtained transcripts of the submissions made before Milman J. on both occasions, and a transcript of the oral reasons for judgment delivered on April 4, 2022. These materials were available for the court's reference during closing submissions at the conclusion of trial in March.

- [54] I have given very little weight to the transcript of the submissions made before Justice Milman; the exchange between the chambers judge and counsel does not, in my view, explain the reasoning of the chambers judge. In any event, the portions of the transcript relied upon by counsel for Ms. Lux does not in my view support her position.
- [55] Counsel submitted that the claimant reasonably relied on obiter in Milman J.'s oral reasons, which led her to believe that the claimant could have her own expert provide calculations regarding the stub period between February 21, 2021, and trial, and that these calculations could be argued at trial if necessary. She further argued that it was in the reasonable contemplation of the Court and the claimant that the Stub Period Report would be admitted.
- [56] I disagree with claimant counsel's interpretation of Milman J.'s oral reasons. First, neither the February 2021 or 2022 Valuation Date Orders make any reference to the admissibility of a stub period report for either party. This is not surprising, as it would be in, my view, unusual for the chambers judge to tie the hands of the trial judge with respect to the discretionary admission of evidence at trial.
- [57] Furthermore, the transcript of Milman J.'s oral reasons do not support the claimant's contention that Mr. Jensen's Stub Period Report should be admitted. In his oral reasons at para. 8, after rejecting the claimant's request for a later valuation date and setting the valuation date as February 28, 2022, Milman J. acknowledged that the value of the businesses in question would likely increase as they emerged from the pandemic. At paras. 9-11, Milman J. stated:
- [9] Nevertheless, as I concluded last year when a similar issue was presented to me, the potential prejudice to Ms. Lux of having the companies undervalued can be remedied with a reply report that discusses the likelihood of improvement in the months following the valuation date, which can be bolstered with updated financial information such as the quarterly reports to which she refers.
- [10] As I concluded last year, the prejudice that would flow from the parties' inability to have a completed report in time for the parties to respond to it and be ready for trial outweighs the prejudice to Ms. Lux from an unduly early evaluation date.
- [11] I am therefore ordering that the valuation should proceed on the basis of the value of the corporate assets as of February 28, 2022.

[Emphasis added.]

- [58] I do not read Milman J.'s reasons to be approval of Ms. Lux admitting the Stub Period Report at trial. Rather, these comments indicate to me that Milman J. simply emphasized that a reply report could be prepared in response to Mr. Mynett's valuation reports and that such a reply report could deal with issues in the changes in value that may have resulted from the passage of time. As pointed out by Mr. Lux, the claimant did in fact have Mr. Jensen produce a reply report in the form of "limited critique" on Mr. Mynett's valuation. Although this report was not introduced as evidence at trial, it was provided to the parties prior to

mediation in November 2022.

- [59] I agree with Mr. Lux that the Stub Period Report tendered by Ms. Lux was not a reply report, but rather an attempt at a new valuation. While parties to a family law matter are entitled to prepare a report in reply to a jointly retained expert's report in accordance with the Rules, in my view the parties are not entitled to engage their own experts in financial matters to conduct their own valuations. In *Aquilini v. Aquilini*, 2012 BCSC 1616, Justice N. Smith discussed the use of experts in family law actions and concluded that neither party has the ability to unilaterally appoint their own financial expert in the absence of agreement or court order. The court noted that the Rules indicate that there is a strong policy preference for the use of jointly appointed financial experts in family cases. Justice N. Smith concludes that evidence in respect of financial matters in family cases should come from a jointly retained expert unless the court is satisfied that there are circumstances that would make the use of such a joint expert inappropriate or impracticable:
- [33] In the absence of such an agreement between the parties, the question then becomes whether it is appropriate for the court to make an order dispensing with the requirement for a joint expert. The rule does not state any express limits on the court's discretion to make such an order but, as with any discretion, it must be exercised judicially in the context of the provision at issue.
- [34] The rule creates a mandatory requirement for joint experts, which is then made subject to the parties agreeing or the court ordering otherwise. That structure suggests a legislative intention that joint experts become the norm on financial issues and separate experts the exception.
- [35] Therefore, before the court makes an order relieving the parties of the requirement to present evidence through a joint expert, it should be satisfied that there are circumstances in the individual case that make use of a joint expert inappropriate or impracticable. I make no effort to list what those circumstances might be--that will emerge as the jurisprudence develops. Experience may also identify certain specific issues that will not easily lend themselves to the use of joint experts.

[Emphasis added.]

- [60] I agree with the respondent that this is not a case where the use of a joint expert is inappropriate or impracticable and I am not prepared to exercise my discretion to depart from the norm in family law cases: that expert financial information is to be presented by the jointly retained expert. The affidavit evidence before me in respect of the attempts to have Mr. Mynett produce an updated valuation report during the adjournment of this trial indicate that such an update was not impossible, inappropriate, or impracticable. Although it was not able to be done given the time constraints and the dispute between the parties as to the methodology to be used in the report, an updated valuation could have been prepared by the jointly appointed expert had the parties turned their minds to it earlier.

- [61] If I am wrong, and the Stub Period Report should be admissible in these proceedings, I would give it no weight in respect of determining the value of Triquest as of December 31, 2022.
- [62] As I understand it, the Stub Period Report was prepared on the basis that the conclusions in Mr. Mynett's October Triquest En Bloc Report and Triquest Supplemental Report were correct. Mr. Jensen then estimated the after-tax income earned by Noverra and its Subsidiaries in the period between March 1, 2022, and December 31, 2022, by reference to Noverra's trailing twelve-month financial statements as at September 30, 2022. Mr. Jensen then took that after-tax income and simply added it to the value that Mr. Mynett had found in his report. In my view, this approach is not an appropriate way to value Triquest for that stub period.
- [63] Mr. Jensen acknowledged that his stub period approach was not a proper valuation report and was merely a calculation that he performed based on the information available to him. He testified that he spent approximately two hours in the preparation of his stub period calculation, including the drafting of the Stub Period Report. Mr. Jensen acknowledged that he did not have the time to consider a number of factors that he considers to be important when performing a proper analysis of the value of a business. Mr. Mynett explained that the valuation of Noverra and the Subsidiaries was very complex. Given that Mr. Mynett has had approximately 30 years of experience in valuing businesses, I do not take this statement lightly. The reliability of the Stub Period Report is questionable at best when one considers that it attempts to opine on such a complex valuation matter and was prepared in the hurried circumstances described by Mr. Jensen.
- [64] When Mr. Mynett testified at trial, he was provided with the opportunity to comment on the Stub Period Report. In his expert opinion, he did not believe that Mr. Jensen's approach was appropriate, and I wholly accept his opinion in this respect. Mr. Mynett explained that this approach would only be defensible if there had been no changes in the economic environment, risk factors applicable to the businesses, or cash flows, in the intervening period. Notably, the economic environment did drastically shift during the stub period, due to the rapid changes in interest rates in the United States and Canada. The evidence is that these economic factors have had an impact on Noverra's and the Subsidiaries' businesses. Simply adding the after-tax income to Mr. Mynett's earlier valuation is not a reflection of the fair market value of Triquest.
- [65] Moreover, as pointed out by Mr. Lux, Mr. Mynett's valuation of Triquest was based on the aggregation of separate valuations of each of the Subsidiaries. Mr. Mynett testified that this approach was necessary given the complex nature of the valuation including the different cash flows of the Subsidiaries and the fact that the risks of each of them are different. However, the methodology used by Mr. Jensen in the Stub Period Report used Noverra's financial information at the consolidated level. One cannot come up with the value of a bushel of apples by adding the value of a basket of oranges to a basket of apples.

[66] In my view, Ms. Lux's attempt to tender a new valuation report through Mr. Jensen's Stub Period Report is an effort to get around the order made by Milman J. because she is dissatisfied with the Valuation Date. Had Ms. Lux been truly concerned with the fairness of the trial based upon the valuation date of the parties' business interests, she would have also tendered a report on the change in value of her own business interests in the stub period. Alternatively, she could have attempted to work more cooperatively with the respondent in order to have Mr. Mynett update his valuation conclusions during the trial adjournment.

The Valuation Date is the Best Evidence of Value at the Date of Trial

- [67] The parties agree that the value of family property is to be determined as of the date of trial pursuant to s. 87(b)(ii) of the FLA. I agree and find that there is no reason in this case to depart from the presumptive date of valuation.
- [68] While the valuation date used by Mr. Mynett was just over one year old by the time this trial concluded in March 2023, it remains the best evidence of the value of the corporate interests at the date of trial. The practical reality is that there will almost always be a period of time between the date used to value property and the date of trial, given the time required to produce and disclose relevant information, the need for the expert to analyse that information, and to generate an opinion of fair market value: *Sanai v. Mahmoud*, 2017 BCCA 155 at para. 16.
- [69] In this case, February 28, 2022, is the valuation date that is closest to the date of trial as the parties were unable to obtain an updated report from the jointly retained expert, and because I have found the Stub Period Report inadmissible. Mr. Mynett's reports as at the Valuation Date are the only admissible expert evidence of the value of the parties' business interests as of the date of trial. As neither party is taking the position that it would be significantly unfair to value the business interests as at the date of trial, the Valuation Date reports are the best evidence of value at the date of trial and will be used: *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 75.

The Fair Market Value of Ms. Lux's Interest in Simetra

- [70] As stated earlier, the Simetra Supplemental Report values Ms. Lux's interest in Simetra as at the Valuation Date as being between \$370,000 and \$640,000 with a midpoint of \$505,000. It is uncontested that there is an outstanding shareholder loan owing from Simetra to Ms. Lux in the amount of \$564,335 and that it is family property subject to equal division between the parties.

- [71] Ms. Lux accepts that the midpoint value of \$505,000 is the appropriate valuation for her interest in Simetra, plus the outstanding shareholder loan, and she does not raise any issue with respect to the methodology employed by Mr. Mynett. Mr. Lux accepts the range of value provided in the Simetra Supplemental Report; however, in his oral submissions he suggests that the fair market value of Simetra should be at the higher end of the range found by Mr. Mynett.
- [72] Mr. Mynett valued Ms. Lux's ownership interest in Simetra inclusive of its wholly-owned subsidiary Mantech. The value of Mantech, a going concern, was estimated using an income valuation approach which is typically used for companies that are a going concern. Specifically, Mr. Mynett capitalized Mantech's discretionary cash flows and applied capitalization rates which, in Mr. Mynett's opinion, reflected the degree of risk associated with achieving those cash flows. Mr. Mynett adopted an approach that utilized capitalized, normalized, net earnings before interest, taxes, depreciation, and amortization ("EBITDA"). Mr. Mynett explained that prospective information is a key component to estimating a business's fair market value as at any given date. Determining the company's normalized EBITDA requires a prospective view of the discounted cash flow of the company.
- [73] In coming to his conclusion on Simetra's value, Mr. Mynett used a normalized EBITDA for Mantech of \$1,015,000, based in part on representations made by Mantech's leadership. However, Simetra's actual EBITDA that was reported to its lender for the period ending August 31, 2022, was \$1.4 million. If the August 31, 2022, EBITDA is substituted for the amount used by Mr. Mynett, the value of Mantech, and consequently the value of Simetra's ownership share, increases significantly.
- [74] Ms. Lux argues that it would be inappropriate to use the EBITDA provided in the August 31, 2022, financial documents provided to the lender because Mantech's year-end is November 30, and therefore, the August 31 numbers do not include adjustments that are typically made near the year-end. There is merit to this position. However, it is noteworthy that the August 31, 2022, EBITDA is based upon a trailing 12 months, not a year to date; consequently, adjustments typically made at the year-end should have been accounted for in the August 31, 2022, numbers.
- [75] Significantly, Ms. Lux and Mr. Linsley both gave evidence at trial that they expect Simetra's 2022 EBITDA to be approximately \$1.3 million after the year-end adjustments for inventory and deferred revenue are made and that they do not expect any other material changes. Mr. Lux does not take the position that the significant difference between the normalized EBITDA used by Mr. Mynett and the EBITDA that Mantech's directors testified to at trial is an indication that Ms. Lux has artificially driven the value of Mantech down. Rather, he acknowledges that projections provided to Mr. Mynett by Mantech's leadership are just that--projections--and that things change over time. I agree with the reasonable position taken by Mr. Lux on this point.

[76] However, based upon Ms. Lux's and Mr. Linsley's expectations with respect to Mantech's EBITDA, it appears to me that it would be more appropriate to value Simetra at the higher end of the range identified in the Simetra Supplemental Report. Consequently, I find the value of Ms. Lux's 50% interest in Simetra as at the Valuation Date to be \$640,000. The shareholder loan owing to Ms. Lux in the amount of \$564,335 is to be added to her interest. Thus, the total value of Ms. Lux's interest in Simetra is \$1,204,335 and the parties' equal share of this family asset is \$602,168.

The Fair Market Value of Mr. Lux's Interest in Triquest

The Parties' Positions

[77] As discussed, Mr. Mynett prepared two reports valuing Triquest at the Valuation Date. In the October Triquest En Bloc Report (which was updated by the Triquest Supplemental Report) Mr. Mynett provided his opinion on the en bloc fair market value of Triquest. In contrast, in the Noverra SHA Formula Report, Mr. Mynett provided his opinion on valuation using the formula found in the Noverra SHA. There is a significant discrepancy between the values of Triquest between the two methods: the Triquest Supplemental Report valued Mr. Lux's interest at \$4.3 million at the mid-point, whereas the Noverra SHA Formula Report valued Mr. Lux's interest at \$890,000. No matter which valuation method is used, it is not contested that at the date of trial, Mr. Lux has an outstanding shareholder loan owing to him from Triquest in the amount of \$777,196, which is subject to equal division.

[78] Mr. Lux argues that his interest in Triquest should be valued based upon the formula found in the Noverra SHA, although he concedes that an upward adjustment should be made to exclude a contingent liability that applied at the time of Mr. Mynett's evaluation, but no longer applies.

[79] Ms. Lux argues that the formula used in the Noverra SHA Formula Report does not represent the fair market value of Triquest, and consequently, the value derived from it is not consistent with s. 87(a) of the FLA which requires the value of family property to be based on its fair market value. She argues that Triquest's fair market value is best represented in the Triquest Supplemental Report. As discussed earlier, Ms. Lux submits that the value found in Mr. Jensen's Stub Period Report should be added to the value determined in the Triquest Supplemental Report. However, I have already determined that the Stub-Period Report is inadmissible.

The Relevant Law

[80] Section 87 of the FLA states:

Valuing family property and family debt

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
- (i) an agreement dividing the family property and family debt is made, or
- (ii) of the hearing before the court respecting the division of property and family debt.

[Emphasis added.]

[81] The starting point in determining the division of family property is that its value must be determined based on its fair market value. Although there is no definition of fair market value in the FLA, the authorities are clear that the ordinary meaning applies. Fair market value is the price at which a transaction would occur, in an open and unrestricted market between informed and prudent parties acting at arm's length, where neither party is acting under compulsion: *Maguire v. Maguire*, 2016 BCCA 431 at para. 30.

The Noverra SHA Formula Report is not Representative of the Fair Market Value of Triquest

- [82] The Noverra SHA governs the rights and restrictions of its shareholders, Mr. Lux, Mr. Ladak and Ms. Boyd, through their respective holding companies. It contains significant restrictions on the transfer and sale of shares.
- [83] The share transfer restrictions found in part 6 of the Noverra SHA provide a multi-step process that Mr. Lux says would be used in the event that one of the shareholders desires to sell or transfer its shares of Noverra. I accept that the various restrictions found in the Noverra SHA make it very difficult for a shareholder to sell to an outsider third-party. This is consistent with the express intent of Noverra's principals to keep the business amongst themselves. I accept that, in the event that one party wishes to dispose of some or all of their shares, the provisions of the Noverra SHA effectively require the shareholders to work collaboratively with the others through a defined process in an effort to reach an agreement on value. Should the shareholders not be able to reach such an agreement, the Noverra SHA provides a formula by which the value of the shares will be determined.
- [84] I also accept that the formulaic approach was adopted by Noverra's shareholders as a means of minimizing conflict with respect to determining value should one of the shareholders wish to part. The formula does use an objective metric; the same one that Noverra uses when it determined the value to pay when it acquired the Subsidiaries. I do not find that the approach was intended to be some sort of scheme to devalue Noverra. Rather, for specific reasons based on the past business experiences of Noverra's shareholders, the parties wished to avoid a process of dueling experts or a shotgun clause if one of the shareholders wanted to sell some or all of their shares.

- [85] While I accept the above premises that were put forward by Mr. Lux, I agree with Ms. Lux that the proper assessment of fair market value in the present case is an analysis conducted through the lens of the commonly accepted definition of fair market value, irrespective of the consequences that might flow from the sale of the shares pursuant to the default provisions of the Noverra SHA and the formula.
- [86] While the formula found in the Noverra SHA might very well be used by the shareholders should one of them wish to sell their interest to one of the other shareholders, that does not mean that it is the best measure of fair market value for the purposes of s. 87(a) of the FLA. I agree with Mr. Lux that the restrictions around the transfer of shares in Noverra have an effect on the marketability of those shares. However, as will be discussed later, those restrictions are best considered when determining where Triquest properly falls in the range of values provided for in the Supplemental Triquest Report, or when determining whether a minority discount should be applied to that value: *Mclean v. Dahl*, 2017 ONSC 1288 at paras. 229, 236-237.
- [87] In the October Triquest En Bloc Report, Mr. Mynett defines fair market value for the purposes of his valuation of Triquest as being:
- the highest price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.
- [88] Mr. Mynett's definition is substantively identical to the definition provided by the Court of Appeal in *Maguire*, and in my view best accords with the requirements of s. 87(a) of the FLA. In his testimony, Mr. Mynett explained that the methodology used in the October Triquest En Bloc Report and the Triquest Supplemental Report effectively consider the restrictions placed upon the disposition of shares by the Noverra SHA.
- [89] My understanding of Mr. Mynett's evidence is that business valuers begin by valuing a business as if there were no restrictions on sale, but then factor those restrictions into the final determination of value. While the rationale for this may be conceptually difficult to understand, it makes sense to me that an en bloc valuation better represents the fair market value of Triquest. While it may be effectively difficult to dispose of the shares to another party, if Mr. Lux was to hold on to his shares of Noverra through Triquest, and hold them in perpetuity, then he would realize a value significantly greater than the value provided for in the Noverra SHA formula (i.e. the present discounted value).
- [90] Moreover, it is a hypothetical sale to third party in an open and unrestricted market that is considered when determining fair market value for the purposes of s. 87(a) of the FLA. There is nothing in the commonly understood definition of fair market value that would lead me to conclude that it would be appropriate to base the fair market value of family property upon a theoretical sale to a current shareholder in what is effectively a closed market, pursuant to a default clause and formula found in a shareholders' agreement that

was created specifically for the purpose of limiting the market upon which the shares could be sold.

- [91] For the foregoing reasons, I conclude that the better estimate of the fair market value of Triquest's shares of Noverra is found in the Triquest Supplemental Report and not the Noverra SHA Formula Report.

The Value of Mr. Lux's Interest in Triquest

- [92] As referenced earlier, Mr. Mynett valued each of Noverra's Subsidiaries individually in order to determine the ultimate value of Mr. Lux's interest. The value of all of the Subsidiaries was estimated using the income valuation approach, except for the valuation of Troy, which was estimated using an asset-based valuation approach. Mr. Mynett chose this approach for Troy even though it was an operating company and would usually be valued on an income basis because it was not generating sufficient cash flows to support the use of an income-based approach.
- [93] Given that Weisshorn was in its early stages, Mr. Mynett assumed that its value was equal to the initial capital investment provided by NEI, which was valued using an asset-based approach. The values of the Subsidiaries, Weisshorn, and NEI were essentially rolled up into its parent company Noverra, which itself was valued using an asset-based approach. Finally, Triquest, the holding company controlled by Mr. Lux that owns 1/3 of Noverra, was valued using an asset-based approach.
- [94] The Triquest Supplemental Report estimated Noverra's and its Subsidiaries' combined fair market value as at the Valuation Date as being between \$12.8 million and \$15.2 million. Triquest's 1/3 ownership share of Noverra was valued as being between \$4,266,667 and \$5,066,667. Mr. Mynett then evaluated Triquest, which has relatively small assets and liabilities, apart from its ownership stake in Noverra, and determined that Triquest's fair market value was between \$3.9 million and \$4.7 million at the Valuation Date. Mr. Mynett selected the midpoint of \$4.3 million as the fair market value of Triquest. Although Mr. Mynett applied a minority discount in respect of Ms. Lux's interest in Simetra, no minority discount was applied to Triquest's 1/3 interest in Noverra.
- [95] As alluded to earlier, Mr. Mynett described the valuation of the Noverra group of companies as being one of the most complex valuations he has done in his approximately 30 years of practice. He explained that the valuations of Troy and Thorpe were particularly complex because of the companies' risk profiles and the risks presented by the COVID-19 pandemic. Adding to the complexity was Thorpe's relatively recent merger with Victory and the fact that the anticipated synergies of the merger had not yet been realized. Moreover, Thorpe had also recently experienced some turmoil in respect of a transition of leadership. Troy was facing significant operating challenges. The space that Brighter operates in also posed complexities, particularly in respect of insurance related issues.

- [96] The complexity of the valuation itself was magnified by the volume of materials Mr. Mynett was provided with and the extensive iterations of questions asked and answered by the parties and their representatives. As I understand it, Mr. Mynett collected 30 binders of information and more than 300 written questions were asked and answered. An extensive number of questions were asked by Ms. Lux with the assistance of Mr. Jensen. Noverra disclosed reams of information to Mr. Mynett. Mr. Mynett testified that there was no information that he had asked for that had not been provided.
- [97] As discussed earlier, Mr. Mynett produced a number of reports valuing Triquest (and Simetra) in the years since he was retained in 2020. Following the release of the October Triquest En Bloc Report and the October 2022 Simetra Report, the parties raised a number of questions, provided further documentation, and proposed various changes. Ms. Lux did this with the assistance of her advisor, Mr. Jensen, because the terms of the confidentiality order then prevented her from reviewing Noverra's unredacted materials. Mr. Mynett considered all of this information and issued his final report valuing Mr. Lux's interest in Triquest dated December 31, 2022: the Triquest Supplemental Report.
- [98] I have placed a considerable amount of weight on Mr. Mynett's opinions on value. He is an undoubtably very experienced certified business valuator. By all indications, he approached the valuations in this case with a great deal of thought, care, and precision. In my view, Mr. Mynett was also keenly aware of his duty to the Court as an expert witness and he fulfilled that duty in an impartial manner that has assisted the Court greatly. Nonetheless, the parties each raise issues with certain aspects of Mr. Mynett's valuation of Triquest and I must determine if it would be appropriate to make any modifications to the valuation conclusions, in light of the evidence that I have heard and accepted and the legal conclusions that I have made.
- [99] Ms. Lux raises a threshold issue with respect to the reliability of the October Triquest En Bloc Report and the Triquest Supplemental Report. Ms. Lux's concerns are grounded in her view that the information that Noverra provided to Mr. Mynett is unreliable, and therefore, Mr. Mynett's report can not be relied upon in certain respects because he made many assumptions based on that information.

The Credibility and Character of Mr. Lux

- [100] In her written submissions, Ms. Lux states that I need not make negative credibility findings in respect of either Mr. Lux or Mr. Ladak in order to find that some of the assumptions provided by Noverra's management were incorrect. While this is true, it is a somewhat surprising submission in light of the repeated attacks on Mr. Lux's credibility throughout the trial and the repeated suggestions that Mr. Lux and Mr. Ladak, on behalf of Noverra, have intentionally provided information or engaged in transactions designed to artificially decrease Noverra's value or to defeat Ms. Lux's interest in her share of the family property.

[101] I have considered the often-cited factors summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296, leave to appeal to SCC ref'd 35006 (7 March 2013) in assessing credibility and determining whether I will accept all, some, or none of their evidence: *Currie v. Taylor*, 2014 BCCA 51 at para. 33. The factors at para. 186 of *Bradshaw* include:

the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally [citations omitted]. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[102] A witness's testimony is to be assessed in the context of all the circumstances before the Court. *Bradshaw* at para. 187 provides a succinct summary of the correct approach to do so:

It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the Court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".

[Citations omitted.]

[103] Before I go on to consider the threshold reliability issue in respect of Mr. Mynett's report, I will briefly address Mr. Lux's and Mr. Ladak's credibility. I reject any suggestions that either of them was not credible.

[104] Mr. Ladak was a careful and credible witness. I have been pointed to nothing that would lead me to conclude otherwise.

[105] I found Mr. Lux to be a careful and thoughtful witness who was willing to make reasonable concessions when necessary. He answered questions directly, carefully, and clearly without resorting to argument. He was not confronted with any inconsistencies in his testimony before me or between testimony at discovery and at trial. To the extent that demeanour is relevant, Mr. Lux answered questions in a calm manner.

[106] I disagree with the claimant's suggestion that Mr. Lux takes steps that are "borderline in terms of legality, if not crossing the border". It is curious that in support of this suggestion, Ms. Lux points to the fact that the couple's nanny was paid through Triquest, and that the deduction of this personal expense from Triquest's income resulted in Triquest paying less

in corporate taxes. I say that this is curious because the nanny has been paid through Triquest since 2015 and it appears that Ms. Lux was aware of this. Ms. Lux is also a very sophisticated businessperson and any benefit to organizing their affairs in this manner would have been evident to her at that time as well.

[107] Ms. Lux also points to the creation of Weissshorn as being indicative of Mr. Lux's "borderline" illegal behaviour. In her written submissions, she states:

Moving funds into a tax shelter in Barbados that while perhaps not considered abusive tax-planning, clearly reduces the tax payable in the country in which the Noverra shareholders reside and operate business, depriving other taxpayers of the social services that taxes are allocated for.

As a trained accountant, Mr. Lux is well aware that his actions are not compliant with the Income Tax Act, whether in the strict letter of it law [sic] or in spirit. Nonetheless, the fact that he has deliberately taken these actions indicate a type of businessman that tries to maximize his returns, even if it may involve what most would consider unsavoury or borderline behavior.

[108] It is trite to say that Canadian taxpayers are entitled to organize their affairs in a manner that minimizes the amount of tax payable: *Moss v. The Queen*, 2005 TCC 139 at para. 6. There is nothing unsavoury or borderline in doing so under the law. There is no indication that the Canada Revenue Agency has taken any issue with respect to the creation or operation of Weissshorn, and as will be discussed below, there were legitimate business reasons in support of its creation. Whether or not the creation of Weissshorn "deprives" Canadians of the social services that are funded by tax revenue is of no legal significance here; rather, that is the subject a policy debate about which reasonable people can disagree. It does not affect Mr. Lux's credibility in any manner.

[109] In any event, there is evidence that there were legitimate business reasons to create Weissshorn as a captive insurance company, in addition to the potential tax savings. The decision to create a captive insurance company to insure some of the risks associated with the Subsidiaries' business operations was made based on detailed recommendations made in a feasibility study, provided to Noverra by one of the largest insurance brokers in the United States. Although Weissshorn has faced some challenges and has not yet been able to provide all of the insurance that was envisioned in the feasibility study, in 2022 it began to insure a subset of what was envisioned. Moreover, the return on the capital investment in the first six months of operation has been 9% (the annualized return is expected to be double that). While it is true that the amount invested in Weissshorn could have been used to generate increased revenue which would have positively affected Noverra's value, this cannot be said with certainty. Moreover, the long-term viability of Weissshorn is still being pursued. Given the return on the investment made to date and the possible return as detailed in the feasibility study should Weissshorn reach its full potential, I find that the decision to invest the capital in Weissshorn had a legitimate business rationale. It is not for this Court to second guess the prudence of legitimate business decisions.

[110] On numerous occasions throughout the trial, Ms. Lux suggested that the Noverra SHA, in particular its restrictive conditions on the sale of shares, the formula, and its specific default provisions, were designed to thwart Ms. Lux's interest in the family property by artificially decreasing the value of Triquest. In support of her argument, she points to a number of clauses which she says are unreasonable and/or not consistent with business norms.

[111] In my view, the evidence does not come close to supporting these allegations. Mr. Lux and Mr. Ladak have both testified that the Noverra SHA is the agreement that governs their relationship. There is no evidence to the contrary. Should a shareholder wish to divest their interest, Mr. Lux (or Mr. Ladak or Ms. Boyd) would bear the consequences of the formula that determines the value of Noverra's shares. The fact that this formula may result in the divesting shareholder receiving an amount below market value does not indicate that the Noverra SHA was designed to thwart Ms. Lux's interest. I accept Mr. Lux and Mr. Ladak's explanation as to why the agreement was designed and drafted the way it is. As referenced earlier, it is based on the shareholders' specific objectives with respect to the operation of the business, the personal and business relationships between the shareholders, and was developed with reference to their past experiences with other shareholder agreements and divestiture clauses. The Noverra SHA was designed to require the shareholders to work collaboratively with the others through a defined process in an effort to reach an agreement on value.

[112] There is no evidence that the Noverra shareholders have another shareholder agreement that is the actual agreement between them. On the evidence before me, the default and valuation provisions operate to affect a shareholder's interests in the case of default or if a shareholder wished to liquidate their interest; they were not drafted to affect the parties' marital dispute.

[113] In her written submissions, Ms. Lux invites this Court to draw an inference that Mr. Lux engages in unsavoury or borderline behaviour because of the circumstances surrounding the execution of the Noverra SHA. In her written submissions, she states the following:

Mr. Lux made a conscious decision to sign an agreement that would potentially have devastating effects on the value of Ms. Lux's share, and it was designed to do so because Mr. Lux anticipated the parties' separation and wished to minimize his ultimate payment to Ms. Lux.

[114] This requires me to consider the timing of the execution of the Noverra SHA. It is true that the Noverra SHA was executed in June 2018 at a time when the parties were experiencing marital difficulties and the possibility of separation may have been on their minds. However, the evidence does not support a finding that Mr. Lux designed the agreement to minimize the compensation payment to Ms. Lux.

[115] I accept that the Noverra shareholders began working on the development of the Noverra SHA in late 2017, around the time that Noverra itself was formed, the remaining interest in Brighter was acquired, and the subsequent reorganization occurred. This was when

Noverra was created as the common corporate vehicle to hold the growing assets. There were shareholder agreements in place in the former corporate structure and some of those agreements were referred to for the creation of the Noverra SHA. The Noverra SHA was drafted with the assistance of legal counsel. It is not unreasonable that it took a few months to complete when one considers that the Noverra shareholders were very busy at the time operating the newly formed Noverra group of companies. Thus, in my view, the timing of the execution of the Noverra SHA in June 2018 is not indicative of Mr. Lux having concocted the Noverra SHA as a means to minimize the compensation payment made to Ms. Lux.

- [116] Moreover, Mr. Lux's conduct around this time is not consistent with such motives. During the time that the Noverra SHA was being prepared, Mr. Lux assisted Ms. Lux in leaving her employment and starting her own business. The parties used \$170,000 of their savings to do so. Notably, Mr. Lux withdrew nearly \$500,000 from Noverra, and subsequently through Triquest, to fund Ms. Lux's share in the acquisition of Mantech through Simetra. As will be discussed later, this came at a significant cost to Mr. Lux's overall interest in Noverra. Despite being advised by his friends and colleagues not to do so considering the problems the parties were having with their marriage, Mr. Lux withdrew those funds because he thought it was the right thing to do and because he believed that Ms. Lux was a talented business person, that she should have the opportunity to be successful, and because doing so was in the spirit of what they had worked together for during the course of their relationship. Had Mr. Lux intended to negatively affect Ms. Lux's financial position, he simply could have not obtained the funds from Noverra for Ms. Lux to purchase her share of Mantech.

The Reliability of Mr. Mynett's Reports and the Information Provided by Noverra

- [117] Ms. Lux submits that Noverra's management, through Mr. Lux and Mr. Ladak, made various misrepresentations by failing provide accurate information to Mr. Mynett for the purposes of his valuation. Therefore, she argues, many of the assumptions upon which Mr. Mynett's opinion of value are based on are incorrect. I will address a number of the alleged misrepresentations in turn.
- [118] Ms. Lux submits that Noverra's management misrepresented the status of a loan owing to the United States government by one of the Subsidiaries. This misrepresentation is alleged to have been made when management was providing information to Mr. Mynett for an older valuation that was based on a February 28, 2021, valuation date. For that valuation, Mr. Mynett relied on management's representations that there was an outstanding Paycheck Protection Program ("PPP") loan of [monetary amount] owing by Thorpe that was not going to be forgiven by the United States government. PPP loans were provided to companies in the United States as part of its government's response to the COVID-19 pandemic. Ms. Lux submits that Noverra's management knew that the PPP loan would in fact be forgiven before Mr. Mynett completed the 2021 valuation in October of that year and that they should have advised him of the same. There are documents that suggest that Noverra's management

expected that the loan would be forgiven as early as January 2021. However, the loan was not formally forgiven until June 2021.

- [119] Mr. Lux testified that he did not believe it was relevant to advise Mr. Mynett that the PPP loan had in fact been forgiven in June 2021 because it occurred after the February 28, 2021 valuation date that Mr. Mynett was using for that report. Noverra advised Mr. Mynett that Thorpe had submitted an application for forgiveness of the PPP loan and that they believed the PPP funds had been used in a manner that would result in the loan being potentially forgiven. However, a decision had not yet been made by the relevant government agency. There is no indication that this is untrue.
- [120] Mr. Mynett testified that if he had known that the PPP loan had later been forgiven in June 2021, when he was in the process of preparing the report based on the February 2021 valuation date, he "may" have gone back and adjusted the report to reflect this. However, he stated that whether he did make that change would have been dependent upon how foreseeable it was that the loan would be forgiven as at February 28, 2021. In essence, the effect on valuation is dependent upon what an arm's length purchaser would pay at that time. Considering that as at February 28, 2021, the US government had not yet made a decision with respect to the loan forgiveness, it is not clear that the loan should have been removed from Mr. Mynett's 2021 valuation. Therefore, I do not find that Noverra's management misrepresented the status of the PPP loan to Mr. Mynett.
- [121] In any event, Noverra disclosed, and Mr. Mynett was fully aware, that the PPP loan had been forgiven when he was gathering information and preparing the 2022 valuations and it was properly accounted for in those valuations. Consequently, this issue has no bearing on the reliability of the valuations before me.
- [122] Ms. Lux submits that Noverra's management misrepresented the prospective costs of its various insurance premiums when it provided information to Mr. Mynett. Management stated that those costs were increasing from approximately \$4 million in 2021 to \$5.4 million in 2022, a change of about \$1.4 million. However, the actual insurance costs for 2022, which were available at the time of trial, were \$5.3 million. Thus, the estimate of \$5.4 million provided to Mr. Mynett is remarkably close to the actual amount incurred. The claim that management misrepresented these costs is without merit.
- [123] Ms. Lux also argues that Mr. Mynett's report is unreliable because Noverra's management has intentionally painted a "doom and gloom" picture of the Noverra group of companies' future performance. She submits that the doom and gloom scenario has not materialized and does not accurately reflect its true potential. The claimant argues that this is part of Noverra's management's intent to artificially diminish the value of Noverra to in turn diminish Ms. Lux's interest. In particular, Ms. Lux points to Noverra's predictions with respect to the EBIDTA in 2022, which were used by Mr. Mynett as part of his determination of Noverra's normalized EBITDA, and a key component in his estimation of value of each of the Subsidiaries.

- [124] In her written submissions, Ms. Lux stated that Mr. Mynett used a total EBITDA of [monetary amount] for his discretionary cash flow calculation at the high end of his valuation range in the October Triquest En Bloc Report. In the Triquest Supplemental Report, she states that the EBITDA was revised to [monetary amount]. By the time of trial, Noverra's EBITDA for 2022 was determined to be [monetary amount] CAD. Ms. Lux argues that the difference between the actual and projected EBITDA is indicative of Noverra's management's inclination to paint a more negative outlook than what came to fruition.
- [125] However, the comparison provided in Ms. Lux's written submissions is misleading. When adding the EBITDA of the Subsidiaries, Ms. Lux neglected to convert the US Subsidiaries' EBITDAs to Canadian dollars. Using an exchange rate of 1.2698, which is what Mr. Mynett used in his report, results in the EBITDA projections provided by management as being [monetary amount] CAD in the October Triquest En Bloc Report and [monetary amount] CAD in the Triquest Supplemental Report. The difference between these amounts and the actuals is much less than Ms. Lux submits.
- [126] Moreover, when one looks deeper, the difference between the actual EBITDA achieved by the Noverra group of companies and the normalized EBITDA used by Mr. Mynett in his report is eliminated entirely. The [monetary amount] CAD of actual EBITDA achieved is calculated using the actual average exchange rate applicable for 2022, which was 1.36. In order to compare the actual EBITDA with the normalized EBITDA used in Mr. Mynett's report, one must use the same exchange rate for the US Subsidiaries in both calculations in order to provide a meaningful comparison. If one applies an exchange rate of 1.36 to the normalized EBITDA used in Mr. Mynett's Triquest Supplemental Report, the result would be [monetary amount] CAD; almost the exact amount of EBITDA actually achieved.
- [127] I agree with Mr. Lux that there is no indication that the normalized EBITDA used by Mr. Mynett was based on a picture of "doom and gloom" that has not transpired as alleged by Ms. Lux. In fact, it indicates that the actual performance of Noverra for the 2022 calendar year was approximately equivalent to the normalized EBITDA that Mr. Mynett used in the Triquest Supplemental Report. In my view, this enhances the reliability of the conclusions in that report.
- [128] Ms. Lux also alleges that the financial statements and other information provided to Mr. Mynett by Noverra's management are unreliable. In particular, she alleges that there are material differences between the internally prepared financial statements and the audited consolidated financial statements. She also says that Noverra withheld certain relevant documents from being disclosed to Mr. Mynett. I do not agree with Ms. Lux.
- [129] Mr. Mynett explained that Noverra's audited consolidated financial statements were of little use for his valuation because his methodology required him to value each of the Subsidiaries individually. Therefore, the financial statements for the Subsidiaries prepared by Noverra's internal management were the relevant financial statements for Mr. Mynett's purposes.

[130] It is undisputed that there are differences between these sets of financial statements. Mr. Jensen questioned Mr. Mynett in respect of these differences before the trial and Mr. Mynett was questioned about them at trial. Mr. Mynett explained that, while the differences are material, he did not have any concerns about them. He found the differences to be readily identifiable and they could be explained by the different ways in which certain measures are recognized for different purposes (i.e. accounting standards vs. management purposes). Mr. Mynett was not surprised to see these differences and was easily able to make the necessary adjustments for valuation purposes. He testified that the differences between the documents prepared by management and those prepared by the external accountants did not cause him any concern with respect to the integrity of the information being provided to him by Noverra's management. Mr. Mynett was entirely satisfied with the quality and quantity of information he received from Mr. Ladak on behalf of Noverra. Ms. Lux did not identify any differences between these financial statements that Mr. Mynett was unaware of and did not take into consideration. I am not persuaded that the information provided by Noverra's management was unreliable, and further, I am not persuaded that the differences between the audited financial statements and the internally prepared statements has had any negative impact on the reliability of Mr. Mynett's valuations.

[131] In conclusion, I do not find that the information provided to Mr. Mynett by Noverra's management was unreliable or that it intentionally painted a more negative financial outlook than in reality. I am satisfied that Mr. Mynett received full disclosure from Noverra and that the reliability of his reports is not negatively impacted by any of the representations made by Noverra's management.

What Adjustments Should be Made to Triquest's Valuation?

[132] In my view, the Triquest Supplemental Report is the best indicator of Triquest's value. In creating the Triquest Supplemental Report, Mr. Mynett adjusted the October Triquest En Bloc Report to account for information he received subsequent to its release. In my view, the adjustments made are supported by the evidence before me, and therefore, are properly considered in determining Triquest's value.

[133] For example, Mr. Mynett reduced the value of Brighter to account for a rise in costs. This rise in costs is supported by third party documents provided to Mr. Mynett and by Mr. Ladak's testimony in respect of the reduction in Brighter's gross profit margin, attributable to inflation and the increasing cost of labour. The Triquest Supplemental Report also properly accounts for the correct corporate income tax rate and the unrecorded cash received by Noverra's shareholders in respect of the sale of copper salvaged from Brighter's re-piping operations (the "Copper Cash").

- [134] The Triquest Supplemental Report valued Triquest as being between \$3.9 million and \$4.7 million. Given the actual EBIDTA realized by Noverra (as discussed above), it is my view that the appropriate starting point for the valuation of Triquest as of the Valuation Date is \$4.7 million rather than the mid-point that was selected by Mr. Mynett, who did not have the benefit of Noverra's actual EBIDTA at the time the Triquest Supplemental Report was issued.
- [135] Mr. Lux submits that a number of adjustments should be made to Mr. Mynett's en bloc valuation to arrive at the fair market value of Triquest for the purposes of this litigation. I will discuss each of these in turn.

Settlement of Class Action Lawsuits

- [136] I agree that an adjustment should be made in respect of the settlement of class action lawsuits in which Thorpe was a defendant. These lawsuits had not yet been litigated or settled at the time that Mr. Mynett prepared his valuations but he was made aware of their existence and the estimated liability associated with them. Mr. Mynett opined that the fair market value of Triquest should be reduced by \$300,000 if the lawsuits settled for \$1 million USD, which is the amount that Noverra provided to Mr. Mynett as an estimate of what was then a contingent liability. In February 2023, a memorandum of understanding was entered into to resolve the litigation for a total cost of \$1.013 million USD.
- [137] Ms. Lux concedes that a reduction should be made but argues that the reduction should be less because the total cost of the settlement included legal fees of approximately \$250,000 USD, and thus, the lawsuits were settled for less than the \$1 million USD estimated by Noverra. I do not agree with Ms. Lux's position. Mr. Mynett estimated the reduction in value resulting from the settlement of the lawsuits based on a September 2022 letter from Thorpe's outside counsel which estimated the total liability as being \$1 million USD, including legal fees. Consequently, Mr. Mynett's estimate of the impact on the value of Triquest was based on almost exactly what occurred, which was settlement of the lawsuits for \$1.013 million USD.
- [138] I find that the value of Triquest should be reduced by \$300,000 to account for the total cost of settling the lawsuits against Thorpe.

Minority Discount

- [139] A minority discount is often applied to discount the value of shares where the party is a minority shareholder, and consequently lacks control over the corporation. A minority discount is appropriate where the minority truly lacks control of the company, thus making the shares illiquid: *McLean v. Dahl*, 2017 ONSC 1288 at paras. 229, 236. A lack of control can be exemplified by an inability to "control the direction of the company, determine dividends or bonuses, or require that shares be redeemed or transferred": *McLean* at para. 229. A minority discount also recognizes that the shares may be subject to limitations on

sale: McLean at para. 229. Taken together, a minority discount is meant to reflect the reduced value of a minority block of shares and aims to encourage a sale at a fair value of the shares: David S. Morritt, Sonia L. Bjorkquist & Allan D. Coleman, *Oppression Remedy* (Toronto: Thomson Reuters Canada, 2020), (loose-leaf updated 2023), at 6:26.

- [140] Mr. Lux argues that a minority discount should be applied to the value of Triquest's shares in Noverra given that it holds only 1/3 of Noverra's shares. In Mr. Mynett's opinion, which is adopted by Ms. Lux in her submissions, a minority discount is not appropriate given a provision in the Noverra SHA which provides that there is to be no discount for a minority position.
- [141] Mr. Mynett opines that if his interpretation of the Noverra SHA is incorrect, a minority discount of 5% should be applied. As explained by Mr. Mynett in his report, the quantum of a minority discount (if one is to be applied) depends on many factors including, but not limited to, the applicable incorporating statutes; the existence and provisions of shareholder or partnership agreements; shareholder/partner relationships; the size of the interest relative to other interests; the dividend paying history of the company; and the extent to which an acquisition of the subject interest may confer voting control to existing shareholders/partners.
- [142] The parties' positions first require me to interpret the relevant provisions of the Noverra SHA. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47 confirms the modern approach to contractual interpretation:
- [47] the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[Internal citations omitted; emphasis added.]

- [143] Section 11.7 of the Noverra SHA is entitled "Determination of Fair Market Value". Subsection 11.7(g)(i) provides that, where determination of fair market value is made by the valuers under that section, "there shall be no premium for a control position or discount for a minority position." In Mr. Mynett's opinion, this provision would be operative upon the disposition of Triquest's share interest in Noverra, and therefore, no minority

discount would be applicable. However, I am persuaded that this provision would not likely be operative, and therefore, a minority discount is appropriate.

[144] Section 11.7 provides:

Where, pursuant to the provisions of this Agreement, a determination of the fair market value of an Investment is required to be made, a Shareholder may give written notice to the other Shareholders requesting that the Shareholders forthwith meet and attempt in good faith to agree upon the fair market value of the Investment".

[Emphasis added.]

[145] Section 11.7 and its subsections go on to describe a process by which valuers would be selected and the way in which fair market value is to be determined. However, s. 11.7 is not rendered operative anywhere in the Noverra SHA, despite the words of that section only taking force "pursuant to the provisions" of the Noverra SHA. Importantly, the Noverra SHA does not identify any circumstance where "a determination of the fair market value of an Investment is required to be made." Rather, as discussed earlier, Part 6 of the Noverra SHA provides for the method of valuing the shares should one of the shareholders wish to divest itself of its ownership interest. Consequently, it does not appear to me that s. 11.7 would be operative upon the disposition of Triquest's ownership interest in Noverra.

[146] If this is the case, Ms. Lux reasonably questions the reason why s. 11.7 was included in the Noverra SHA. Mr. Lux and Mr. Ladak explained that this section was boilerplate language that was inadvertently left in the Noverra SHA. They explained that they did not consider this section when reviewing and negotiating the Noverra SHA, but instead focussed on discussing and negotiating s. 6.1 which deals with share transfers and the formula of valuation set out in s. 10.3.

[147] While it seems somewhat odd that boilerplate language would inadvertently be overlooked when one considers the sophistication of the parties to the Noverra SHA, the formulaic valuation process described earlier in these Reasons, and set out in ss. 6.1 and 10.3 of the Noverra SHA, are consistent with the relationship between the shareholders and their past business experience which led them to develop a way to evaluate the company in a manner that would be least likely to lead to conflict. I accept Mr. Ladak's testimony that the parties did not intend for an independent valuation process to play into the sale of a party's shares because they do not believe that the use of an independent valuator reduces conflict, but rather leads to more conflict and uncertainty. The surrounding circumstances in this commercial context lead me to conclude that s. 11.7 does not apply.

[148] As referenced earlier, the Noverra SHA restricts the liquidity of Triquest's interest in Noverra. While I did not accept the valuation formula provided for in s. 6.1 of the Noverra SHA for the purposes of determining the fair market value of Triquest, a prospective purchaser of Triquest's shares would likely interpret that provision as a restriction on the value of the shares. In these circumstances, it is appropriate, in my view, to apply a

minority discount to the value of Triquest's ownership interest: McLean at paras. 236-237. Moreover, as will be discussed in detail later in these reasons, Triquest's ability to influence Noverra with respect to its future direction and the declaration and payment of dividends is limited. This is not a situation where, although a minority shareholder at law, Triquest factually has the ability to operate as a controlling shareholder.

- [149] In Mr. Mynett's opinion, should I find that s. 11.7 of the Noverra SHA is inapplicable, as I have done so, a minority discount of 5% should be applied to Triquest's interest in Noverra. Mr. Lux takes the view that a minority discount should be at least 5%, and likely more, given that a 5% minority discount was applied to Simetra's interest in Mantech. Mr. Lux notes that Ms. Lux, as a 50% indirect shareholder in Mantech, has a greater ability to influence the corporation than he does as a 1/3 indirect shareholder of Noverra.
- [150] In my view, a 5% minority discount in respect of Triquest's interest in Noverra is appropriate in the circumstances. I come to this conclusion for the same reason that Mr. Mynett did: as at the Valuation Date, Noverra had no controlling shareholder and if either of Noverra's two other shareholders acquired Triquest's one-third, that shareholder would become a controlling shareholder. Although Mr. Ladak and Ms. Boyd can effectively act as a voting block given that they are married, I do not see what they would do to assert their control in a manner that would not disadvantage the other spouse in the same manner that it would disadvantage the other 1/3 shareholder. Therefore, I do not agree with Mr. Lux that the fact that Mr. Ladak and Ms. Boyd are married results in a larger minority discount being applicable than that proposed by Mr. Mynett.
- [151] The court has discretion to award a lower minority discount, or even decline to award one at all, where the shareholder has no intention of selling their shares, or no willing prospective purchaser exists: *Huck v. Huck*, [2004] O.J. No. 3652, 2004 CanLII 22079 at para. 39; *Gray v. Gray*, 2000 MBQB 207 at para. 78. Here, the evidence is that Mr. Lux has no intention of selling his shares to any prospective purchasers. Accordingly, I find that a 5% minority discount is appropriate in the circumstances.
- [152] Given that I have determined that the starting point for the fair market value of Triquest is \$4.7 million and that it is appropriate to reduce this value by \$300,000 in respect of the cost of settling the class action lawsuits, a 5% minority discount results in a further reduction of \$220,000.

The Impact of Triquest's Pledge of Shares and its Role as Guarantor of Noverra's Debt

- [153] Noverra's financing package with the Bank of Montreal ("BMO") includes a number of guarantees by its shareholders for its debt. Mr. Lux argues that certain of these provisions impacts the value of Triquest's interest in Noverra.
- [154] While Mr. Lux is not a personal guarantor of Noverra's debt to BMO, Triquest is a limited resource guarantor of Noverra's debt to BMO, which was in excess of [monetary amount] at the Valuation Date. Furthermore, Triquest has pledged its shares of Noverra to BMO as

security for BMO's lending position. Mr. Lux argues that the provisions of Noverra's financing package provide that if Triquest were to sell its shares of Noverra to the other shareholders or a third party, the full proceeds must be given to BMO as a mandatory prepayment of Noverra's debts.

[155] Pursuant to s. 13.4 of the Noverra SHA, Triquest may be entitled to reimbursement from the other shareholders of part of the prepayment collected by BMO. Mr. Lux says that the reimbursement would equate to Triquest only receiving 2/3 of the net sale proceeds should it sell its shares of Noverra while the BMO financing package is in place. Consequently, Mr. Lux argues that the fair market value of Triquest's shares should be reduced to 2/3 of its fair market value for the purposes of determining the equal division of property which is a reduction of approximately \$1.25 million from the value estimated in the Triquest Supplemental Report.

[156] Ms. Lux argues that the prepayment provisions of the BMO financing package will not necessarily be enforced should Triquest sell its shares of Noverra, and that therefore, this should not be considered in determining the value of Triquest's shares in Noverra. Furthermore, Ms. Lux argues that even if the prepayment provision was enforced, the Noverra SHA would operate to fully indemnify Triquest for the entire amount of the prepayment such that Triquest would ultimately receive the entire proceeds of disposition.

[157] The relevant portion of the BMO financing agreement provides as follows:

Mandatory Prepayments: 100% of the net proceeds of (i) any sales or issuances for cash consideration of equity or debt securities by the Borrower or any Unlimited Recourse Guarantor (with exceptions to be determined by the Lender) (ii) any sales of shares of Noverra for cash consideration by the Limited Recourse Guarantor, (iii) any sale or disposition of any assets (other than sales of inventory in the ordinary course of business) of the Borrower or any Unlimited Recourse Guarantor above CDN\$200,000, and not otherwise reinvested within 180 days and (iv) insurance and condemnation proceeds not otherwise reinvested within 180 days.

[158] In Mr. Mynett's opinion, the mandatory prepayment provisions raise a "significant valuation issue" in respect of Triquest's shares. Despite his three decades of experience, Mr. Mynett had not encountered this valuation issue in the past. He explained that in his experience, an individual (such as Mr. Lux in this case) would usually be the guarantor and that such a guarantee would not impact the fair market value of shares. However, given that Triquest is the guarantor, this provision could result in the value of Triquest's shares being significantly impacted.

[159] In Mr. Mynett's view, the extent of the impact on the value of Triquest's shares is dependent upon the interpretation of the indemnity provisions of the Noverra SHA. If those provisions provide for Triquest to be fully compensated for the amount of the prepayment by the other Noverra shareholders, then the prepayment provisions would not likely have an impact on value. However, if Triquest was not to be fully compensated by the other Noverra shareholders, then a purchaser of Triquest's shares would have to consider when and if

Triquest would ever be compensated with respect to the sale proceeds taken by the BMO. Given the need for a legal interpretation of the Noverra SHA, Mr. Mynett declined to quantify the valuation implications of the prepayment provisions.

- [160] The first issue to address is whether the mandatory prepayment provisions would apply if Triquest's shares were sold. I agree with Ms. Lux that it is not a foregone conclusion that BMO would enforce this provision if Triquest was to sell its shares in Noverra; Mr. Lux has conceded the same. However, I disagree with Ms. Lux's argument that the evidence before this Court shows that BMO has not enforced the provision in the past, and that therefore, I should conclude that it would not likely do so in the future.
- [161] In support of her position, Ms. Lux points to Troy's sale of assets as part of its downsizing in 2022, which could have been subject to the BMO prepayment provision. She says that the evidence shows that the [monetary amount] of sale proceeds were not taken by BMO as prepayment because the total amount of the BMO loan remained relatively constant in the month. While that inference may be available on the evidence, there are other readily available inferences that could explain how the balance of the loan appears to be relatively stable despite the prepayment provision having been enforced, such as exchange rate fluctuations and long-term debt reorganization. Importantly, neither Mr. Lux nor Mr. Ladak were asked whether BMO exercised the prepayment provision in respect of the sale of these assets.
- [162] Ms. Lux puts forward the same argument with respect to the approximately [monetary amount] of net insurance proceeds received from Weissshorn in 2022. However, it was also never put to Mr. Lux or Mr. Ladak whether this resulted in a prepayment being enforced under subsection (iv) of the prepayment provision.
- [163] It is important to note that Ms. Lux made this assertion for the first time during closing submissions. However, the mandatory prepayment provisions and their effect on the value of Triquest's shares have been an issue in this litigation for a very long time. Mr. Mynett addressed the issue in his correspondence with the parties and in his report. It is true that the financial statements relied upon by Ms. Lux in support of her position were not available to her until recently; however, no application was made to recall Mr. Lux or Mr. Ladak to answer questions in this respect. In my view, it would be fundamentally unfair to accede to the claimant's position based on the circumstantial evidence she relies upon, without giving the respondent an opportunity to address that evidence.
- [164] The next issue that must be addressed is the proper interpretation of s. 13.4 of the Noverra SHA, relating to the reimbursement of Triquest. The parties appear to agree that s. 13.4 would likely apply in circumstances where Triquest sold its shares and was required to make the prepayment of the proceeds to BMO in its role as guarantor. However, the parties do not agree to what extent Triquest would be reimbursed by operation of s. 13.4.

[165] As discussed, Mr. Lux takes the position that Triquest would only be reimbursed for 2/3 of the prepayment to BMO, resulting in a 1/3 reduction in Triquest's holding of Noverra upon disposition of that interest. Mr. Lux acknowledges, as did Mr. Ladak in his testimony, that the operation of s. 13.4 would likely be a contentious issue should Triquest sell its shares and the bank was to enforce the prepayment provision.

[166] Ms. Lux argues that the proper interpretation of s. 13.4 results in Triquest being fully indemnified for the entire amount of the prepayment taken by BMO. Consequently, she submits that the prepayment provision has no impact on the value of the shares.

[167] In my view, the proper interpretation of s. 13.4 is dependent upon when one would calculate each contributing shareholder's "proportionate share" of the amount taken by the BMO pursuant to the prepayment provisions. Section 13.4 of the Noverra SHA provides as follows:

Indemnification and Reimbursement. If any of the Shareholders discharges any liabilities of the Company directly or indirectly pursuant to a guarantee given hereunder, then the Shareholder so paying shall have the right to be protected, indemnified, saved harmless and reimbursed by the other Shareholders not so contributing so that in the end result, each Shareholder shall have contributed his Proportionate Share (as at the time of demand for payment by or on behalf of the creditor in whose favour the guarantee was given). Notwithstanding the joint and several nature of any guarantee entered into by any such Shareholder, as between the Shareholders their liability for repayment shall be allocated in the manner specified above.

[Emphasis added.]

[168] Only the shareholders that were not required to make the payment as a guarantor are required to contribute to the indemnification of the shareholder who was required to make the payment. In the hypothetical situation in this case, OMI and Pineapple would be required to make their contribution proportionate to their shares in Noverra (each of which is 1/3). In these circumstances, s. 13.4 provides that OMI and Pineapple's "proportionate share" is to be calculated "as at the time" BMO demands payment of the sale proceeds from Triquest.

[169] The parties did not direct me to, and I was unable to find, any provisions that specifically set out when exactly BMO would make such a demand under the financial agreements with Noverra. However, it seems to me that BMO would likely decide whether such a demand was made at the time Triquest sold its shares. Section 8 of the non-financial covenants in the BMO lending agreements provides that no change of control or ownership of Triquest (as a guarantor) can occur without prior approval of BMO. It stands to reason that BMO would likely decide whether to make a demand for prepayment of the sale proceeds at the same time it determined whether it would approve that same sale. However, this does not definitively answer the question of when exactly the demand itself would be made to Triquest.

- [170] Ms. Lux argues that the indemnity clause in s. 13.4 would only be triggered after the sale proceeds and shares were exchanged, such that the ownership percentages used to calculate each shareholder's proportionate obligation under s. 13.4 would be based on post-sale shareholdings of Noverra. Therefore, she argues that if OMI, for example, was to purchase Triquest's 1/3 share in Noverra, then OMI and Pineapple would own 100% of Noverra's shares following the transaction. Consequently, OMI would be responsible to reimburse Triquest for 2/3 of the sale proceeds taken by BMO, and Pineapple would be responsible for reimbursing 1/3, with the end result being that Triquest would be fully reimbursed for the amount paid to BMO.
- [171] However, if a demand were to be made for the sale proceeds, it seems reasonable for BMO to take the sale proceeds before transferring Triquest's shares to the purchaser since those shares are pledged to BMO in the first place. If this is in fact the time the demand would be made, then in my view, OMI and Pineapple would each be liable to reimburse Triquest for their proportionate share of those sale proceeds, which at that time would total 2/3 of the sale proceeds.
- [172] Given the nature of the relationship between Noverra's shareholders, it is likely that one shareholder's interest would likely be acquired by another Noverra shareholder as opposed to an outside buyer. If s. 13.4 operates as Mr. Lux submits it should, it seems that one shareholder could not divest itself of their interest to another of Noverra's shareholder's without losing 1/3 of the proceeds of that sale. This is indicative of the likely contentious nature of these provisions should Triquest sell its shares.
- [173] Unfortunately, I am being called upon to interpret s. 13.4 in a vacuum of facts which requires me to make a number of hypothetical assumptions. For example, it is possible that the interpretation and impact would differ depending upon who the purchaser of the shares would be, and the structure and timing of the transaction, among other things. Furthermore, no one from BMO provided evidence as to the way in which it approaches such demands for prepayment. This Court is left to guess what might happen, and in these circumstances, I am unable to come to a definitive conclusion on how s. 13.4 would operate.
- [174] However, I am able to conclude that the operation of s. 13.4 is a significant factor and risk that a purchaser would consider in determining the price it was willing to pay for Triquest's shares of Noverra. While Mr. Lux has met the onus upon him in this regard, I agree with Ms. Lux that he has not proven that s. 13.4 would operate to deprive the purchaser of 1/3 of the purchase price.
- [175] Given my earlier findings, the value of Triquest's interest in Noverra is \$4.18 million before a further reduction is made in respect of Triquest's pledge of its shares and as guarantor of Noverra's debt. On Mr. Lux's position, the reduction would be approximately \$1.393 million. On Ms. Lux's position it would be zero. Given the uncertain way in which s. 13.4 would operate, I have concluded that, on the evidence before me, the risk in the way in which s.

13.4 would operate is best reflected by a reduction to the fair market value that is between each parties' position. Consequently, I have determined that it is appropriate to reduce the value of Triquest's shares in Noverra by a further \$696,500.

Conclusion on the Value of Triquest

[176] In summary, I have determined the value of Triquest's 1/3 share in Noverra as follows:

En Bloc Fair Market Value of Triquest's Interest in Noverra

\$4,700,000

Less Triquest's Share of the Costs of Settling Class Action Law Suits

(\$300,000)

Less Minority Discount

(\$220,000)

Less the Reduction Attributable to Triquest's Pledge of its Shares and as Guarantor of Noverra's debt

(\$696,500)

Value of Triquest's 1/3 Share in Noverra

\$3,483,500

[177] The shareholder loan amount owing to Triquest's shareholders in the amount of \$777,196 is to be added to the value of Triquest. Thus, the total value of Triquest is \$4,260,696 and the parties' equal share of this family asset is \$2,130,348.

Division of the Non-Corporate Assets

[178] As referenced earlier, the parties have agreed upon the value and division of the vast majority of their remaining family assets and liabilities by way of an interim agreement. The interim agreement provided for the equal distribution of the parties' jointly held bank and investment accounts, net of the unsecured liabilities that were retired.

[179] While the parties' interim agreement provided for the division of almost all of the remaining assets to be divided, Ms. Lux claims that an RRSP with a balance of \$25,517.23 and a TFSA with a balance of \$3,208.94 (both as of December 29, 2022), are excluded property on the basis that these amounts arise from post-separation contributions.

[180] Upon being pointed to further evidence during closing submissions, it is my understanding that Mr. Lux concedes that Ms. Lux's claim in this respect should succeed. In any event, I am satisfied that these amounts are not properly included as family property under s. 84 of the FLA because the deposits in these accounts were made post-separation and are not derived from family property.

[181] Consequently, the value of the parties' investment accounts subject to equal division is \$84,167. Mr. Lux will be required to make a payment to Ms. Lux in the amount of \$42,084 in order to equalize these financial assets.

[182] The total value of the parties' RRSPs subject to equal division is \$810,237. The parties may elect a spousal rollover in order to equalize their RRSPs. This would require Ms. Lux to roll over \$184,932 to Mr. Lux's RRSP in order to equalize this asset.

[183] The only remaining asset to equalize is the vehicle that Ms. Lux retained which the parties have agreed to be valued at \$15,000. Consequently, Ms. Lux will be required to make a payment to Mr. Lux in the amount of \$7,500 to equalize this asset.

Summary of the Division of Assets and Conclusion on the Amount of Compensation Payment to be Made by Mr. Lux to Ms. Lux to Equalize Family Assets

[184] The total family property subject to equal division is \$6,374,435. This consists of the parties' corporate and non-corporate interests and is discussed in further detail below and is illustrated in Schedule 1 which is appended to these reasons.

[185] I have determined that the fair market value of Ms. Lux's share interest in Simetra is \$640,000. It is undisputed that Ms. Lux is owed \$564,335 by way of a shareholder loan. Consequently, I have determined that the value of Ms. Lux's total interest in Simetra is \$1,204,335. Ms. Lux is required to pay \$602,168 to Mr. Lux in order to equalize this asset. Ms. Lux shall retain her full ownership interest over all of her shares in Simetra.

[186] I have determined that the fair market value of Triquest's 1/3 share interest in Noverra, net of the reductions I have detailed earlier in these Reasons, is \$3,483,500. It is undisputed that Mr. Lux is owed \$777,196 by way of a shareholder loan. Consequently, I have determined that the total value of Triquest, is \$4,260,696. The parties agree that it is appropriate for Ms. Lux to receive a compensation payment to divest herself of her shareholding in Triquest. As such, Mr. Lux will be required to pay \$2,130,348 to Ms. Lux to acquire her interest in Triquest.

[187] I have discussed the value and division of the non-corporate assets immediately above. As a result of my findings, Mr. Lux will be required to pay \$34,584 to Ms. Lux to equalize the parties' investment accounts and vehicles. Ms. Lux will be required to transfer \$184,932 to Mr. Lux's RRSP by way of a spousal rollover in order to equalize the parties' RRSPs.

[188] In total, Mr. Lux will be required to pay Ms. Lux \$1,562,764 as a compensation payment to equalize the family assets. Ms. Lux will be required to make the RRSP spousal rollover in the amount of \$184,932 within 30 days of the release of these Reasons.

The Method to Implement the Division of Assets

- [189] I accept that Mr. Lux does not have sufficient liquid assets from which the compensation payment could be made. While it is possible that he could borrow funds personally from Mr. Ladak and/or Ms. Boyd, the evidence does not lead me to conclude that this is likely to happen without coming at a significant cost to Mr. Lux's position in Noverra. Given the speculative nature of this analysis, this cannot be accounted for in my determination of value. It is also possible that Mr. Lux could obtain a loan from a financial institution; however, I accept that it is unlikely that he can secure a loan for the entire amount of the equalization payment considering that Mr. Lux has almost no assets other than his RRSPs and his indirect shareholding in Noverra.
- [190] I have found no evidence that the Noverra SHA is anything but the actual agreement between its shareholders. Therefore, despite the suggestions made by Ms. Lux that the Noverra SHA does not represent the true state of affairs between the shareholders, I agree with Mr. Lux that there are significant restrictions on his ability to obtain the funds necessary to make the compensation payment without creating a default under the Noverra SHA. As will be discussed later in these Reasons, I also do not agree with Ms. Lux that Mr. Lux has the ability to control the distribution of income from Noverra; however, I do find that he has demonstrated some ability to influence distributions in the past.
- [191] I further agree with Mr. Lux that the division of the family property should be done in a way that avoids creating a default under the Noverra SHA because a default may result in Triquest losing its shareholdings in Noverra and the loss of Mr. Lux's employment. This Court should avoid making an order that would eliminate or restrict Mr. Lux's ability to earn income, and which would also affect his ability to pay child support.
- [192] The restrictions found in the Noverra SHA and the potential consequences of their breach mean that Mr. Lux cannot practically sell the parties' interest in Triquest, cannot sell Triquest's share of Noverra, and cannot obtain a loan from Triquest that has pledged its investment in Noverra as security. Nor does the Noverra SHA permit Ms. Lux to retain an ownership interest in Triquest after the divorce is finalized. Also, as discussed above, any sale of Triquest's interest in Noverra may result in the proceeds being taken by BMO pursuant to the mandatory prepayment clause of the lending arrangement, which would likely result in litigation amongst Noverra's shareholders and uncertainty with respect to the proceeds that such a sale would generate.
- [193] The only practical option for the equalization of the parties' interest in Triquest is for the claimant to receive an entitlement to future distributions received by Triquest until the equalization amount has been fully paid. Before discussing how such a future entitlement would be structured, I first must address whether there will be tax consequences in respect of Mr. Lux's equalization payment and whether those tax consequences should be considered.

Consideration of Distributive Tax Consequences

- [194] There is no absolute rule as to whether tax consequences should be accounted for in the division of family assets. As held by the Court of Appeal in Maguire at para. 38, tax consequences should be accounted for where there is evidence that the division of the family assets will attract tax. However, where it is not clear that taxes will be exigible, an allowance may not be made. At para. 39, the Court further held that distributive taxes "can and should" be accounted for in appropriate cases.
- [195] As stated above, the equalization payment will come from the receipt of dividends from Noverra, which would flow to Triquest. As discussed by Hugh Woolley, who provided expert evidence on the tax consequences of such distributions, any receipt of funds from Triquest to make such an equalization payment will have tax consequences.
- [196] Any dividends received by Triquest from Noverra would be an inter-corporate dividend and would not incur taxes. However, if those funds were distributed to either Mr. Lux (to then be passed along to Ms. Lux) or paid to Ms. Lux directly, they would be considered taxable dividends to Mr. Lux or Ms. Lux and would incur dividend tax at the personal level at the rate of 36.54%.
- [197] On the evidence before me, including the expert evidence, I accept that there is no circumstance in which it is likely that Mr. Lux can receive funds to make an equalization payment that would not result in tax consequences. In my view, these tax consequences go beyond speculation and should be considered in the equalization of the family property.
- [198] I disagree with Ms. Lux that this Court should not consider distributive tax consequences in circumstances where the equalization payment will be made over a period of years. The fact that the equalization payment cannot be made immediately is a function of the particular circumstances of this case, including Mr. Lux's illiquidity, his indirect minority shareholding in Noverra, and the restrictions in the Noverra SHA. These circumstances, however frustrating they may be to Ms. Lux who desires an immediate payout, do not negate the fact that distributions from Noverra to make the equalization payments will result in significant tax consequences.
- [199] I do not find that Maguire extends so far as to set a principle that an equalization payment is not to be discounted for tax if the equalization payment is to be made over a period of time and that period of time is not certain. The facts in Maguire are unique and distinguishable from the case at bar. In Maguire, the compensation payment was contingent upon a particular event that the Court found may or may not occur, that event being the sale of a professional practice. It was not certain if or when the practice would be sold, how it would be sold or for what amount, nor was it clear that taxes would be incurred: Maguire at para. 40. In this case, as discussed above, the tax implications of liquidation or a withdrawal of funds from Mr. Lux's interest in Triquest is not speculative or uncertain. Although the facts are different, I agree with Mr. Lux that this Court's decision in *M.M. v. L.M.*, 2020 BCSC 798, is more like the case at bar, where taxes were found to be

inevitable and were accounted for in the equalization payment: paras. 143, 146.

[200] Having found that the value of the shares of Triquest must be adjusted for tax consequences, I must now determine the manner in which the tax consequences will be accounted for. As Mr. Woolley testified, the tax implications can be accounted for by either discounting the value of the assets to reflect the distributive taxes inherent in those assets or by equally dividing the tax attributes of the assets as part of the equalization.

[201] In my view, the preferable method in this case is to divide the tax attributes equally by means of a butterfly transaction instead of discounting their value. This method does not require tax discount calculations and it provides both parties with more control over the timing and form of taxes incurred. The use of a butterfly transaction will result in the parties receiving equal tax consequences of their interest in Triquest. In *Chapman v. Chapman*, 2020 BCSC 1029 at para. 153, this Court held that s. 97(2)(b) of the FLA provides the Court with the jurisdiction to order a butterfly transaction. Butterfly transactions have been ordered by this Court in the past: *Chapman* at para. 153.

[202] The details of how the butterfly transaction will operate are to be decided by the parties with reference to the following general framework, as opined by Mr. Woolley:

- a) Ms. Lux would establish a new company ("Newco") that would be 100% owned by her.
- b) Triquest would enter into a rollover under s. 55(3)(a) of the Income Tax Act, R.S.C. 1985 c. 1 (5th Supp.). This rollover would be structured to transfer 50% of Triquest's relevant tax attributes, including its Adjusted Cost Base, Paid Up Capital, and General Rate Income Pool, to Newco.
- c) Triquest would provide Newco with a promissory note in the amount of the required equalization payment (\$1,562,764). The terms of the promissory note could be structured as required to effect the equalization payment(s) between Triquest and Newco pursuant to these Reasons for Judgment.
- d) The claimant would hold the shares of Newco and would have full discretion as to how and when she might want to distribute Newco's cash received for payment of the promissory note from Triquest.
- e) The respondent would hold all of the shares of Triquest which would now have exactly half of their previous tax basis, including half of the previous Adjusted Cost Base, Paid Up Capital, and General Rate Income Pool.

[203] Given that it is Mr. Lux's property that will necessitate the butterfly transaction in order to equalize the parties' interests, in my view, it would be fair for Mr. Lux to bear the reasonable costs incurred by Ms. Lux to establish Newco and for the initial transfers of tax attributes between it and Triquest.

The Way in Which the Equalization Payment will be Made

- [204] Given that Mr. Lux is a minority shareholder and cannot dictate the way in which Noverra makes distributions to Triquest, Mr. Lux proposes that the equalization payment be made over a period of time in proportion to the amount of distributions received by Triquest. He suggests that 65% of all income that Triquest receives in excess of the \$250,000 annual management fee it currently receives from Noverra be paid to Ms. Lux on an annual basis until the equalization amount has been eliminated. Mr. Lux (or Triquest) would be entitled to keep the remaining 35% paid in excess of the \$250,000 management fee and that amount would be included in the calculation of child support. Of course, the amount paid to Ms. Lux would not be subject to child support as it is in respect of the equalization of assets. As will be discussed later in these Reasons, while Mr. Lux cannot determine the amount of distributions to be made from Noverra to Triquest, history suggests that he has an ability to influence the amount and timing of distributions to a limited extent. Mr. Lux says he would be incentivized to pursue and influence these additional distributions if he is able to retain some benefit from them.
- [205] In my view, Mr. Lux's proposal makes sense in the circumstances. However, I am of the view that a larger portion of distributions in excess of the \$250,000 annual management fee should be paid towards the equalization payment because it is in the parties' best interests that Ms. Lux receive the equalization payment as soon as possible.
- [206] Thus, I order that 75% of all income that Triquest receives in excess of the \$250,000 annual management fee it currently receives from Noverra be paid to Ms. Lux on an annual basis until the equalization amount has been eliminated. In order to further incentivize Mr. Lux to pursue and influence the additional distributions as quickly as possible, I find that it is necessary to make the equalization payment subject to a rate of compounding interest. In my view, it is appropriate that interest equal to the post-judgment interest rate pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, applicable on the date of this judgment, plus 1%, immediately accrue. For as long as the equalization payment remains outstanding, the interest rate is to be calculated pursuant to s. 7 of the Court Order Interest Act; however, I exercise my discretion under s. 8 to make the interest compound annually.
- [207] I am also of the view that it is appropriate to make an order that the equalization payment be made over a definitive period of time. In my view, Noverra and its Subsidiaries' past financial performance and Mr. Lux's limited demonstrated ability to influence distributions in the past, suggest that it could make the additional distributions totalling the amount of the equalization payment within four years. Noverra was able to advance over [monetary amount] to NEI in the span of two years while remaining within their banking covenants and while retaining a significant amount of cash in Noverra for the purposes of future acquisitions. Consequently, the equalization payment is to be made annually over the course of four years. The first payment is to be made within one year from the date of these Reasons for Judgment in an amount not less than 1/4 of the amount then owing to Ms. Lux under the terms of the equalization payment set out herein. The remaining payments are

to be made in equal annual instalments. Nothing in these Reasons should be seen as restricting Mr. Lux from making the equalization payment in full before the expiry of four years, should that be possible. The terms of the promissory note to be provided by Triquest to Newco as part of the butterfly transaction discussed above is to reflect these terms of payment, including interest and timeline. If after two years, Mr. Lux believes he is unable to make the equalization payment in full within the four years provided, then he has leave to apply to this Court, with evidence, to vary this term of the order.

- [208] If the circumstances were different, I would not hesitate to order Triquest to pledge its shares in Noverra as security for the equalization payment. However, as discussed earlier, Triquest has pledged its shares of Noverra to BMO as security for BMO's lending position, and encumbering Triquest's investment in Noverra would be an event of default under the Noverra SHA. Therefore, it appears that Triquest cannot secure the terms of the promissory note with its shares of Noverra in priority to other claims.
- [209] Ms. Lux's concerns about security for payment of the equalization payment are entirely legitimate. While there are restrictions on the security that could be granted over Triquest's interest in Noverra, it appears that Mr. Lux can pledge Triquest's shares as security in Noverra for the promissory note with the consent of Noverra's other shareholders and possibly with BMO's consent. This seems particularly feasible if the pledge of Triquest's shares of Noverra was in second position, behind the existing BMO loan facility. However, there is no evidence that Mr. Lux has sought such consent and there is no guarantee that he can obtain their consent. The most I can do in the circumstances is order that Mr. Lux make bona fide efforts to seek their consent.
- [210] Given the unique circumstances of this case, I agree with Ms. Lux that Mr. Lux should be subject to an order restraining him from disposing of his shares, pursuant to s. 91 of the FLA, in an effort to secure Ms. Lux's entitlement to the equalization payment. Consequently, I make the following restraining order, which will be in effect until the promissory note is paid in full:
- a) Mr. Lux is to immediately seek the consent of Noverra's other shareholders and BMO to pledge Triquest's share interest in Noverra as security for the payment of the promissory note in respect of the equalization payment, whether that security be in priority to, or in second position behind, the existing BMO loan facility.
 - b) Mr. Lux, in his personal capacity and in his capacity as a director and shareholder, whether direct or indirect, of Triquest, Noverra, and NEI, is restrained and enjoined from disposing of, transferring, selling, converting, assigning, exchanging into another form, or in any similar manner dealing with property in which Ms. Lux may have an interest, including but not limited to his shares of and assets of Triquest, Noverra and NEI, without further order of this Court or the prior written consent of Ms. Lux.

- c) Mr. Lux, in his personal capacity and in his capacity as a director and shareholder, whether direct or indirect, of Triquest, Noverra and NEI, is prohibited from consenting to any further distributions not in the ordinary course of business from Noverra to NEI, or to any other corporate entity or any individual.
- d) Mr. Lux, in his personal capacity and in his capacity as a director and shareholder, whether direct or indirect, of Triquest, Noverra and NEI, is prohibited from consenting to any further acquisitions by Noverra or exercising any of his rights under s. 2.3 of the Noverra SHA without first making best and good faith efforts to obtain the agreement from Noverra's other shareholders for a minimum additional distribution of \$200,000 in excess of the \$250,000 annual management fee, 75% of which is to be distributed to Ms. Lux.
- e) Mr. Lux, in his personal capacity and in his capacity as a director and shareholder, whether direct or indirect, of Triquest, Noverra, and NEI, is prohibited from paying to himself or any other party, other than Ms. Lux, more than 25% of any distributions made by Noverra or NEI, to Triquest or Mr. Lux personally, in excess of the \$250,000 annual management fee.
- f) Mr. Lux must pay 75% of any distributions made by Noverra or NEI to Triquest or Mr. Lux personally, in excess of the \$250,000 annual management fee, to Ms. Lux immediately upon receipt of the same.

[211] The order for the way in which the equalization payment is to be made is admittedly complicated. In my view, this was unavoidable given the particular circumstances of this case and the position the parties took at trial. However, if the parties are able to come to an agreement with respect to a different way that the equalization payment can be made, they are at liberty to do so. Any such agreement should be included in the final order and referenced as being made on consent.

Financial Information to be Provided until the Equalization Payment is Made in Full

- [212] Given the terms I have ordered in respect of the equalization payment to be made by Mr. Lux, it will be necessary for Ms. Lux to be privy to certain financial information of Noverra and NEI to assess whether Mr. Lux is meeting his payment obligations and complying with the s. 91 order I have made above. Therefore, until the equalization payment is made in full, Noverra will be required to provide Ms. Lux with its annual audited financial statements.
- [213] The Confidentiality Order made by Milman J. dated November 29, 2019, remains in effect and is applicable to the financial information provided to Ms. Lux pursuant to these Reasons. Ms. Lux is not to use Noverra or NEI's financial information for any purpose other than to monitor Mr. Lux's compliance with this order.

[214] Triquest will be required to provide financial information to the company established by Ms. Lux under the butterfly transaction (i.e. Newco) until such time as the promissory note has been repaid and the equalization payment has been made in full. However, as will be discussed below, Mr. Lux will be required to provide Triquest's financial information to Ms. Lux to determine his ongoing child support obligations and that obligation will survive the extinguishment of the equalization payment.

CHILD SUPPORT

Background

[215] The parties have equally shared the parenting of their two children since separation and have agreed to continue doing so. The 2020 Interim Order determined the parties' incomes and support obligations, pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The interim support order set Mr. Lux's Guidelines income in 2020 as \$326,263 and in 2021 as \$311,925. Ms. Lux's Guidelines income in 2020 was \$169,053 and in 2021 was \$169,594. Given the shared parenting arrangement, Mr. Lux was to pay Ms. Lux \$1,855 a month for net set-off child support for the period from March 1, 2020, to December 31, 2020. Commencing January 1, 2021, Mr. Lux was to pay Ms. Lux \$1,680 a month for net set-off child support. The children's special and extraordinary expenses for 2020 and 2021 were agreed to be nanny fees and after-school care. The parties were to contribute to those expenses proportionate to their incomes. Effective November 15, 2020, any school fees, counselling costs, camps, organized sports, or other activities of the children agreed upon in advance in writing, net of eligible tax credits, would be shared equally by the parties. The interim support order was made subject to variation at trial.

[216] The parties now seek to vary the interim support order both retroactively and prospectively. While the parties agree that child support is payable pursuant to the Guidelines, they do not agree on what their respective Guidelines income is. Both parties argue that the other has more income available to them by way of their corporate interests than what is reported in their income tax returns. There are two expert reports before the Court in respect of the parties' Guidelines income. Ms. Lux has tendered a report by Mr. Jensen dated October 13, 2022, in which he opines on Mr. Lux's Guidelines income. Mr. Lux has tendered a report prepared by Patti Daum dated December 21, 2022, opining on both parties' Guidelines income.

[217] Generally, there is agreement on s. 7 expenses; however, Mr. Lux seeks an order that the nanny's services be terminated effective August 31, 2023.

The Legal Principles

[218] The relevant provisions for the calculation of Guidelines income are provided in ss. 16-19 of the Guidelines. Pursuant to s. 16, the starting point is line 150 of the parents' tax return which sets out the spouse's total income. Adjustments are then made as required by

Schedule III. Reference may then be made to ss. 17-19, depending upon the circumstances of the particular case. In this case, ss. 18 and 19 are relevant. Section 18(1)(a) provides that, where a spouse is a shareholder, director or officer of a corporation and the Court is of the view that determining the spouse's income under s. 16 would not be a fair reflection of the amount of money available for support, all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, may be included in the spouse's Guidelines income. For ease of reference, the relevant section is reproduced below:

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

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

[219] Section 19 of the Guidelines provides a non-exhaustive list of circumstances in which the Court may impute income to a spouse. Of relevance to the case at bar are s. 19(1)(d) and (h):

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

- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax;

[220] As will be detailed later, Ms. Lux argues that Mr. Lux's income should be much greater than it would be, if determined under s. 16 of the Guidelines. She argues that pursuant to s. 18, Noverra's pre-tax income, by way of his indirect shareholding in Noverra through Triquest, should be used to determine Mr. Lux's income for support purposes. Mr. Lux makes a similar argument with respect to the pre-tax income of Simetra, a portion of which he says is available to her for support purposes.

[221] Pre-tax income of a corporation may be included in a spouse's income where a spouse wholly controls a corporation and where a spouse shares ownership and control with others: *Kowalewich v. Kowalewich*, 2001 BCCA 450 at para. 48. However, in circumstances where a spouse is a minority shareholder in the corporation, the corporation's pre-tax income will generally not be included unless the evidence is sufficient to establish that the spouse can influence the amounts paid to them from the corporation, notwithstanding the

fact that they have only a minority interest: *Bennett v. Bennett*, 2015 BCSC 699 at para. 81, citing *Chapman v. Summer*, 2010 BCCA 237 [Summer].

[222] The objectives of the Guidelines are set out at s. 1:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[223] In *Brown v. Brown*, 2014 BCCA 152, Justice Groberman described the importance of advancing the objectives set out in s. 1 of the Guidelines when exercising its discretion in determining a spouse's income under a section other than s. 16 of the Guidelines. At para. 23 the Court stated:

Sections 17-20 of the Guidelines allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the Guidelines. It is important, however, in interpreting and applying those sections, that courts recognize the need for consistent and predictable results. Courts should interpret ss. 17-20 of the Guidelines with a view to advancing the objectives set out in s. 1.

[224] In *Kowalewich* at paras. 41 and 45, Justice Huddart described the application and operation of s. 18 this way:

I note the use of pre-tax corporate income as a basis for the determination of child support does not strip a spouse of his available money. It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support.

To determine whether "Total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the Guidelines, the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.

Ms. Lux's Guidelines Income

[225] Mr. Lux argues that Ms. Lux's Guidelines income should be \$344,500. In his submission, Ms. Lux's income consists of the salary she receives from Mantech in the amount of \$100,000, a cash dividend in the amount of \$50,000 which she has received from Simetra in each of the last four years, and an imputation of \$19,000 associated with the tax advantage

on the lower taxed dividend. In addition, Mr. Lux argues that Ms. Lux is able to influence distributions from Mantech and says that \$141,000 of Mantech's pre-tax income should be added to her Guidelines income. He also seeks an imputation of income in the amount of \$34,500 which represents half of Ms. Lux's housing, utilities, transportation, and household expenses set out in her most recent F8 Financial Statement. Mr. Lux's basis for imputing this amount is that Ms. Lux has re-partnered and has been co-habiting with her new partner for over 18 months. Mr. Lux submits that this new partner is likely contributing to half of those expenses, thereby making more money available for support purposes.

- [226] Ms. Lux submits that her Guidelines income should be found to be \$167,000. While she concedes that she does have some degree of influence over the funds distributed from Mantech, she submits that \$167,000 is representative of the pre-tax income available to her, less the necessary working capital that must be maintained to keep Mantech operational as a going concern. In essence, Ms. Lux concedes that her Guidelines income should consist of her salary, the dividend income, and the associated imputation of income in respect of the tax advantage enjoyed by the lower taxed dividend. What is at issue then is whether there is any additional amount of pre-tax corporate income available to Ms. Lux for support purposes and whether a portion of her living expenses should be imputed to her because her new partner is paying for a portion of them.

Is Section 18 of the Guidelines Applicable to Ms. Lux?

- [227] In my view, Ms. Lux has the ability to influence distributions from Simetra, and in turn from Mantech, and consequently, the corporations' pre-tax income should be considered in determining her Guidelines income.
- [228] Ms. Lux is a 50% shareholder of Simetra and the other 50% of the shares are owned by Mr. Linsley. Simetra wholly owns Mantech, and therefore, there is no doubt that Mantech is related to Simetra for the purposes of s. 18 of the Guidelines. It is also not in dispute that Simetra has the ability to control distributions from Mantech as its sole owner.
- [229] Given that neither Ms. Lux nor Mr. Linsley own more than 50% of Simetra's shares, the definition of "controlling shareholder" in the Simetra SHA will be of assistance in determining Ms. Lux's ability to influence distributions from Simetra, and in turn, from Mantech. The Simetra SHA defines "controlling shareholders" as meaning "any Shareholder acting alone or in concert with others that holds or controls at least 50% of the Shares of the Corporation". Thus, Ms. Lux is a controlling shareholder of Simetra.
- [230] Although Ms. Lux is a controlling shareholder, there are circumstances provided for in the Simetra SHA which require unanimous approval of the shareholders. In essence, the unanimous approval provisions provide the other shareholder with a veto power in certain circumstances which include changing the corporation's bank account, capital expenditures in excess of \$1,000, and the encumbrance or sale of the corporation's assets. Notably, unanimous approval is not required for distribution of Simetra's profits or for the declaration of dividends. In fact, the Simetra SHA provides that the profits remaining after

debt servicing, reserves for normal operations, and other things, are to be distributed to the shareholders by way of dividend. There are no other provisions in the Simetra SHA that relate to the distribution of its profits.

- [231] Consistent with her status as a controlling shareholder, the evidence demonstrates that Ms. Lux has had the ability to influence and control the timing and amount of distributions from Simetra. For example, Ms. Lux received a \$100,000 unsecured and interest-free loan from Mantech in February 2020. Mr. Linsley did not receive an equivalent amount. It appears that this distribution to Ms. Lux put Mantech at risk of being offside of its lending agreement. Despite being made aware of this, Mr. Linsley did not require repayment of the loan. Ms. Lux repaid the loan in 2022 in order to avoid the amount being included in her income pursuant to the Income Tax Act.
- [232] Ms. Lux's ability to access the corporations' pre-tax income is further illustrated by the influence she had over the timing of a dividend paid to her in 2022. In August 2022, Ms. Lux was able to determine the timing of the most recent \$50,000 dividend she received from Simetra. As Ms. Lux and Mr. Linsley testified, this dividend has historically been declared after Simetra's fiscal year-end of November 30 and paid in January and February. However, in 2022, the dividend was paid to the shareholders many months earlier than usual to align with Ms. Lux's personal need for funds in order to pay for various professional fees.
- [233] Ms. Lux has the ability to influence the distribution of funds from Simetra and Mantech. Her ability to do so is supported by her status as a controlling shareholder of Simetra, the provisions of the Simetra SHA, and the history of distributions from the corporations.

The Income Available to Ms. Lux Arising from her Ownership Interests

- [234] In her report, Ms. Daum considered the Simetra SHA, the availability of cash and pre-tax corporate income of Mantech, and included a detailed calculation of the funds available for distribution from Mantech after consideration of the applicable lending covenants with BMO and the effect they would have on the ability of the corporations to make further distributions. Ms. Daum concluded that Ms. Lux's 2022 Guidelines income was \$342,000.
- [235] Ms. Lux argues that her ability to draw income from the corporations is limited by the lending agreement Mantech has entered into with BMO. However, contrary to Ms. Lux's understanding of the BMO lending covenant, on a balance of probabilities, I do not find that the lending arrangement restricts distributions to Ms. Lux and Mr. Linsley to \$150,000 each, per year. The reference made in the lending agreement to cash distributions totalling \$300,000 to Ms. Lux and Mr. Linsley appears to refer to the way in which the lender determines whether a cash sweep provision is applied and calculated. It does not stipulate the maximum amount that is permitted to be distributed. In essence, the lending agreement provides for a formula by which distributions may be made by Mantech to Simetra up to a certain point that is determined by reference to a ratio of Mantech's senior funded debt ("SFD") and EBITDA.

- [236] Ms. Lux tendered evidence from an employee of BMO in support of her interpretation that the shareholders are restricted to distributions of \$150,000 per year. However, the BMO employee's evidence is hearsay; it consisted of emails between the employee and Mr. Linsley. The BMO employee was not called to testify, and therefore, this contentious evidence was unable to be challenged on cross-examination. Consequently, I have not admitted it for the truth of its contents.
- [237] Moreover, it seems unlikely to me that Ms. Lux and Mr. Linsley would be restricted from receiving distributions in excess of \$150,000 per year given that the lending arrangement with BMO is in effect until 2028. Accepting Ms. Lux's position, would mean that they had agreed to limit their compensation for the first ten years of Simetra's ownership of Mantech, regardless of its profitability or its ability to make further distributions by reference to the lending covenant formulas. Given Ms. Lux's and Mr. Linsley's level of business acumen and sophistication, and the fact that Ms. Lux made upwards of \$300,000 per year in her previous employment, it does not seem reasonable to me that they would limit themselves to \$150,000 of income per year for such a long period of time without regard for the corporations' performance.
- [238] Ms. Lux submits that Mantech was in fact offside its lending covenants with BMO in 2022. Thus, she argues that Ms. Daum is incorrect in her conclusion that there is \$173,000 of funds available to be distributed to her from her indirect shareholding of Mantech. Mr. Lux submits that Mantech was not offside its lending covenant in this regard, and therefore, Ms. Daum's conclusion is correct.
- [239] In June 2022, Mantech completed the buyout of its former owner/operator. In order to do so, it refinanced its SFD with BMO to pay off the two vendor take-back notes in the amount of \$785,352.99 owed to the former owner/operator. It is this transaction that Ms. Lux argues resulted in Mantech being offside its lending covenants in its 2022 year-end reporting because its SFD:EBITDA ratio was above the amount permitted. Thus, she says a cash sweep in the amount of \$300,000 will be triggered pursuant to the lending agreement. I accept that if the cash sweep provision is triggered in these circumstances then Mantech's shareholders will not be permitted to receive a distribution greater than \$150,000 each.
- [240] Mr. Lux submits that the decision to pay back the vendor take-back notes was not a legitimate business decision and that it was actually made in order to decrease the amount available to Ms. Lux by triggering the cash sweep provisions of the lending agreement.
- [241] I agree with Mr. Lux that the decision to refinance Mantech's SFD in order to repay the vendor take-back notes in June 2022 was discretionary as they did not need to be repaid until November 2023. I also agree that repaying the vendor notes reduced the cash available for distribution relative to what Ms. Daum used to calculate Ms. Lux's Guidelines income. If this decision had not been made, Mantech would not have had to use cash for the cash sweep which would have resulted in additional funds being available for distribution to shareholders.

- [242] Nonetheless, I disagree with Mr. Lux that the decision to repay the vendor take-back notes was a strategic decision made by Ms. Lux and Mr. Linsley to pay down debt while at the same time attempting to minimize the amount of income available to Ms. Lux for support purposes. Rather, I accept that there was a commercially reasonable reason for the decision to repay the vendor take-back notes and that was to increase Mantech's cash flow.
- [243] The annual debt service for the two vendor take-back notes in 2022 and 2023 was amortized over six quarters. On the other hand, refinancing the SFD with BMO to repay these notes allowed for a much longer amortization payment, and thus lower quarterly debt payments by Mantech. Mr. Linsley testified as to the rationale for Mantech seeking to increase its cash flow by paying down the vendor take-back notes. He explained that there were significant capital expenditures budgeted for Mantech, including the purchase of a new computerized numerical control machine with an estimated purchase price of \$600,000 to \$700,000. This purchase would require further financing and a sufficient amount of working capital to be retained in Mantech for these expenses.
- [244] Ms. Daum only had access to Simetra and Mantech's financials as of February 2022. Thus, the particular circumstances of the repayment of the vendor take-back notes was not factored into her original report. Ms. Daum projected Ms. Lux's income by pro-rating the relevant financial information from Mantech for the remainder of the year. During her cross-examination and re-examination, Ms. Daum was asked to opine on the effect of the repayment on Ms. Lux's access to income from the corporations. However, on the evidence before me it is difficult to tell exactly what effect the refinancing had on Ms. Daum's calculations. Presumably, while the refinancing and repayment of the vendor take-back notes reduced Mantech's cash obligation to pay for them on an annual basis, this reduction is somewhat offset by the increase to the interest and principal payments associated with the refinanced senior lending facility. This was a factor that had to have been weighed by Ms. Lux and Mr. Linsley when making this business decision.
- [245] Ms. Lux argues that Ms. Daum's report should be given less weight because it fails to factor in Mantech's negative cash balance. I disagree. It appears to me that Ms. Daum did factor this into her calculations and opinion. Further, the negative cash balance at the time Ms. Daum reviewed the financials could have been reduced by the collection of receivables later that fiscal year, which would be consistent with Mantech's usual year-end reporting that does not end up in a negative cash position.
- [246] However, I do agree with Ms. Lux that it is inaccurate to conclude that Mantech has over \$1 million of available funds at its disposal. That amount includes the funds available on the operating line of credit, which is not available as cash for distribution to its shareholders, as doing this would deplete Mantech's ability to fund its operations. This is an action that I accept Ms. Lux and Mr. Linsley would not take as prudent business owners. However, all of the remaining funds available will not likely be used to make the significant capital expenditures Mr. Linsley and Ms. Lux referred to because, as Ms. Lux testified, Mantech is likely to finance those purchases. Nor is it clear to me that all of these funds are needed for

the day to day operations of Mantech.

- [247] The onus is on the payor (here, Ms. Lux) to prove that the corporation's pre-tax income is not available to them: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52. While I agree with Ms. Lux that not every excess penny of pre-tax income is available for distribution, I am of the view that Ms. Lux has not met the onus upon her of proving that there is no amount of the corporations' pre-tax income available to her for distribution.
- [248] Considering that I have found that there was a legitimate business reason for refinancing the vendor take-back notes, in my view, the amount of the resulting cash sweep likely to be taken by BMO should be deducted from the amount available for distribution that was calculated by Ms. Daum. As the cash sweep had not yet been taken at the time of trial, I must determine what that amount will likely be based upon the evidence tendered.
- [249] Mr. Linsley testified that BMO had not provided an estimate of how much the cash sweep would be. Mr. Linsley estimated that the cash sweep would be between \$200,000 and \$300,000 on his understanding of the not yet finalized November 30, 2022, year-end financials. Ms. Lux testified that the cash sweep would be approximately \$175,000 to \$200,000 based on her projected EBITDA of \$1.3 million for the fiscal year ending November 30, 2022. During her cross-examination, Ms. Daum performed an on-the-spot calculation of what the cash sweep would be based on her understanding of Mantech's annualized financials up to August 31, 2022. She determined that the cash sweep would be approximately \$171,000.
- [250] On the evidence before me, I find that the cash sweep is likely to be approximately \$200,000. This amount should be deducted from the amount available for distribution. Thus, as a 50% owner of Mantech through her shareholding of Simetra, the money expected to be available to Ms. Lux will be reduced by \$100,000. This would reduce Ms. Daum's calculation of Ms. Lux's Guidelines income to \$242,000 from \$342,000.
- [251] Mr. Lux argues that after considering the amount of the cash sweep, Ms. Lux's share of the net available cash flow in Mantech is \$192,500 and that this amount should be added to the salary and dividend income she receives. As I understand his submission, Mr. Lux's calculation results in a Guidelines income of \$310,000 for Ms. Lux. However, in my view, it would not be appropriate to add the entire amount of net available cash flow to her income.
- [252] I must account for the fact that some amount of working capital must be left in Mantech, while keeping in mind that Mantech historically generally operates with a negative working capital. Nonetheless, Mantech cannot be stripped of all of its cash; it is a going concern and requires cash to operate. I must also consider that Mantech plans to finance the purchase of the large capital expenditures and not use its cash on hand for that; however, financing charges will be incurred for these acquisitions.

- [253] In my view, it is also appropriate to consider the realities of the relationship between Ms. Lux and Mr. Linsley as business partners. While Ms. Lux is a controlling shareholder pursuant to the Simetra SHA, she is not the sole owner; Mr. Linsley is also a controlling shareholder. While Ms. Lux may technically have the ability to take further distributions of Mantech's profits through her indirect ownership position, unilaterally deciding to strip 50% of Mantech's available cash would not likely serve the business relationship in the long run and is simply not practical. In my view, it is reasonable to approach this with reference to the philosophy of Simetra's two controlling shareholders and the operating minds of Mantech when determining the ability of Ms. Lux to influence distributions. On the evidence before me, that philosophy is a cooperative business relationship between two partners who wish for the business to expand and grow, with the expectation that both would act in a fiscally responsible manner towards the company while also meeting their own economic interests. This is consistent with Ms. Lux's ability to influence, to some degree, the timing and amount of distributions as discussed above.
- [254] In light of the above considerations, including the relevant covenants of Mantech's lending arrangement, I find that the amount of additional cash available to Ms. Lux from her indirect ownership interest in Mantech is approximately \$75,000. Consequently, the total income available to Ms. Lux from her 50% share of Simetra and indirect 50% ownership of Mantech is \$242,000.

Should Income be Imputed to Ms. Lux in Respect of the Payment of a Portion of her Household Expenses by her New Partner?

- [255] Mr. Lux argues that income should be imputed to Ms. Lux pursuant to ss. 9(c) and 19 of the Guidelines because she cohabits with a new partner who presumably pays for some of Ms. Lux's reported living expenses. Mr. Lux relies on s. 9(c) of the Guidelines which provides that, in cases of shared parenting, the court must not only consider the incomes of each spouse, but "the conditions, means, needs and other circumstances of each spouse" when determining the amount of the child support order. He also relies on the Court of Appeal's decision in *Lozinski v. Lozinski*, 2017 BCCA 280 at paras. 42 and 50, in support of his position that this Court has a broad discretion to consider the resources and needs of both spouses and the children in determining the appropriate amount of support. Section 19 of the Guidelines gives the court discretion to "impute such amount of income to a spouse as it considers appropriate in the circumstances" in a variety of non-exhaustive circumstances. Thus, Mr. Lux argues that Ms. Lux has resources and means beyond her stated income as a result of her relationship with her new partner and this should be accounted for in the support order.
- [256] The evidence before me is that Ms. Lux has cohabited for more than 18 months with a new partner who is an executive with an international building materials supply company. It appears that Ms. Lux's new partner is involved in the lives of the parties' children.

- [257] There is no evidence before me of Ms. Lux's partner's income. He was not called as a witness by either party. Ms. Lux testified that her new partner has maintained his own apartment but that he does not live there at all; rather, he lives with Ms. Lux in her residence. Ms. Lux also testified that her new partner does not contribute to her household expenses, other than some contributions to groceries, because he is still paying rent and utilities for his apartment.
- [258] In MFSJ862 v. FFSJ862, 2022 BCSC 1259, the Court did not have evidence of the amount contributed by the new partner to the payor spouse but accepted an amount of \$30,000 as being reasonable; consequently, that amount was added to the payor's Guideline income. However, in MFSJ862, the payor admitted that the new partner contributed to their household expenses and that his expenses and needs were overstated: para. 188. In the case at bar, Ms. Lux has made no such admission and in fact she has denied that her new partner contributes to the household expenses other than for some groceries.
- [259] While this state of affairs does not seem reasonable to me, particularly considering that Ms. Lux's partner likely has the means to contribute given that he is an executive of an international company and they have been cohabiting for over 18 months, there is no evidence to contradict Ms. Lux's testimony. Moreover, it is not clear to me that the statement of expenses in Ms. Lux's F8 includes expenses that her new partner would likely incur if he is in fact contributing to them. For example, Ms. Lux was not questioned on whether the monthly grocery expenses she reported in her F8 were hers and the children's alone or if they included her new partner's. The same is the case for the utilities, transportation and other household expenses reported in her financial statement. Ms. Lux's reported rent of \$4,000 per month is, however, the entirety of her rental expense. But, as mentioned, the uncontroverted evidence is that Ms. Lux's new partner does not contribute to the rent given that he is paying rent on the apartment that he has maintained.
- [260] In the circumstances, Mr. Lux has not met the onus upon him of proving that income should be imputed to Ms. Lux as a result of her current living situation and I decline to impute any such income pursuant to s. 19 of the Guidelines.

Summary and Conclusion of Ms. Lux's Guidelines Income

- [261] No income will be imputed to Ms. Lux in respect of her current living situation.
- [262] I have found that there is approximately an additional \$75,000 available to Ms. Lux by virtue of her corporate ownership interests. Given the undisputed income Ms. Lux receives as salary and dividends in the amount of \$167,000, the total income available to Ms. Lux in 2022 for support purposes is \$242,000. The parties agree that Ms. Lux's Guidelines income was \$167,000 for 2021.

Mr. Lux's Guidelines Income

- [263] Ms. Lux relies on ss. 18 and 19 of the Guidelines and on Mr. Jensen's Guidelines income report in support of her position that Mr. Lux's income in 2021 should be \$1,179,000 and that his 2022 income should be \$1,175,067. As I understand her position, Ms. Lux submits that Mr. Lux's income was \$326,263 in 2020. Ms. Lux argues that the significant increase she seeks to impute to Mr. Lux's reported income is appropriate because of Mr. Lux's ability to control the distribution of pre-tax income from Noverra to Triquest.
- [264] Mr. Lux submits that his 2022 income should be found to be \$316,000 comprised of: his salary from Triquest in the amount of \$204,000; an imputation of \$36,000 associated with the salary paid to the nanny through Triquest; and an imputation of the income associated with the unreported Copper Cash, including the gross up for the tax benefit from the unreported income, of \$73,000. Mr. Lux submits that the only amount of additional income available to him from Triquest is \$3,000 and concedes that this amount should be added to his income pursuant to s. 18(1)(a) of the Guidelines. Mr. Lux relies on the report prepared by Ms. Daum in support of his position.
- [265] Similar to the issue that needed to be determined with respect to Ms. Lux's income, the principal issue in respect of Mr. Lux's income is whether or not there is any additional amount of pre-tax corporate income available to Mr. Lux for support purposes.

Is Section 18 of the Guidelines Applicable to Mr. Lux?

- [266] Ms. Lux argues that despite his status as an indirect minority shareholder in Noverra, Mr. Lux has some degree of influence and control over the distribution of funds from Noverra given the unanimous voting restrictions provided for in the Noverra SHA. She submits that these provisions allow Mr. Lux to block Noverra's other two shareholders from doing certain things as a way of exerting influence. Ms. Lux also says that historically, Mr. Lux has influenced his two business partners to advance additional funds over and above the regular management fees paid to their holding companies.
- [267] Ms. Lux concedes that, like Simetra's shareholders, Noverra's shareholders have the intention of growing Noverra's business and thus are expected to act in a fiscally responsible manner in respect of the corporate objectives while also meeting their own respective economic interests.
- [268] Mr. Lux argues that he does not have the ability to control distributions from Noverra, and therefore, his income should be found to be as set out in Ms. Daum's report.
- [269] While Ms. Lux attempts to draw parallels between her ownership interest in Simetra and Mr. Lux's ownership interest in Noverra, their respective interests are fundamentally different. Mr. Lux is a 1/3 shareholder of Noverra (through his ownership interest in Triquest) and, unlike Ms. Lux, the governing shareholder agreement does not define him as a controlling shareholder. Nonetheless, Mr. Lux may still be subject to additional income pursuant to s. 18(1)(a) as a minority shareholder: Kowalewich at para. 48. However, in

many of the cases where a minority shareholder has been found to be capable of influencing the distribution of funds from a corporation such that the corporation's pre-tax income may be found available to them for support purposes, the corporation's other shareholders were family members of the spouse and the evidence was that the minority shareholder had clearly influenced the distribution of funds in the past: Summer at paras. 6, 21; Soucie v. Soucie, 2010 BCSC 1783 at paras. 2, 23.

[270] In *E.M.M. v. J.I.M.*, 2012 BCSC 372 at paras. 23-25, the Court held that the corporation's pre-tax income should not be added to Guidelines income in a situation where the minority shareholder was not related to the other shareholders, and where the other two shareholders swore that they were not prepared to increase the amounts of profit distributed to the shareholders. In *E.M.M.*, the judge was not prepared to find that the corporation required all of its excess profit for its business operations; however, the corporation's pre-tax income was not added to the shareholder's income because the judge did not accept that the shareholder had the ability to cause a greater distribution of that corporate income.

[271] The decision in *E.M.M.* was applied by the Alberta Court of Queen's Bench (as it then was) in *Ramsay v. Mackintosh*, 2013 ABQB 80. At para. 30 of *Ramsay*, the Court provided what I find to be an accurate statement of the approach to take in the present circumstances:

The courts are reluctant to intervene in corporate affairs and to impute income where the business is conducted between arm's length parties or where the payor is not the controlling mind of the business.

[272] As I did with the analysis relevant to Ms. Lux, it is necessary for me to review the ownership structure of Noverra and the rights, restrictions and responsibilities provided by the applicable shareholder agreement, as this will inform the analysis of Mr. Lux's ability to influence distributions from Noverra. Having done so, I find that Mr. Lux, as a 1/3 indirect owner of Noverra, does not control Noverra. In fact, no individual shareholder controls Noverra as each of its shareholders own an equal 1/3 interest. However, it is arguable that Mr. Ladak and Ms. Boyd, as indirect owners of Noverra through their respective holding companies, together control Noverra as a married couple for some purposes.

[273] Importantly, the Noverra SHA provides that any unequal distributions from Noverra require unanimous agreement by each of the shareholders. Consequently, I agree that Mr. Lux cannot unilaterally decide to pay a distribution beyond the regular monthly management fee paid to Triquest. Furthermore, the Noverra SHA provides that control requires a majority of the shareholders; this provision also supports Mr. Lux's position that a single shareholder cannot determine the amount or timing of distributions. As referenced earlier, I find that the Noverra SHA is the applicable agreement between its shareholders.

[274] In my view, Mr. Ladak's understanding of the way in which the Noverra SHA governs the parties' decision making and control of Noverra is correct:

- a) If all three shareholders agree to do something, then anything can be done subject to the limits of the law and third-party obligations like the BMO lending agreement.
 - b) If only Mr. Lux agrees to do something, but he does not have the agreement of either Mr. Ladak or Ms. Boyd, then there is little that the respondent has the power to do. He cannot lend money to Triquest. He cannot sell Triquest's shares in Noverra.
- [275] Noverra's partnership principles, appended to the Noverra SHA, indicate that the corporate objective of Noverra is to acquire additional companies which requires the retention of income. Nonetheless, unequal distributions can be made with unanimous consent of the shareholders, so it is possible that Mr. Lux could extract additional income from Noverra if he can obtain Mr. Ladak and Ms. Boyd's consent. In order to determine the likelihood that Mr. Lux can influence the distribution of funds from Noverra, it is necessary to examine whether there is a history supportive of this ability.
- [276] Mr. Lux's income has been relatively stable over the past three years, ranging from \$316,000 to \$326,000. There is only one instance in the evidence before me where Mr. Lux was provided with a cash distribution in excess of the regular annual management fee.
- [277] In 2018 and 2019, Triquest received a total of \$450,000 from Noverra in addition to its usual management fee. These funds were referred to as a special management fee. These funds were used to fund the family's investment in Simetra in order for Simetra to acquire Mantech. It is undisputed that Mr. Lux obtained these funds to assist Ms. Lux, to realize upon her business goals and to acquire Mantech. While this is indicative that Mr. Lux can exert influence over the distributions received from Noverra, it is important to recognize that obtaining the special management fee to fund Ms. Lux's business came at a considerable cost to Mr. Lux. As part of the agreement to provide the special management fee, Mr. Ladak and Ms. Boyd required that they receive a preferential distribution totalling [monetary amount] before tax.
- [278] I do not accept Ms. Lux's argument that Mr. Lux could force distributions by withholding his consent for other matters that require unanimous consent decisions, such as investments or acquisitions over \$250,000. Various provisions of the Noverra SHA require unanimous consent of the shareholders. Other provisions provide that certain decisions require unanimous consent of the board of directors rather than, or in addition to, the unanimous consent of the shareholders. The agreement contains provisions that set out the consequences if shareholders do not live up to their professional obligations to the company, either as a shareholder or a director. All of these considerations combined leads me to conclude that should Mr. Lux seek to withhold consent for unanimous decisions that are required for Noverra to fulfill its operating objectives, (i.e. for the purposes of extracting extra funds from the corporation) the remaining shareholders would likely take the position that Mr. Lux was in breach of the Noverra SHA and a defaulting shareholder. Mr. Ladak's testimony is also supportive of this likelihood.

- [279] Ms. Lux points to the creation and funding of Weisshorn and distributions made to NEI as being indicative of Mr. Lux's ability to obtain distributions in excess of the management fees and of there being excess cash in Noverra that is available for distribution. In 2021, Noverra distributed approximately [monetary amount] to NEI which in turn invested the funds in Weisshorn. Approximately [monetary amount] more was distributed from Noverra to NEI in 2022. I do not agree that there was no legitimate business reason for NEI to make these distributions.
- [280] As discussed earlier, Weisshorn was incorporated in 2021 as a Class 1 captive insurance company to insure the risks undertaken by the Noverra Subsidiaries. It was created upon a recommendation in a comprehensive feasibility report prepared by a leading company in the insurance industry. There were a number of legitimate reasons for Weisshorn's creation. For example, Weisshorn would manage risk and permit the Subsidiaries to capture underwriting profits and associated investment income otherwise earned by commercial market insurance companies. For the reasons provided at paras. 107-109, I do not find that the funds distributed to NEI and Weisshorn are indicative of millions of dollars of additional cash available to the shareholders of Noverra. The Weisshorn transactions are not, in my view, indicative of Mr. Lux's ability to control distributions to the shareholders.
- [281] The intention of Noverra's other shareholders with respect to future distributions is a relevant factor when considering if a minority shareholder has the ability to control further distributions: E.M.M. at paras. 23-25. I find that Noverra's shareholders have no intention of distributing additional funds from Noverra beyond the established management fees and the Copper Cash. As discussed earlier, Mr. Lux does not have the ability to compel them to under the terms of the Noverra SHA. Mr. Ladak's testimony with respect to his intention was not successfully challenged on cross-examination. The fact that Mr. Ladak and Ms. Boyd have not taken their preferential [monetary amount] distribution arising from the special management fee advanced to Mr. Lux to assist Ms. Lux in purchasing Mantech, supports the stated intention of Noverra's shareholders to retain cash in Noverra for the purposes of future acquisitions. Furthermore, it is reasonable that the Noverra shareholders have taken this conservative approach given that the Subsidiaries' businesses have been facing difficulties in the current economic climate, as testified to by Mr. Ladak and Mr. Lux.
- [282] Moreover, the intention of the shareholders to not distribute additional funds to themselves is consistent with Noverra's corporate objectives. Both Mr. Ladak and Mr. Lux testified that Noverra's principal objective is to acquire additional companies without outside investors. This objective is reflected in the partnership principles that were first created in 2008, later updated in 2016, and then incorporated as a schedule to the Noverra SHA. In order to achieve that strategy, I accept that Noverra must retain income earned from its existing operations to provide the capital for future acquisitions. This objective is also consistent with the way in which Noverra's lending arrangement was structured. That lending

arrangement only permits draws for the acquisition of new companies.

- [283] Furthermore, I accept that Noverra must maintain cash in order to make offers to businesses it seeks to acquire. Mr. Ladak testified that it is important to demonstrate to acquisition targets that Noverra has the resources to complete a deal, in a reasonable time span, and without the significant risk of needing to secure new financing. He testified that the ability to do this is a strategic advantage to Noverra. Mr. Ladak's testimony was not undermined on cross-examination and I accept that his explanation is a legitimate reason for Noverra, or even NEI, to retain significant amounts of cash on hand.
- [284] In my view, there is no basis for concluding, as Ms. Lux has urged me to, that there is no legitimate need for Noverra to have transferred funds to NEI. The respondent has established legitimate business reasons for retaining funds in Noverra and its related companies.
- [285] I also accept that there are other legitimate business reasons that Noverra has for not distributing additional funds to its shareholders, all of which support Mr. Lux's and Mr. Ladak's testimony that the shareholders have no intention of taking bigger draws in the future.
- [286] Noverra's requirement to maintain compliance with its bonding requirements supports Mr. Lux's and Mr. Ladak's testimony that Noverra needs to maintain a conservative balance sheet. Noverra is required to maintain and acquire bonds as a condition of securing new work in the construction industry. This in turn requires a third-party bonding entity to provide such bonding. Those entities require Noverra to adhere to certain financial covenants in respect of its SFD to EBITDA ratio, and fixed charge coverage ratios. As Noverra's principals testified, Noverra would no longer be able to secure bonds and sign new construction contracts if these bonding covenants were violated.
- [287] I do not accept Ms. Lux's argument that Noverra's bonding covenants are not a restriction on the deployment of its funds because Noverra would have "presumably" set aside the funds necessary to meet those covenants at the time they were entered into. The uncontradicted evidence before me is that the bonding covenants are an ongoing obligation and they must continue to be met as a means of continuing to obtain new work in the construction industry.
- [288] In my view, it is also important to consider the covenants that Noverra is subject to under its lending arrangement with BMO. These covenants undoubtably act to restrict the amount of distributions that can be made to the shareholders if they are breached. Although I agree that the amounts that Ms. Lux proposes that Mr. Lux can draw from Noverra for support purposes may not put Noverra offside these covenants, Noverra's financials indicate that as of December 31, 2022, they are approaching the limits of the required fixed charge cover ratio.

- [289] I also accept that the cyclical nature of the construction industry is such that maintaining a conservative balance sheet is a legitimate approach to take in order to permit Noverra and its Subsidiaries to weather the lower points in the cycle. As Mr. Lux and Mr. Ladak explained, the U.S. housing recession has had, and is expected to continue to have, a significant impact on the Subsidiaries operating businesses. As they testified, revenue is down in both Troy and Thorpe compared to previous years and 2023 is expected to be a challenging year. A very significant amount of staff has been laid off from both of these companies. In my view, it is a reasonable approach to maintain a conservative balance sheet in an effort to endure this.
- [290] Finally, there are other legitimate uses of the cash retained by Noverra, including payments still owing to the vendors arising from previous acquisitions. In 2022, this totalled approximately \$1 million. Like Simetra, Noverra's Subsidiaries are required to make capital expenditures from time to time; in 2021, those expenditures totalled approximately \$1 million.
- [291] For the reasons provided earlier, I find that on a balance of probabilities, Mr. Lux does not have the ability to control the distributions made to Noverra's shareholders. However, even if Mr. Lux did have such control, upon considerations of the factors above, I am satisfied that Mr. Lux has met the burden upon him of proving that Noverra's pre-tax income is not available to him given the various legitimate business reasons that I have accepted as a reasonable explanation for retaining profits within Noverra. Funds required for a company's legitimate business purposes and to maintain the business as a viable going concern are not available for the purposes of child support: Kowalewicz at paras. 58-59. Justice G.C. Weatherill's comments in *Isacson v. Isacson*, 2014 BCSC 2351 at para. 110, citing Ramsay at para. 46, are particularly relevant to this case:

I reject the claimant's submissions to the effect that Allterra could pay the respondent a higher income but [chose] instead to use its resources in other ways. Section 18 of the Guidelines is not intended to be a tool for the Court to second guess the bona fide business decisions of a corporation

- [292] As in Ramsay, there is no evidence that Mr. Lux is using Noverra, or engaging in transactions in his role as a principle of Noverra, to reduce the amount of money available to him for support purposes. As discussed above, and like in Ramsay, I accept that there are several legitimate business reasons for leaving retained earnings in Noverra and NEI. Further, the historical practice of Noverra is to retain a substantial amount of working capital in the company in the form of retained earnings, and there are legitimate business reasons for doing so. Also like in Ramsay, Noverra's other two shareholders are at arms-length from Mr. Lux.
- [293] The case at bar is similar to this Court's decision in *Isacson*, which Mr. Lux has accurately summarized as follows:

The respondent was a 1/3 shareholder of a construction company. His partners testified that the retained earnings must be kept at a level that maintains financial ratios required by the bonding company. The evidence also showed that the retained earnings were being employed in active operations and were not available for distribution to shareholders. The testimony was that it was important for construction companies to build retained earnings for business purposes (at para. 104).

The court found that the company did not have the financial ability to pay its shareholders higher salaries and that the money received by the respondent and claimant's previous family unit remained intact, and the respondent continued to receive the same salary as his two partners (at para. 111).

The Court distinguished this case from [Summer] on the basis that the facts were contrary to those in [Summer]. In [Summer] it was demonstrated that funds in the company were not required to be retained for corporate needs and were available for distribution to the shareholders and that there was evidence that the payor was in a position to influence the amounts paid out by the company. In this case, the evidence was to the contrary (at para. 109).

[294] For all of these reasons, I do not agree that it would be appropriate to add 1/3 of the amounts distributed by Noverra to NEI in 2021 and 2022, such that Mr. Lux's income in those years would be increased by \$842,000 and \$859,067, respectively. Additionally, I do not agree that Mr. Lux has the ability to control distributions from Noverra under its current operating conditions.

The Income Available to Mr. Lux Arising from his Ownership Interests

[295] Having determined that s. 18 is not applicable to add a portion of Noverra's pre-tax income to Mr. Lux's Guidelines income, I must determine what his Guidelines income is for the relevant years and at the time of trial. Given that Ms. Lux's claim for retroactive support is for the period beginning January 1, 2021, it is not necessary for me to determine Mr. Lux's income in the preceding years for the purposes of analyzing child support.

[296] The report prepared by Mr. Jensen and tendered by Ms. Lux provided two opinions of Mr. Lux's Guidelines income based upon different methodologies.

[297] Under the first methodology, Mr. Jensen determined Mr. Lux's income based upon his pro rata share of the pre-tax income of Noverra and its Subsidiaries ("Jensen Methodology #1"). Mr. Jensen determined that Mr. Lux's Guidelines income was \$5,298,000 in 2020; and \$2,274,000 in 2021.

[298] Given that I have found that Noverra's pre-tax income is not to be added to Mr. Lux's Guidelines income, I reject Mr. Jensen's opinion in this regard. In any event, had I found that Mr. Lux did have the ability to access Noverra's pre-tax income, I am of the view that Jensen Methodology #1 significantly overstates Mr. Lux's Guidelines income. It does not consider the various factors I discussed above as having an effect on the amount of cash

available to be distributed from Noverra, such as the terms of the Noverra SHA, the terms of Noverra's lending arrangement and the associated covenants, the terms of Noverra's bonding covenants, Noverra's legitimate business objective of acquiring additional companies without the need to involve outside investors, and maintaining a conservative balance sheet.

- [299] Mr. Jensen's second methodology is based upon the income reported by Triquest and controlled by Mr. Lux ("Jensen Methodology #2"). Mr. Jensen determined that Mr. Lux's Guidelines income was: \$330,000 in 2020; and \$337,000 in 2021. As will be discussed below, Jensen Methodology #2 comes to a conclusion that is very similar to Ms. Daum's opinion for 2021. However, Mr. Jensen does not opine on Mr. Lux's 2022 income and Ms. Lux has provided no expert evidence in respect of Mr. Lux's income for that year.
- [300] In Ms. Daum's opinion, Mr. Lux's Guidelines income was: \$323,000 in 2020; \$326,000 in 2021; and is estimated to be \$316,000 in 2022.
- [301] Although their calculations are slightly different, both Mr. Jensen and Ms. Daum essentially agree that Mr. Lux's 2021 income from employment and RRSP income, after Schedule III adjustments, is \$200,003. They also essentially agree that the amount of pre-tax income available to Mr. Lux from Triquest in 2021 was \$8,029. Thus, the experts agree that Mr. Lux's 2021 income before s. 19 adjustments was \$208,032.
- [302] Both experts have added the same items to Mr. Lux's income pursuant to s. 19 of the Guidelines. Ms. Daum added \$35,000 to Mr. Lux's 2021 income in respect of the Copper Cash received that year while Mr. Jensen added \$40,000 in respect of the Copper Cash. The amount added by Ms. Daum is more consistent with the evidence of what was actually received by Mr. Lux. Both the experts grossed up the amount of Copper Cash received by Mr. Lux to account for the tax benefit conferred upon him because this income was not reported in Mr. Lux's tax return. Consequently, Ms. Daum added a further \$38,380 to Mr. Lux's 2021 income in respect of this tax benefit. I agree that these additions are appropriately imputed to Mr. Lux pursuant to s. 19 of the Guidelines.
- [303] Both experts have opined that it is appropriate to impute income to Mr. Lux in respect of the nanny's salary which was paid for by Triquest. Mr. Lux concedes, and I find, that this is proper given that this amount is evidently available to Mr. Lux to draw from Triquest. Ms. Daum used the precise amount of \$41,433 paid to the nanny in her calculation, whereas Mr. Jensen used an estimate based on the \$2,000 per month salary. Consequently, the amount each included in Mr. Lux's income is marginally different. I prefer Ms. Daum's use of the precise amounts actually paid.
- [304] Ms. Lux argues that the nanny expenses paid for by Triquest should also be grossed-up to account for what she says is the tax advantage that accrues to Mr. Lux by having Triquest pay for the nanny expense instead of him paying for it personally. Ms. Daum testified that there is no tax advantage to paying the nanny through Triquest, because the respondent would receive childcare tax credits if the nanny was paid by him personally and he has

forgone these credits by having Triquest pay directly. Mr. Jensen did not directly express an opinion on Ms. Lux's proposed gross-up; however, he did not include such a gross-up in his calculation. I find that for the purposes of determining Guidelines income, it is not appropriate to gross up the nanny expenses paid by Triquest for the reasons provided by Ms. Daum. Moreover, I agree with Mr. Lux that if there was a tax advantage from this arrangement, it would be to the benefit of both Mr. and Ms. Lux, as they share equally in the benefit of the nanny's services and both were well aware of the way in which the nanny's payments were made.

- [305] As a result of the foregoing, I find that Ms. Daum's reports better reflects Mr. Lux's income in 2021 and I find it to be \$323,000.
- [306] Ms. Daum's report is the only expert opinion in respect of Mr. Lux's 2022 Guidelines income and I find that, in general, it accurately reflects Mr. Lux's income for that year. The methodology used in the calculation mirrors his 2021 income in all but two respects.
- [307] The first difference is that the amount of Triquest's pre-tax income available to him in 2022 is slightly less than in 2021. This is a reasonable conclusion to come to and is consistent with the evidence before me.
- [308] The second difference is that Ms. Daum calculated the nanny expense to be included in Mr. Lux's 2022 income based on the assumption that the nanny's services were no longer needed as of October 31, 2022. Consequently, the amount of the nanny expense included in Mr. Lux's income was slightly less in 2022 than 2021. However, the nanny's services have continued to be needed throughout 2022, and therefore, I would add approximately \$6,000 to Ms. Daum's income calculation. As a result, I find Mr. Lux's 2022 income to be \$322,000.

Section 7 Expenses

- [309] The parties agree that the nanny expenses are the children's special and extraordinary expenses and that they should be shared proportionate to their incomes. Ms. Lux is to reimburse Mr. Lux for this expense on a monthly basis for as long as it is paid by Triquest or Mr. Lux directly.
- [310] Mr. Lux seeks an order that the nanny's services be terminated effective August 31, 2023. However, I am satisfied that the nanny's services are still required for the parties to earn income given Ms. Lux's medical condition. Therefore, the nanny's expenses will continue to be a proper s. 7 expense. The parties may apply to vary this aspect of the order upon a material change in circumstances.
- [311] Effective January 1, 2023, any other s. 7 expenses such as school fees, counselling costs, prescription medications, camps, and other organized activities that are agreed upon in advance in writing are to be shared by the parties proportionate to their Guidelines income.

Summary and Conclusion on Guidelines Income and Child Support

- [312] As discussed above, I find Mr. Lux's 2021 and 2022 Guidelines income to be \$323,000 and \$322,000, respectively. Ms. Lux's Guidelines income is determined to be \$167,000 and \$242,000, in 2021 and 2022, respectively.
- [313] Ms. Lux seeks an order that Mr. Lux pay her retroactive child support from January 1, 2021, to March 1, 2023. She seeks a significant amount, based on her submission that Mr. Lux's Guidelines income was \$1.2 million per annum during that period and that her income was \$167,000, less the amount that Mr. Lux has already paid during that period pursuant to the 2020 Interim Order. However, given my findings with respect to the parties' incomes during this period, a retroactive order of such a magnitude would not be appropriate.
- [314] The 2020 Interim Order was made on the basis that Mr. Lux's 2021 income was \$311,925 and Ms. Lux's 2021 income was \$169,594.
- [315] As I have found that Mr. Lux's 2021 income was \$323,000, and Ms. Lux's income was \$167,000, Mr. Lux will owe a retroactive amount of set-off child support for the period between January 1, 2021, and December 31, 2021.
- [316] The parties have continued to calculate their child support obligations since January 1, 2022, based upon the interim consent order with respect to their 2021 incomes as set out in that order above. However, given that I have found that Mr. Lux's 2022 income was \$322,000 and Ms. Lux's 2022 income was \$242,000, Mr. Lux has significantly overpaid his set-off child support obligation since January 1, 2022. The parties are to recalculate the amount of set-off child support owed by Mr. Lux since January 1, 2022, and Ms. Lux is to reimburse Mr. Lux for any amount that has been overpaid. This amount is to be credited against the equalization payment owing by Mr. Lux to Ms. Lux.
- [317] Commencing January 1, 2023, the parties' child support obligations will be based upon my determination of their 2022 incomes. As the parties continue to equally share the children's parenting, a set-off amount of support, determined by the Guidelines will be payable by Mr. Lux to Ms. Lux in the amount of \$944 per month, payable on the first of each month and continuing for so long as the children are each children of the marriage as defined by s. 2(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. Because the parties have continued to pay support under the interim order, Mr. Lux will have overpaid his child support obligation since January 1, 2023, in the same manner that he has since January 1, 2022, as described in the above paragraph. This overpayment can also be credited against the equalization payment owing by Mr. Lux to Ms. Lux.

Exchange of Financial Information to Facilitate Adjustments to the Parties Child Support Obligations

- [318] Beginning in 2024, the parties are to exchange financial information by April 30 of each year to determine their respective incomes for the proceeding year. The amount of child support is to be adjusted in accordance with those determinations. The exchange of information and the corresponding adjustment are to continue until both children are no longer considered children of the marriage under s. 2(1) of the DA.
- [319] The parties' Guidelines incomes are to be determined in accordance with these Reasons for Judgment. In order to do so, the parties are to exchange the following financial information:
- a) Ms. Lux will provide:
 - i. her personal tax return (T1), financial statements and corporate income tax return (T2) of Simetra for the previous fiscal year ending December 31, and the reviewed financial statements and corporate income tax return (T2) of Mantech for the previous fiscal year ending November 30;
 - ii. the Simetra SHA if any modifications are made to it; and
 - iii. the financial statements and corporate tax return for any other corporation in which she owns a controlling interest.
 - b) Mr. Lux will provide:
 - i. his personal tax return (T1), and the financial statements and corporate income tax return (T2) of Triquest for the previous fiscal year ending September 30;
 - ii. the Noverra SHA if any modifications are made to it; and
 - iii. the financial statements and corporate tax return for any other corporation in which he owns a controlling interest.
- [320] Given that I have found that Mr. Lux's Guidelines income can be determined without reference to Noverra's pre-tax income as he is unable to control distributions from Noverra, it is unnecessary for Mr. Lux to provide Noverra's financial information to Ms. Lux for the annual child support adjustments. However, as discussed earlier, Mr. Lux is required to provide Noverra's financial information to Ms. Lux until the equalization payment is made in full.
- [321] The parties are to keep the financial information exchanged strictly confidential and are not to disclose it to anyone other than their professional advisors and legal counsel, and they are not to use the information for any purpose other than the determination of their respective Guidelines income.

SPOUSAL SUPPORT

[322] Ms. Lux submits that she has suffered greater disadvantages related to the breakdown of the parties' marriage, compared to Mr. Lux. She claims spousal support on both compensatory and non-compensatory grounds. Ms. Lux seeks an order retroactive to January 1, 2021, based upon this Court's findings with respect to the parties' incomes, less the amounts that Mr. Lux has already paid pursuant to the 2020 Interim Order. She seeks ongoing spousal support for a further five years, which would terminate on April 1, 2028.

[323] Mr. Lux argues that neither party is entitled to spousal support. He seeks an order that he be reimbursed the \$1,500 per month he has paid in spousal support pursuant to the 2020 Interim Order. At the time of trial, Mr. Lux had paid approximately \$45,000 of spousal support to Ms. Lux under the interim order.

The Statutory Provisions

[324] The objectives of spousal support are found in s. 15.2(6) of the DA which provides:

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

[325] Subsections 15.2(6)(a) and (b) are referred to as the compensatory entitlement to support, whereas ss. 15.2(6)(c) and (d) are commonly referred to as the non-compensatory or needs-based entitlement to support: *Chutter v. Chutter*, 2008 BCCA 507 at para. 47. Before the quantum of support is determined, it must be found that a spouse has an entitlement to support on either a compensatory or non-compensatory basis, or both.

Entitlement to Compensatory Support

[326] *Moge v. Moge*, [1992] 3 S.C.R. 813, 1992 CanLII 25, is the seminal case in respect of compensatory based support. As described in *Moge* at 861-83 and other cases such as *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715 at para. 39, and *Chutter* at para. 50, the compensatory support model is rooted in the "independent" model of marriage in which each spouse is seen to retain economic autonomy in the union and is entitled to

receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise. It recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success.

- [327] During oral submissions, counsel for Ms. Lux acknowledged that the claim for compensatory support was not particularly strong. As I will discuss below, I have concluded that Ms. Lux has not established an entitlement to support on compensatory principles.
- [328] I find that Ms. Lux has not suffered any economic loss caused by the marriage or breakup of the marriage which would not have been suffered otherwise. This is not a situation where one member of the marriage has foregone career opportunities or removed themselves from the workforce in order to raise children and to take care of household responsibilities, while at the same time enabling the other spouse to reap the advantages of being free to pursue their career. The evidence in this case is that throughout the marriage, Ms. Lux maintained her employment, received a high level of compensation, and received promotions and raises. On the evidence before me, I find that that the parties shared the child-raising and household responsibilities.
- [329] Before the children were born, the parties each supported the other in pursuing their career goals. This included a move to Toronto from Vancouver in 2008 in order for Ms. Lux to pursue a career change that came with a significant increase in her compensation. Mr. Lux supported this move and his earnings declined significantly as a result of this move. There is no evidence before me that during the four years they lived in Toronto, Ms. Lux assumed more of the household duties than Mr. Lux. In fact, it is not contested that she routinely worked 60 hours per week and the respondent took on much of the household duties. The parties returned to Vancouver in 2012 for mutually agreeable reasons.
- [330] I conclude that Ms. Lux is not entitled to spousal support even though Ms. Lux took some time away from the paid workforce after the birth of the parties' children. Their first child was born in June 2012 and Ms. Lux took approximately 10 months of leave between May 2012 and April 2013. When she returned to work, the child was enrolled in full-time daycare and the evidence shows that the parties shared the drop-off and pick up responsibilities.
- [331] The parties' second child was born in October 2015. Ms. Lux again took approximately 10 months of leave from September 2014 to July 2015. During this maternity leave, the parties' eldest child remained in full-time daycare and the parties continued to share the pick-up and drop-off responsibilities. After Ms. Lux returned to work, the youngest child was also enrolled in full-time daycare. Subsequently, the parties hired a full-time nanny.

- [332] Ms. Lux returned to work and there is no evidence before me that her earning capacity or career advancement suffered as a result of the maternity leaves that she took. In fact, the parties took steps to prevent this from happening by agreeing to incur significant expenses in relation to childcare so that both of them could pursue their careers in the same manner they did throughout the marriage before the children were born.
- [333] Shortly after Ms. Lux returned from her maternity leave after the birth of their first child, she was promoted to Vice President of the organization for which she worked. After returning from her second maternity leave, Ms. Lux was granted participation in her employer's ownership program. During her maternity leaves, it is uncontradicted that Ms. Lux earned a greater salary than Mr. Lux. In fact, between 2010 and 2017, Ms. Lux earned more in all but one of those years; in 2017, Ms. Lux earned approximately \$1,000 less than Mr. Lux. In those seven years, Ms. Lux's income fluctuated between \$164,000 and \$481,000. That wide variance is attributable to bonuses she received that were dependent upon her employer's overall performance.
- [334] In 2017, Ms. Lux left her employment. However, she did not leave her employment in order to support Mr. Lux in his business venture, nor did she leave her employment to assume a greater responsibility with respect to the children or the household responsibilities. Rather, she left her employment to pursue her professional goal of owning her own business, and despite having done so, she still earned a significant income in that year. Although the parties' marriage began to deteriorate, they continued to support each other in their professional goals, as evidenced by Mr. Lux obtaining the nearly \$500,000 special management fee that was provided to Ms. Lux in order for Simetra to purchase Mantech, merely weeks before the parties formally separated.
- [335] There is simply no evidence before me that Ms. Lux has made any economic sacrifices occasioned by the marriage such that she has a reduced earning potential and diminished future prospects of financial success. To the contrary, the evidence is that the parties shared child raising and household responsibilities. In my view, they fulfilled similar roles. Moreover, Ms. Lux had great success in her career throughout the marriage both as an employee earning a very significant salary, and as a business owner with a 50% interest in a company that earns a pre-tax corporate income of \$1.1 to \$1.5 million per year, on average over the four years that she has owned the company.
- [336] In my view, both parties realized economic advantages derived from the relationship and neither was disadvantaged by it. They jointly decided to invest heavily in childcare to maintain their careers. They were both advantaged by the other's support in moving to and from Toronto and Vancouver. Ms. Lux was advantaged by Mr. Lux obtaining funds from Noverra for her to purchase her share of Mantech through Simetra. Mr. Lux was advantaged by business relationships he forged with some of Ms. Lux's prior business associates. In the circumstances I have described, I conclude that Ms. Lux is not entitled to spousal support on a compensatory basis.

Entitlement to Non-Compensatory Support

- [337] Non-compensatory support principles address the needs of a spouse after the breakdown of a relationship; hence non-compensatory support is also referred to as needs-based support. This type of support arises out of the relationship itself and is based on the social obligation of a spouse to look after a former partner who is in difficulty, rather than letting that burden fall upon the public: Chutter at para. 54, citing Bracklow at para. 23. Determination of entitlement to needs-based support is highly dependent upon the particular facts of the case: *L.A.I. v. K.B.Z.*, 2014 BCSC 652 at paras. 133-134.
- [338] As she confirmed during oral submissions, Ms. Lux's claim for non-compensatory support is primarily based on the disparity of incomes between the parties. Income disparity is a relevant factor to consider when determining entitlement to non-compensatory support as such entitlement "requires some consideration of the standard of living enjoyed by the parties during the marriage and by the other spouse after the marriage": Chutter at para. 60; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 74. Spouses are not required to share the same standard of living after separation; however, in long marriages there should not likely be a large disparity between them: *Hodgkinson* at para. 74; Chutter at para. 53. A difference between the parties' post-separation incomes in and of itself does not entitle the lower-earning spouse to non-compensatory support. Entitlement requires evidence of a diminution in the standard of living and a significant difference between the parties with respect to their current lifestyles: *Lee v. Lee*, 2014 BCCA 383 at para. 55; *Madruga v. Madruga*, 2015 BCSC 1605 at paras. 41-44.
- [339] As referenced above, Ms. Lux seeks a spousal support order retroactive to January 1, 2021, less the amounts that Mr. Lux has already paid pursuant to the 2020 Interim Order. Given that Mr. Lux seeks reimbursement of all the spousal support he paid pursuant to the interim order which was effective March 1, 2020, the parties' 2020 incomes are relevant to this discussion.
- [340] The parties agree that Ms. Lux's 2020 and 2021 income was \$167,000.
- [341] Both Mr. Jensen and Ms. Daum opined on Mr. Lux's 2020 income. I have already rejected the entirety of Jensen Methodology #1 under which Mr. Jensen concluded that Mr. Lux's 2020 income was \$5,298,000. Under Jensen Methodology #2, Mr. Jensen opined that Mr. Lux's 2020 income was \$330,000. In Ms. Daum's opinion, Mr. Lux's 2020 income was \$323,000. The small difference between the two opinions is based upon different amounts imputed to Mr. Lux in respect of the nanny's expenses and the gross-up of the Copper Cash. Given Ms. Daum's reference to specific financials, I prefer her report and find that Mr. Lux's 2020 income was \$323,000.
- [342] To the extent that Mr. Lux's 2019 income is relevant to this analysis, I do not accept Mr. Jensen's opinion pursuant to Jensen Methodology #2 that Mr. Lux's income in that year was \$721,000. It appears that Mr. Jensen included the special management fee that Mr. Lux obtained from Noverra for the purposes of assisting Ms. Lux with her purchase of Mantech

in his calculation, even though those funds were received by Mr. Lux in 2018. When the special management fee is removed from Mr. Jensen's calculation, Mr. Lux's income was approximately \$300,000. Given my findings with respect to the parties' incomes, the disparity is not as large as the difference upon which Ms. Lux's argument is based upon.

- [343] Despite the differences in income, in my view, the parties' post-separation standards of living are not materially different. The parties' current standard of living is also not significantly different than it was during the marriage. The evidence supports a finding that the parties lived a relatively modest lifestyle during the marriage. They lived in a modest home and owned one vehicle between the two of them at any given time. It does not appear that either of them had any expensive hobbies or spent lavishly on discretionary items. They did not take lavish vacations; instead choosing to limit their travel to relatively close destinations to visit family.
- [344] At the time of trial, the parties continued to each reside in modest homes in the same neighbourhood in which they lived before separation. Neither of them owns their current residences and they both pay a comparable rent. Ms. Lux retained the former family vehicle which she owns outright. Mr. Lux drives a 2017 vehicle which is fully financed. Ms. Lux has made some modest contributions to her TFSA and RRSP since separation; Mr. Lux has not. Given my findings with respect to Mr. Lux's income, I accept that his income since separation has been largely consumed by living expenses, support payments and payment of professional fees related to this litigation. He continues to limit his vacations to visit family in Alberta and a week in the Okanagan. Ms. Lux appears to live similarly. While there is no doubt that they both live a comfortable lifestyle, I would not conclude that either of them lives lavishly.
- [345] Ms. Lux currently suffers from some serious and significant health issues that arose in August 2021, nearly three years after the parties had separated. Her condition has undoubtedly had a significant impact on her daily life. She says that her condition has and continues to affect her ability to work. Despite this, her health has not impacted her ability to earn income. Upon agreement with Mr. Linsley, her remuneration from Simetra and Mantech has remained the same as it was before her health deteriorated. Mr. Linsley testified that there are no plans to change her level of remuneration, and consequently, there is no indication that she will earn less in the future.
- [346] In any event, in July 2022, the claimant's counsel advised Mr. Lux that Ms. Lux would not be claiming a diminution of income due to her health condition and no expert evidence was tendered on this issue. Relying on this, Mr. Lux did not seek disclosure from Ms. Lux in respect of her health condition and her capacity to work and he did not concede that her health will cause a reduction in her income. In my view, Mr. Lux was entitled to rely on that representation. This, combined with Ms. Lux's submission that her claim for spousal support is based on the difference between the parties' incomes, leads me to conclude that I need not consider whether her post-separation health issues affect her entitlement to support on a non-compensatory basis.

- [347] As a result of my conclusion on the division of property, each of the parties will have property in excess of \$3 million. Ms. Lux's reported income is approximately \$167,000 and I have found her 2022 Guidelines income to be \$242,000. Her income earning capacity does not seem to be at risk. There is no indication that Ms. Lux does not, or will not, have sufficient income to meet her needs. She is completely economically self-sufficient. Therefore, the objective under s. 15.2(6)(d) has been met.
- [348] While Mr. Lux's Guidelines income is larger than Ms. Lux's, the difference is not particularly material since 2022. While the difference was larger in 2020 and 2021, sufficient evidence was not led in support of a decrease in Ms. Lux's standard of living post-separation compared to the parties' pre-separation lifestyle. Further, there is no evidence before me that would suggest that there is a material difference between the parties' post-separation lifestyle. As discussed, the case authorities establish a need for a "significant difference" in the parties' lifestyles before non-compensatory spousal may be awarded: *Madruga* at para. 44.
- [349] In my view, Ms. Lux has not met the onus upon her of proving that there is an economic hardship arising from the breakdown of the marriage that should be addressed by an award of spousal support. Therefore, Ms. Lux's claim for spousal support is dismissed.
- [350] As I have found that Ms. Lux is not entitled to spousal support, Mr. Lux shall be reimbursed for the amount of spousal support he paid to Ms. Lux pursuant to the 2020 Interim Order. This amount is to be credited against the equalization payment that Mr. Lux must pay to Ms. Lux.

DIVORCE

- [351] I am satisfied that there is no possibility of reconciliation and that the other pre-requisites for granting a divorce have been met. In the normal course, I would grant the divorce and order that it take effect on the 31st day after this Judgment. However, the butterfly transaction that I have ordered to accomplish the equalization of property must be executed as part of a reorganization plan that would need to take place in advance of the final divorce order because the Income Tax Act only allows this form of transaction to take place between related parties.
- [352] I do not know how long it will take the parties to settle the terms of this order or whether there will be any appeals. Consequently, I cannot predict how much time will elapse before the butterfly reorganization will take place. It would be most unfortunate if the parties were unable to accomplish the butterfly transaction simply because a divorce order took effect before the butterfly transaction was able to be executed. Therefore, the application for a divorce is adjourned. The parties may seek the final divorce order by submitting a consent desk order divorce application directly to my attention once they are ready to do so.

COSTS AND PUBLICATION

- [353] Given the positions taken by the parties at trial, Mr. Lux was substantially successful. Therefore, subject to circumstances of which I am unaware, Mr. Lux is entitled to his costs of the action at the usual scale. Should the parties wish to make submissions on costs, they may arrange to do so with Supreme Court Scheduling. Any such arrangements to speak to the matter of costs must be made within 45 days of the date of these Reasons for Judgment.
- [354] I intend to publish these Reasons; however, I am not aware if they contain information that is subject to the Confidentiality Order or the partial sealing order. Therefore, the parties or the intervenor are to advise the Registry in writing within 30 days if these Reasons contain such information, and if so, if they object to the public release of any portion of these Reasons on the basis that they contain confidential information that presents a risk to an important public interest. In that case, they are to submit a copy of these Reasons with the proposed redactions identified for my consideration.
- [355] Should the parties be unable to agree on the terms of the order, they may send the draft order to me for my review, or they arrange with Supreme Court Scheduling to speak to the matter.

"Majawa J."

Appendix

Schedule 1 - Division of Assets

ASSETS

Value

Ms. Lux

Mr. Lux

Business Interests

Simetra

Value of Ms. Lux's share interest

\$640,000

Shareholder loan owed to Ms. Lux

\$564,335

Net family asset

\$1,204,335

Amount Ms. Lux to pay to Mr. Lux

(\$602,168)

\$602,168

Triquest/ Noverra

En bloc valuation of Triquest's 1/3 share

\$4,700,000

Triquest's pro-rate portion of Thorpe contingent liability

(\$300,000)

5% minority discount to en bloc value

(\$220,000)

Impact of Triquest's share pledge and guarantee of Noverra debt

(\$696,500)

Shareholder loan owed to Mr. Lux

\$777,196

Net family asset

\$4,260,696

Amount Mr. Lux to pay to Ms. Lux

\$2,130,348

(\$2,130,348)

Investment Accounts & Vehicles

Investment Accounts

Total investment accounts, less Ms. Lux's excluded TFSA

\$84,167.36

Amount Mr. Lux to pay to Ms. Lux

\$42,084

(\$42,084)

Vehicles

Ms. Lux's vehicle

\$15,000

Total vehicles

\$15,000

Amount Ms. Lux to pay to Mr. Lux

(\$7,500)

\$7,500

Amount Mr. Lux to pay Ms. Lux to equalize investment accounts and vehicles

\$34,584

(\$34,584)

TOTAL FAMILY PROPERTY SUBJECT TO DIVISION

\$6,374,435

AMOUNT MR. LUX TO PAY TO MS. LUX

\$1,562,764

(\$1,562,764)

RRSPs

AMOUNT MS. LUX TO ROLL OVER TO MR. LUX

(\$184,932)

\$184,932

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