

CANADA / JUDGMENT

Wu v. Sun

2009 BCSC 985

COURT

Supreme Court of British Columbia

DECIDED

21 July 2009

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2009 BCSC 985 Wu v. Sun IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wu v. Sun, 2009 BCSC 985 Date: 20090721 Docket: E032018 Registry: Vancouver Between: Tania Mun Wu Plaintiff And Philip Tsang Yu Sun also known as Philip Sun, Charles Yau Kwok Sun and Catherine Wing Tai Choi Sun Defendants Before: The Honourable Mr. Justice Burnyeat Reasons for Judgment (from Trial) Counsel for Plaintiff Until February 27, 2007 A.E. MacLennan, Q.C. Acting on her own behalf after February 27, 2007: T.M. Wu Counsel for Defendant Philip Tsang Yu Sun also known as Philip Sun M.V. Weremchuk Counsel for Defendants Charles Yau Kwok Sun and Catherine Wing Tai Choi Sun K.J. MacDonald Date and Place of Trial: October 25-27, November 6-10, 22-24, 27-29, and December 4-7, 11-13, 15, 18-21, 2006, January 8-11, 15-17, 19, 24-25, 2007, May 28-29, June 1, 6-8, 25, 28, August 3, November 19-21, 2007 Vancouver, B.C. TABLE OF CONTENTS (A)..... BACKGROUND. 4 (B)..... REASONS WHY THE TRIAL OF THIS ACTION SHOULD NOT HAVE PROCEEDED. 6 (I)..... The Inaccuracy of the Financial Statements of Ms. Wu. 6

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- [1] The Plaintiff is 40. The Defendant, Philip Tsang Yu Sun, also known as Philip Sun, is 42. They were married on September 2, 1995 and had a son born on June 7, 1996. The Defendants, Charles Yau Kwok Sun and Catherine Wing Tai Choi Sun, are the parents of Philip Sun.
- [2] Philip Sun was born and grew up in Hong Kong. He left Hong Kong at the age of 14 for a boarding school in Scotland, came to Canada in 1983 on a student visa, attended Columbia College in Vancouver, quit school to work in his father's restaurant in Vancouver from 1985 until October 1986 when the restaurant closed, attended Langara College and later Simon Fraser University where he was in a general studies program for two years, obtained a realtor's license, worked for three reality companies between 1990 and 1993 before giving up his license, managed a driving range project in Burnaby in 1993 and was involved in various other businesses until 2001 when he left Vancouver for Hong Kong and China. Philip Sun has worked there for his father ever since.

- [3] Ms. Wu graduated from high school in 1984, attended Marymount College in Upper State New York, and graduated with a degree in international business with a 2.9 Grade Point Average. In 1998, Ms. Wu began work at the Hongkong Bank of Canada in Vancouver as a teller and later in the Controller's Department where she worked between 1990 and 1995. In the Controller's Department, Ms. Wu was responsible for "preparing quarterly/annual returns for the internal bank use and for the government". Ms. Wu left the Bank prior to when their son was born. Since 1999, Ms. Wu has not sought employment and has worked full time within the household.
- [4] On December 10, 1984, Charles Sun and Catherine Sun entered Canada as landed immigrants. In 1989, Charles Sun, Catherine Sun and their three children became Canadian citizens. On February 28, 1989, property was purchased on Drummond Drive in Vancouver ("Drummond") for \$995,000.00. Drummond was registered in the name of Catherine Sun.
- [5] At a Judicial Case Conference on November 28, 2003, a declaration was made by consent pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128, that there was no reasonable prospect of reconciliation between Ms. Wu and Philip Sun.
- [6] I have concluded that this marriage was of a duration of six years as I have concluded that Philip Sun left the marriage when he left Canada in 2001. Initially, Ms. Wu was of the same opinion. However, I expect that she changed that opinion when it was explained to her that her entitlement to one-half of the family assets might well be affected by the length of the marriage. In her July 9, 2003 Affidavit, Ms. Wu states: Since in or about March 2001 the Defendant and I have been living separate and apart from each other. In March 2001, the Defendant advised me that he was returning to Hong Kong permanently to pursue his business and that he did not want anything more to do with me or ... [our son]. The Defendant told me that he would continue to support me and ... [our son] and that we could continue to live in our matrimonial home and he would continue to take care of all house expenses, but that was it. I asked the Defendant to let [us] return to Hong Kong with him but he refused. Since the Defendant left for Hong Kong, he has had little contact with me or us. At the time of separation, the Defendant told me that I could contact him on his cellular phone to leave messages but he did not give me any address to contact him in Hong Kong. Following the separation the Defendant returned to Canada once a year. ... Since our separation, my only means of contacting the Defendant is to call his cellular phone number. I have previously tried to contact the Defendant on his cellular phone but he never answers any of my calls.
- [7] At her November 15, 2005 Examination for Discovery, Ms. Wu stated that she arranged to change the lock on their bedroom and that she did so "Before Philip started living in Hong Kong." At Trial, Ms. Wu stated that she and Philip Sun never had discussions in March of 2001 or after about ending their marriage, that she never told Philip Sun that she intended to end the marriage ("marriage is for life, for me"), that Philip Sun never told her that he intended to end the marriage and that she first formed the intention to end the marriage in the Spring of 2003. I do not accept that evidence. I prefer the evidence of Ms. Wu as stated in

her July 9, 2003 Affidavit which presents a more honest account of the situation between March 2001 and July 2003. I also reach this conclusion by virtue of the steps taken by Philip Sun between 2001 and 2003 to bring to a conclusion the various business interests he had in British Columbia.

- [8] This matter was set for trial on four occasions. The Trial should not have proceeded when it did. First, it is clear that there had not been a full discovery of the documents of Philip Sun, Charles Sun and Catherine Sun. Second, many of the questions raised at the discoveries of the parties remained unanswered. Third, the admissibility of a number of documents had not been determined by the Court. Fourth, Ms. Wu and Philip Sun had sworn Financial Statements which were incomplete at best and purposefully misleading at worst. Fifth, there were virtually no financial records produced that were dated after to 2003. Sixth, the financial records prior to 2003 were not all produced. Seventh, a number of issues regarding whether some documents were privileged or not had not been resolved. (B) REASONS WHY THE TRIAL OF THIS ACTION SHOULD NOT HAVE PROCEEDED (I) The Inaccuracy of the Financial Statements of Ms. Wu
- [9] While Ms. Wu had sworn 3 Financial Statements indicating that she did not own property, that was not correct. Despite being presented with evidence to the contrary, Ms. Wu maintained at Trial that she had no interest in the following two properties.
- (a) 6666 Marguerite Street Vancouver Property
- [10] In a October 22, 1996 Trust Indenture, Patsy Yin Tong Lai Wu as "Settlor" established an Irrevocable Trust. The "Beneficiaries" under the Trust are Ms. Wu and her sister. The "Property Settled on Trust" was 6666 Marguerite Street, Vancouver, British Columbia. During cross-examination at Trial, Ms. Wu was asked whether this property was owned by her parents or whether it belonged to her and her sister, and she stated: "That's where they live, yes." She was also asked the following questions and gave the following answers: Q. It's held in trust? A. I don't know. Q. For you and your sister? A. I don't know. Q. But the property is held in trust for you and your sister, is it not? A. I don't know. Q. You do not understand that the property at 6666 Marguerite Street is held in trust for you and your sister? A. No. Q. You don't understand that you are a beneficiary of a trust that is holding that property? A. No. Q. You have never spoken to your parents about the ownership of the house they live in? A. No.
- [11] There was no indication in the sworn Financial Statements of Ms. Wu that she had any interest in the Marguerite Street property. As well, she went out of her way to hide this information from the Defendants and the Court. It came out during cross-examination that certain bank statements which were in evidence were being sent to the Marguerite Street address. The documents in evidence initially had the address blanked out. I find that this was an attempt by Ms. Wu to hide the fact that she had an interest in the Marguerite Street property. As well, I find that Ms. Wu was less than truthful in her testimony in this regard Ms. Wu was asked the following questions and gave the following answers: Q. And it was the bank that covered up the address? A. Yes. Q. So when you received it there was no address

showing for you? A. Yes.

- [12] Under cross-examination, Ms. Wu admitted that she had covered the address with a "yellow sticky note". The originals of the bank statements were then produced with the originals clearly showing the Marguerite Street address.
- [13] The BC Assessment Authority evaluations for the Marguerite Street property are as follows:
- | Year | Improvement | Assessment | Land Assessment | Actual Value |
|------|--------------|----------------|-----------------|--------------|
| 2004 | \$256,000.00 | \$896,000.00 | \$1,152,000.00 | |
| 2005 | \$280,000.00 | \$936,000.00 | \$1,216,000.00 | |
| 2006 | \$270,000.00 | \$984,000.00 | \$1,254,000.00 | |
| 2007 | \$270,000.00 | \$1,388,000.00 | \$1,658,000.00 | |
- [14] In an appraisal prepared by Bruce Newby at the request of counsel for Philip Sun, the appraised value as at March 14, 2007 is given as being between \$1,800,000 and \$1,900,000. It is indicated that the site size was 10,950 sq. ft., the building was 22 years old and that it was in "Good" condition.
- [15] I find that Ms. Wu purposefully attempted to conceal from the Defendants and the Court the fact that she and her sister are the beneficial owners of the Marguerite Street property. I also find that she has an interest in the property of somewhere between \$800,000.00 and \$900,000.00.
- (b) Property of Ms. Wu in Hong Kong
- [16] An August 13, 1997 "Deed of Gift" provided that their grandmother was "desirous of a signing of the Property by way of gift to the Donees [Ms. Wu and her sister] ". The document was "Signed Sealed and Delivered" by Ms. Wu in the presence of a Vancouver notary public.
- [17] Under cross-examination, it was put to Ms. Wu that the apartment in Hong Kong was actually owned by her and her sister and she stated: "No, it's my grandmother. No, my grandmother is still alive and it's -- she's -- was living there before, and she still lives there when she go to Hong Kong." Under cross-examination, Ms. Wu was asked about the phrase "tenant in common one-half" and stated: "I read it, but I don't understand what it mean."
- [18] Ms. Wu is not believable in this testimony. First, she signed a document that states clearly "by way of gift". There can be no doubt that she would understand what those words meant. Second, the document was signed in the presence of a Vancouver notary public. I find it highly unlikely that the effect of the document was not explained to Ms. Wu when she signed it in 1997. Third, I am satisfied that a person who graduated with a degree in international business from a well-known college in the United States and worked for a number of years in English at a local bank would fully understand the nature of the document that was being signed by her and that an interest in her grandmother's apartment in Hong Kong was being gifted to her.

- [19] I find that Ms. Wu owns one-half of an apartment in Hong Kong, that she attempted to withhold that information from the Defendants and the Court, and that she was and is fully aware of the nature of her interest in the Hong Kong property. Unfortunately, there is no evidence before the Court as to the value of the property which is subject to a Government Lease which expires in 2071.
- [20] Having found that Ms. Wu had an interest in the Marguerite property and the apartment in Hong Kong, I have also come to the conclusion that she has no other assets which have not been disclosed. (II) Disclosure by Philip Sun
- [21] In *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), Fraser, J. stated that: "Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation." (at para. 9). I am satisfied that there has been a consistent refusal of the Defendants to produce documents. Despite a number of orders being made and despite requests for documents made at Examinations for Discovery, Philip Sun has not produced all of the documents that are relevant in these proceedings. As a result, it has been virtually impossible to undertake the determination of his interest in various companies, the assets held by those companies, the disposition of sale proceeds when assets of those companies were sold, and the income and capital distributions that were available to Philip Sun from those companies.
- [22] Philip Sun has been thoroughly incapable of or unwilling to fulfill his ongoing obligations to produce relevant documents. For instance, it was revealed at his March 23, 2006 Examination for Discovery that there were certain documents in storage. Philip Sun stated that he had not gone to that storage area since October 26, 2005, that "I never looked there" when asked whether there were documents in storage that were relevant, that he did not know whether there were relevant documents there, and that he did not want to go there because "it's full of dust. I have allergies and asthma." His only excuse was: "not that if I deem necessary".
- [23] Pursuant to a court order, Philip Sun was asked to inform himself regarding the source of funds for the creation of Hastings Golf Centre Ltd. ("Hastings Golf"), being one of the companies that he managed and being one of the companies out of which he regularly withdrew funds for family purposes. At his March 23, 2006 Examination for Discovery, Philip Sun stated: "I asked my father whether I can provide those answers." Philip Sun stated that he had not brought those documents to his Examination for Discovery because: "those documents are not in my possession to give you". "They are in my father's possession." "I have asked my father for them." and that his father would not give him any reason as to why the documents were not available other than they were not Philip Sun's documents to give. However, Philip Sun confirmed that his father was not aware of the order requiring the production of the documents.

- [24] At his Examination for Discovery, Philip Sun was asked whether records were kept of all of the transfers of money from his father to him and, while he responded that he could remember that records were kept, he could not say where the records were: "I don't recall at the moment." As a result of his refusal to produce these records, it is impossible to ascertain the extent of any alleged debts owing by Philip Sun to his parents.
- [25] Under cross-examination at Trial, Philip Sun was asked about the documents that were provided to the accountants in order that they could prepare the financial statements for various companies and he indicated that he did not know what documents had been given and he did not know who prepared the documents. Philip Sun stated that he did not take any steps to contact the accountant for various companies regarding loans alleged to have been made by him to those companies. As a result of his refusal to produce these documents, it is impossible to ascertain the extent to which he was actually involved in the management of various companies, and it is impossible to ascertain the reason why there is documentation indicating that he lent as much as \$5,000,000.00 to these companies.
- [26] Under cross-examination at Trial, Philip Sun agreed that he had been asked to produce all documents related to his personal account at the Royal Bank of Canada but stated that he had inquired about the possibility of getting the documents from the bank and the cost of obtaining the documents but took no further steps after that to obtain the documents. Regarding a March 10, 2006 Order in that same regard, Philip Sun under cross-examination could only state: "I inquired about the cost of retrieving those cheques". As to why these statements were not produced, Philip Sun under cross-examination stated: "No, I didn't do that." "I didn't do it and I'll apologize again. I just didn't do it." As a result of his refusal to produce those statements, it is impossible to ascertain the source and amount of funds flowing into the account (including monies being paid out of the various companies and deposited into this account) and the disbursements made out of the account, the recipient of cheques written on the account, and the nature and amount of monthly family expenses that were being incurred and paid out of this account.
- [27] Under cross-examination, Philip Sun had no explanation as to why his Visa and American Express statements had not been produced other than to say: "It lapsed my mind. I don't know. I don't have a - I don't have any explanation. I don't want to create one. I just don't have an explanation." As a result of his refusal to produce these statements, it is impossible to verify that the family expenses being incurred by Philip Sun and Ms. Wu are in accordance with the estimates made by Ms. Wu of what was being spent by the household to maintain a very lavish lifestyle.
- [28] While document production by Philip Sun was made difficult because Ms. Wu took possession of a number of documents that were at the former matrimonial home, that does not eliminate the ongoing requirement of Philip Sun to produce documentation even though it would be necessary for him to go to third parties to obtain that documentation. When asked whether he had gone to the lawyers or the accountants to obtain documents, Philip Sun stated "no". Under cross-examination, Philip Sun admitted that Ken Ing was the

corporate solicitor for various of the companies in Canada. Despite that, Philip Sun confirmed that he did not approach his former lawyer because of a bill that had been outstanding for two years: "I did not contact Ken Ing personally. He was not talking to me."

- [29] Under cross-examination, Philip Sun admitted that he was asked to provide information regarding the \$5,000,000.00 he now says he owes to his parents including particulars of payments made to him, documentation evidencing each payment, where the monies came from, and where the monies were deposited. Philip Sun had to admit that he had not provided answers to those questions. As a result of the refusal or inability of Philip Sun to provide this information, it is impossible to ascertain whether the documents which were prepared regarding the alleged amount said to be owing by Philip Sun to his parents accurately reflect the amount of the alleged debt and the terms of repayment.
- [30] Under cross-examination, Philip Sun was asked where the documents relating to the sale of the units in a shopping centre owned by one of the companies were and he responded: "I guess they're at the lawyer's office". Asked why they had not been produced, he stated: "I believe this is the first time you [counsel] asked me about that". While it is clear that the proceeds from the sale of the various units were used prior to the triggering event on November 28, 2003 to maintain the lavish lifestyle enjoyed by Philip Sun, Ms. Wu and their son, the use of those funds, including the amounts available, are not clear. When asked whether any of the money from the sale of the various units has been used to "maintain yourself since July 2003", Philip Sun under cross-examination stated "yes" but could not tell how much had been used for that purpose. "I don't keep track of what I spend on myself." As a result of the inability or refusal of Philip Sun to produce this documentation, it is impossible to come to an exact determination of the sale price of the units in the shopping centre, the distribution of sale proceeds, the extent to which Philip Sun used the sale proceeds to maintain the lavish lifestyle he and Ms. Wu maintained, whether funds remain available from this source, and what funds were available to Philip Sun from this source after the triggering event.
- [31] The Defendants did not produce an inventory of the "Personal Property" which was at Drummond when Drummond was sold, and have not produced an inventory of what might have belonged to Catherine Sun and Charles Sun, and what might have belonged to Philip Sun either by way of purchase or by gift. As a result of the refusal of the Defendants to produce this documentation, it is impossible to come to an exact determination of the value of the family assets which were located at Drummond, but later removed from that location by Philip Sun, Catherine Sun or Charles Sun.
- [32] Once non-disclosure at any stage is established, the onus of satisfying the court afterwards that there has been full disclosure is on the non-disclosing parties. In Cunha, supra, Fraser J. stated: It is not enough to respond to non-disclosure by an award of costs. Nor is it enough, in a case like this one, to deal only with what is known. Either of these approaches, or both together, may still reward the non-disclosing litigant for his conduct, depending whether his concealment has been successful. I conclude that where there has been concealment of

assets, it ordinarily should be held that the concealment is ongoing, that there are assets still undisclosed, and that the division of assets should be affected accordingly. I am not sure whether it is of consequence whether this is characterized as an assumption, a rebuttable presumption or an inference of fact. The result is the same. Such a holding may be avoided if the trial judge is satisfied by the conclusion of the trial that full disclosure has by then been made. Not only is it a matter of doing justice in any particular case, it is also a matter of general interest. The system should not give offence to the honourable litigant by treating the dishonourable litigant the same. Once non-disclosure at any stage has been established, the onus of satisfying the Court that afterwards there has been full disclosure should be on the non-disclosing party. If by the end of trial the Court is satisfied that full disclosure finally has been made, an award of costs only might be the appropriate penalty. (at paras. 10-13)

- [33] In *Laxton v. Coglon* (2008) 49 R.F.L. (6th) 164 (B.C.S.C.), a finding was made that the defendant had failed to disclose numerous assets acquired prior to the separation. In deciding that he could infer that the defendant had control or possession of undisclosed assets at least equal in value to the assets which had been only recently disclosed, Kelleher J. concluded: The approach articulated in *Cunha* is that once non-disclosure has been established, the non-disclosing party bears an onus of showing that there has since been full disclosure to the court. If the court is satisfied that full disclosure has been made, an award of costs might be an appropriate penalty. However, if the court is not satisfied that full disclosure has been made, the court may infer that the value of the undisclosed assets is at least equal to the value of the disclosed assets. (at para. 27) This approach does not constitute reapportionment as governed by s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128. The inference simply operates to ensure equal division between the parties where the court is satisfied on the balance of probabilities that one party has not fully disclosed assets (see *Kiamanesh v. Kiamanesh*, 2004 BCSC 1052). The inference articulated in *Cunha* has been applied in cases where the court is satisfied that one party persists in failing to disclose assets to the court. See, for example: *Weinrauch v. Weinrauch*, 2004 BCSC 1364; *Gerhardinger v. Gerhardinger*, 2003 BCSC 1412; *Novin v. Novin* (1997), 50 B.C.L.R. (3d) 286 (S.C.). (at paras. 29-30)
- [34] I have no hesitation in coming to the conclusion that Philip Sun has failed to disclose the documents that would establish the value of what I find to be family assets. I conclude that there are undisclosed assets at least equal in value to the assets which have been disclosed by Philip Sun.
- [35] I am also satisfied that there has been a refusal by Philip Sun to answer questions regarding his employment income since he married. At his March 23, 2006 Examination for Discovery, Philip Sun was asked about his employment, and he confirmed that he had taken no steps to provide an answer to the question about his employment history, stating that, despite the court order requiring him to do so, he thought it was irrelevant because: "I have not had a job since I married." As a result of the refusal of Philip Sun to answer these questions, it has been very difficult to establish the income he was producing for his family prior to the date

of separation and what income and the source of the income available to him since separation. (III) Failure to Call Witnesses

- [36] A further difficulty relates to the failure of the parties to call a number of witnesses. For instance, the evidence of the accounting and legal advisors to Catherine Sun would have established whether or not Catherine Sun retained any interest in the former matrimonial home or whether it was her intention to transfer ownership of that home by way of gift to her son because it was necessary for Canadian tax purposes that she not retain any interest in any property in Canada. The former accountant and former lawyer for the various companies would have been in a position to provide testimony as to the use of funds from those companies, including the sale of various stratified units in the shopping centre owned by one of the companies, and how much money was available, either by way of capital withdrawals or income withdrawals from the various companies and the recipient of those withdrawals. The accounting and legal advisors to Catherine Sun and Charles Sun would have been in a position to testify regarding the debt instrument purportedly signed by Philip Sun relating to an alleged loan made by his parents to him, whether those documents were actually signed in April 2000, and why there are two differing documents in evidence in this regard.
- [37] An adverse inference may be drawn against a party who fails to call available witnesses: *Malli v. Malli*, [1987] B.C.J. (Q.L.) No. 849 (S.C.); *Leach v. Leach*, [1985] B.C.J. (Q.L.) No. 2322 (C.A.); *Rytir v. Rytir* (1987), 11 R.F.L. (3d) 239 (C.A.); *Vance v. Vance* (1981), 31 B.C.L.R. 216 (S.C.); *Clark v. Clark* (1974), 16 R.F.L. 214 (S.C.); and *Hauptman v. Hauptman* (1981), 32 B.C.L.R. 119 (S.C.).
- [38] I draw an adverse interest as a result of the failure of the Defendants to call their accounting and legal advisors. Combined with the refusal to provide full discovery of documents and the refusal to comply with court orders requiring the full production of documents, the failure to call former accountants and legal advisors who would be the only source of information regarding matters which were critical in determining the issues between the parties allows me to conclude that the answers that would have been provided were not favourable to the positions taken by the Defendants.
- [39] There was also a failure of Ms. Wu to call a number of witnesses. For instance, the sister of Ms. Wu and the parents of Ms. Wu could have given evidence regarding the Marguerite and Hong Kong properties that are beneficially owned by Ms. Wu and her sister. I draw an adverse interest as a result of the failure of Ms. Wu to call those witnesses. Combined with her failure to disclose and her impeached testimony regarding the Marguerite Street property, I conclude that the answers that would have been provided by those witnesses were not favourable to the positions taken by Ms. Wu. (C) LEGAL COUNSEL FOR MS. WU
- [40] Counsel for Ms. Wu was working under a number of disadvantages. First, Ms. Wu may not have revealed to her counsel that she had considerable assets. Second, the state of discovery of the documents of the Defendants was and remained woefully inadequate. Third, the

scheduling of the Trial and the alleged inability of Charles Sun to travel to Vancouver to testify in person made it necessary for his testimony to be by videoconference. Because of the time differences between Vancouver and Hong Kong, it was necessary to sit late into the evening for the direct evidence and for the cross-examination of Charles Sun. The schedule made it very difficult for counsel for Ms. Wu to prepare for that cross-examination and for other ongoing Trial matters.

- [41] As well, the trial that was originally scheduled for 15 days had already gone 36 days when it became apparent to me that counsel for Ms. Wu was not in an emotional state which would allow her to continue to represent her client on February 27, 2007. Accordingly, the Trial was adjourned generally on January 25, 2007. Subsequently, Ms. Wu found herself without counsel. While Ms. Wu was not obligated to advise me and while I was not in a position to inquire, I was advised by Ms. Wu that she was forced to act on her own as she was not in a position to pay the sums requested by her counsel. Having to act on her own placed Ms. Wu in an untenable position as she was not in a position to effectively represent herself, and she had insufficient time to retain alternate counsel and to allow that counsel sufficient time to prepare for the continuation of the Trial. While time was given to Ms. Wu to allow her to retain alternate counsel, she was not in a position to do so. Accordingly, there was no alternative but to continue to hear evidence in order to bring the Trial to a conclusion. As a result, the completion of the cross-examination of Charles Sun and Catherine Sun was ineffective, and many of the questions that needed to be put to them were not.
- [42] As a result of Ms. Wu representing herself, and as a result of the lack of full disclosure by all of the parties, these Reasons for Judgment have been delayed considerably as an attempt has been made to work through what was in evidence to make the findings of fact that are necessary to deal with the complicated issues between the parties. (D) GUARDIANSHIP, CUSTODY AND ACCESS
- [43] Ms. Wu seeks Orders that the parties have joint guardianship of their child pursuant to a modified Joyce Order, that she have sole custody of their child, and that Philip Sun only have supervised access visits. Philip Sun seeks Orders that the parties have joint guardianship and joint custody of their child, that the primary residence of the child will be with his mother in Vancouver, and that his access to his son be unsupervised.
- [44] The Court was assisted by a psychological assessment of the parties and their child. Dr. Michael F. Elterman prepared a "Psychological Assessment" of Ms. Wu, Philip Sun, and their son in a report dated October 27, 2006. This report was prepared in accordance with an August 9, 2006 Consent Order. The Report contained the following observations and conclusions: Tania Wu presented as a quietly spoken woman, somewhat timid, passive and shy. At times there was a long latency between questions and answers as though she was evaluating her response. She describes ... [their son] as an outgoing child who is good academically. She says that he is smart, loving, caring and sometimes he will get angry and frustrated with friends and later say that he can't help it. Testing Results The Personality Assessment Inventory was administered to provide a description of personality style. The

profile is typical of individuals with the following characteristics: The validity scales suggest that the individual tended to present herself in a favourable light and has been relatively free of common short-comings to which most individuals will admit. She is reluctant to acknowledge personal limitations and will tend to repress or deny distress or other internal consequences. This tendency will likely lead her to minimize or even not be aware of problems. The clinical profile may under-represent the extent of any significant problems of failings. The clinical scales suggest that such individuals in their interpersonal style, tend to be characterized by autonomy and balance. Her responses indicate that she is likely to be experiencing stress and turmoil in a number of major life areas. She reports stress in areas like financial status and family and close relationships. She fortunately says that she has a number of supportive relationships that appear to provide a buffer against stress. With respect to anger she describes herself as a very meek and unassertive person who has difficulty standing up for herself even when assertiveness is needed. She may have some difficulty in the appropriate expressions of anger.

- [45] The Report of Dr. Elterman contains the following observations and conclusions regarding Philip Sun: Testing Results The Personality Assessment Inventory was administered to provide a description of personality style. The profile is typical of individuals with the following characteristics: The validity scales suggest a defensive approach to testing. The individual wishes to portray himself as being relatively free of common short-comings to which most individuals will admit. He is reluctant to acknowledge minor faults in himself. Although there is no evidence to suggest an effort to intentionally distort the profile the results may under-represent the findings. The individual may be reluctant to acknowledge problems. The clinical scales suggest that the self-concept of these individuals appears to be generally stable. His interpersonal style seems characterized as self-assured, confident and dominant. Although not unfriendly, he is likely to be described by others as ambitious and having a leader-like demeanour. He is comfortable in social situations but is not likely to be extrovert. He may prefer to interact with others in situations over which he can have some measure of control. With respect to anger management, he describes his temper as within the normal range and as fairly well-controlled without difficulty. The aggression Inventory is a measure of anger and aggression. The test is divided into Total Aggression, Physical Aggression, Verbal Aggression, Anger, Hostility and Indirect Expression of Aggression. Scores on the total and subtest scales are within normal limits.
- [46] Dr. Elterman had the following observations regarding the parties: In trying to integrate the personalities of these two individuals, it seems likely that as a couple, they would clash inevitably. The testing of Mr Sun suggests that he feels more comfortable in social situations that provide him with some control and there is a repeated theme from ... [their son] and the collaterals that, rather than getting angry, Mr Sun is someone who becomes impatient and frustrated. It is not difficult to see that Mr Sun would be frustrated by his wife's passivity and, more importantly, it is not difficult to see how Ms Wu's unassertiveness would set a low threshold of what she would consider to be angry behaviour in Mr Sun and others. To an individual who is passive and unassertive, any raising of the voice or expressions of

frustration are likely to be seen as an aggressive response. I believe that with these combination of personalities, Ms Wu's threshold of what she would consider abusive or aggressive, may be what others may term expressions of frustration and impatience with her. (I) Guardianship

- [47] On the question of guardianship, there is a dispute between the parties about an appropriate guardian in the event of the death of the other. Ms. Wu stated at Trial that she thought her parents were possible candidates for guardians, that she had not planned to have her sister involved in her son's upbringing, and that she was not concerned that her parents were not the best candidates to raise a child in view of their advanced age and the state of her mother's health. Ms. Wu stated that her father was born in 1939 and her mother was born in 1941, which would make them 70 and 68 respectively. Under cross-examination, Ms. Wu stated that her mother has cancer. "She needs to live in somewhere and she needs treatment. My mother is sick and she needs to take care of her medical expenses." Ms. Wu repeatedly stated that she did not want Philip Sun to be the sole guardian in the event of her death as she was worried about his temper. Under cross-examination, Philip Sun indicated that he did not believe Ms. Wu was a suitable sole guardian if he died while their son was still a youth.
- [48] If Ms. Wu dies before their son reaches the age of majority, I have no hesitation in ordering that Philip Sun be the sole guardian of their son. Similarly, if Philip Sun dies before his son reaches the age of majority, I have no hesitation in ordering that Ms. Wu will be the sole guardian. I am satisfied that the parties have allowed their dislike and distrust of the other to make recommendations that are not in the best interests of their son. I am satisfied that both are loving parents and that it is in the best interests of their child that the other be the guardian in the event of the untimely death of the other.
- [49] The parties are in agreement that they be the joint guardians of their son. Even if they had not reached that agreement, I would have made that order. I make an order on the following terms:
- (a) the parents are to be joint guardians of the estate of the child;
 - (b) in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the child;
 - (c) Ms. Wu, who has the primary responsibility for the day-to-day care of the child, will have the obligation to advise Philip Sun of any matters of a significant nature affecting the child, including but not limited to the child's regular and emergency health care, school attendance and grades, social development, participation in extra-curricular activities;

- (d) Ms. Wu will have the obligation to discuss with Philip Sun any significant decisions concerning the health (except emergency decisions), education, religious instruction, general welfare of the child, and Philip Sun will have the obligation to discuss these issues with Ms. Wu, and each parent will have the obligation to try to reach agreement with respect to those major decisions;
 - (e) if the parents cannot reach agreement with respect to any major decision despite their best efforts, they will attend mediation with a qualified mediator agreed to by both parties or, if they cannot agree, with Dr. Robert Ley;
 - (f) if, after mediation, the parties cannot come to an agreement, the major decision will be made by Ms. Wu subject to the ability of Philip Sun to apply to the Court regarding the decision made;
 - (g) each parent will have the right to obtain information concerning the child directly from third parties, including teachers, counsellors, medical professionals and third-party caregivers. (II) Custody
- [50] On the question of custody, Dr. Elterman in his October 27, 2006 Report records Philip Sun as stating: He would like to have joint custody with Ms Wu where she would need to consult him and if there was an impasse, that it would be in her favour. He says that he is happy that she would make decisions on a day-to-day basis and that on major decisions they would have to agree on. . I believe a child needs both parents and that both parents should have the ability to give input to his activities and his other social life and so on. Into his activities, into how his free times are utilized, his social circles and so on.
- [51] While I have reservations about not ordering joint custody, I am satisfied that an order for joint custody should not be made. Philip Sun and his family have been able to intimidate Ms. Wu and this governs her ability to deal with matters which would arise if joint custody was granted. Instead, it produces a complete inability of Ms. Wu to deal with matters which would arise if joint custody was granted. As well, Ms. Wu hides behind a feigned lack of understanding of the obligations arising if joint custody is ordered, of the Court process and/or of the English language. I am satisfied that Ms. Wu would continue to pretend that she was not aware of her responsibilities if joint custody was ordered. I am also satisfied that Ms. Wu would allow her fear of Philip Sun and his family to cloud her judgment and to make her totally unable to arrive at a decision because she would be fearful about whether Philip Sun and his family had ulterior motives for what Philip Sun was recommending. While her fears may well be groundless, they are very real to her.
- [52] Additionally, the fact that Philip Sun now resides in either Hong Kong or in China makes communication difficult at best. The time difference between Hong Kong and Vancouver makes day to day joint decisions virtually impossible. As well, there were considerable difficulties with the telephone access previously ordered.

- [53] Ms. Wu has also allowed her fears to override common sense. Ms. Wu states that she is not prepared to accept communication by email transmission. When asked whether she was comfortable about communicating with Philip Sun by email, Ms. Wu stated: "Not comfortable." She said she would only be comfortable by "letter" "telephone and letter". As to whether she would accept a letter by fax, she stated: "I prefer letter with a stamp."
- [54] I am satisfied that there is a complete inability of these parents to communicate effectively and, at times, at all. I have no confidence that these parents will be in a position to cooperate and I find that this is an important factor in coming to the conclusion that joint custody should not be awarded: *Taker v. Taker* (1997), 27 R.F.L. (4th) 86 (B.C.S.C.); *Massaar v. Klotild-Houser*, [1999] B.C.J. (Q.L.) No. 196 (S.C.); *Ness v. Ness* (1999), 43 R.F.L. (4th) 363 (C.A.); and *Robinson v. Filyk* (1996), 28 B.C.L.R. (3d) 21 (C.A.).
- [55] The decision on custody is made more difficult as I am satisfied that Ms. Wu has not always acted in the best interests of her son. She has consistently made access more difficult, has been overprotective of her son, has allowed her fear of Philip Sun to delay decisions being made, and has used his trust funds inappropriately.
- [56] An account was opened on August 4, 2000 in the name of "Tanya In Trust Wu". There were a number of cheques in evidence drawn on the Hong Kong account of Charles Sun payable directly to his grandson. The balance in the account at May 5, 2004 was \$34,567.95. There were a number of withdrawals from that account: \$30,000 payable to Basham Thompson & Liu (June 22, 2004) and \$20,000 payable to Alison E. McLennan, Q.C. (July 12, 2004). The balance at November 30, 2006 was \$14,609.04. The balances in the bank account held by Ms. Wu was clearly held in trust for her son. Under cross-examination, Ms. Wu admitted that the money belonged to her son, that it was held in trust by her "because ...[he] is too young, a toddler." She also confirmed that the funds received were birthday gifts from his grandparents Charles Sun and Catherine Sun. As to whether she had withdrawn any funds from the account, Ms. Wu stated: "I don't remember."
- [57] The testimony of Ms. Wu is simply not believable in this regard. It is ludicrous for her to suggest that she would not recall that she had taken \$50,000.00 out of the trust account for her son in order to pay monies to the lawyers representing her in these proceedings. It was even necessary on the eleventh day of Trial to make an order that HSBC Bank of Canada produce the records relating to the account that had been opened, as those materials had not been produced by Ms. Wu.
- [58] In addition to other orders that I make in these Reasons for Judgment, I order that a trust account for the son of these parties be re-established (if the account was previously closed), that Ms. Wu be the sole signing authority on the account, and the amount that was in the account as at December 1, 2003 be returned by Ms. Wu to the account or into a new account no later than September 1, 2009. The amount to be paid into the account or into a new account will include interest on the balance that was in the account as at December 1, 2003, at the rate of the Registrar from and including December 1, 2003 to and including July 1,

2009. The amounts in the account plus any accumulated interest will be available to the son of the parties when he reaches the age of majority. On or before August 1, 2009, Ms. Wu will advise Philip Sun regarding the amount that will be paid and, if there is a dispute between the parties regarding the amount to be paid, the parties will be at liberty to apply for further directions.

- [59] On the question of custody and after taking into account all of the factors noted, it is clear that this child has suffered enough from the complete inability of his parents to cooperate on even the smallest of matters. Taking into account what I believe to be the best interests of the child, I order that Ms. Wu have sole custody.
- [60] However, Ms. Wu will be required to provide Philip Sun with a detailed schedule of the activities of their child including providing Philip Sun an email on the first day of each month outlining in detail the daily activities of their son in the previous month and the anticipated activities in the next month. As well, Ms. Wu will provide by email or facsimile transmission the following information within two days of it being available: (a) the school schedule for the year including all holidays, professional days, etc.; (b) the schedule for and details regarding all school special events, extracurricular activities, social activities, recreational activities for the next month; (c) the schedule of all doctor, dentist, and other professional appointments, including the purpose of those appointments.
- [61] Ms. Wu and Philip Sun shall communicate by email transmission. Each party will provide the other with his or her email address within seven days from the date of these Reasons for Judgment and, within 24 hours, with any new email address. Philip Sun will be responsible for the reasonable costs of installing and maintaining an internet connection at the residence maintained by Ms. Wu, including monthly charges for this service. The parties will respond to email correspondence from the other party within 24 hours but, if more time is required, they will advise the other party within 24 hours of their estimated time of response which shall be not more than 72 hours later. The parties will exchange and will keep each other up to date with respect to their telephone numbers for facsimile transmission purposes.
- [62] Ms. Wu will have the day-to-day care of their child, and the primary residence of the child will be with Ms. Wu in the Lower Mainland of British Columbia. Neither party will move the residence of the child from the Lower Mainland of British Columbia without the other parent's prior express written consent or without a Court Order. If an agreement cannot be reached between Philip Sun and Ms. Wu regarding a new residence, Ms. Wu will be required to give Philip Sun at least two-months' notice of any Court application seeking an order to move the residence of their son and will include in that application the proposed new address, a detailed description (including photographs) of the proposed new residence, and information regarding the schools that are close to the proposed new residence. The same information will be made available by Ms. Wu to Philip Sun in an attempt to obtain his written consent. (III) Access

- [63] Taking into account the reports of Dr. Elterman as well as the reports from Hollyburn Family Services who were responsible for the supervised access program that was put into effect by Court Order, an Order was made that it was no longer necessary for the visits between Philip Sun and his son to be supervised. I continue to be of that view even though Ms. Wu continues to take the position that the access of Philip Sun with his son should be supervised, despite the fact that visits including overnight visits have been made unsupervised for several years.
- [64] Many of the objections of Ms. Wu relate to incidents that occurred many years ago or to incidents that have absolutely no relevance to the question of whether it is appropriate for Philip Sun to have access to his son without the necessity of supervision. As part of what was recommended in the report of Dr. Elterman and what has been put in place as a result of a December 13, 2006 Order are meetings between their son and Dr. Robert Ley, a psychologist, appointed as the access monitor.
- [65] Philip Sun will have generous access to his son including but not limited to the following:
- (a) telephone access between 5:00 p.m. and 6:00 p.m., Vancouver time, each Wednesday and Saturday when Philip Sun is not in Canada. Ms. Wu will not be close enough to her son to listen to the conversation that her son is having with his father, and will not listen in to the telephone conversations or record them;
 - (b) At the expense of Philip Sun as to the required technology, the access visits between 5:00 p.m. and 6:00 p.m. Vancouver time each Wednesday and Saturday can be via web camera. Any members of the extended family of Philip Sun can participate in such visits. Ms. Wu will not participate in any such visits;
 - (c) their son and Philip Sun are at liberty to have unlimited access by email transmission. Their son will be given a different password for his access to the computer at the household maintained by Ms. Wu, with that password being different than the password to be used by Ms. Wu to access the computer;
 - (e) Philip Sun will be restricted in his email transmissions to their son by providing no commentary about Ms. Wu or her parenting skills or matters dealing with the previous or ongoing disputes between the parties;
 - (e) Upon giving at least two months' notice, Philip Sun and members of the extended family of Philip Sun can have extended access visits in Vancouver during Spring break, Easter break, Christmas break, and July and August of each year. Those periods will be divided in two, with their son with Philip Sun half of the time and their son with Ms. Wu the other half of the time;
 - (f) The costs associated with the visits of Philip Sun to Vancouver, telephone access, and internet access will be borne by him.

- (g) Philip Sun will be at liberty to apply for an order permitting him to remove their son from the jurisdiction upon giving Ms. Wu at least 45 days notice of such an application. The application will include detailed information regarding the proposed travel schedule, the purpose of the visit, and the proposed accommodations for Philip Sun and his son while outside British Columbia, and what arrangements, if any, will be made for Ms. Wu to accompany their son.
- (h) Each period of access will be monitored by Dr. Robert Ley with appointments with Philip Sun and his son at the onset and at the end of the period of access during each period of access lasting up to two weeks and an appointment for Philip Sun and his son at the onset, an appointment in each subsequent week, and an appointment at the end of any period of access lasting longer than two weeks. I order that these sessions continue until Dr. Ley is of the opinion that they are no longer required. The cost of these sessions with Dr. Ley or any retainer required by Dr. Ley will be borne solely by Philip Sun.
- [66] Regarding access visits when Philip Sun is in Canada and his son is in school at the time, Philip Sun will have the following access visits with his son:
- (a) from after school on Tuesday until the morning of Thursday, with pick up and drop off at the child's school;
- (b) from after school on Friday until 10:00 p.m. on Sunday, with pick up at the child's school and drop off at the residence of Ms. Wu and their son.
- [67] Regarding access visits when Philip Sun is in Canada and his son is not in school at the time, their son will be with his father continuously for one-half of the period of time, with Ms. Wu having telephone access during the time when their son is with Philip Sun between 5:00 p.m. and 6:00 p.m., Vancouver time, each Wednesday and Saturday. (E) FAMILY ASSETS
- [68] The question of what are family assets is complicated by a number of factors: the relationship of Philip Sun to various companies, the status of the assets and the sale of the assets of those companies by the November 28, 2003 triggering event, the lack of information about assets owned directly by Philip Sun and Ms. Wu, and the failure of Philip Sun and Ms. Wu to accurately list their assets.
- [69] I find that the following are family assets: (a) the interest in Philip Sun in various companies; (b) the former matrimonial home on Drummond Drive in Vancouver; (c) furniture and other contents of Drummond; (d) apartment on West 40th in Vancouver; (e) the insurance policy of Philip Sun; (f) the 1989 Jaguar automobile; (g) assets of Philip Sun in China or Hong Kong; (h) club memberships of Philip Sun; (i) the various bank accounts maintained by the parties; (j) the RRSP of Ms. Wu; (i) the Mercedes vehicle of Ms. Wu; and (l) travel points of the parties. (I) British Columbia Companies
- [70] The companies or entities in British Columbia controlled in whole or in part by Charles Sun, Philip Sun, Catherine Sun, Jenny Sun (the younger sister of Philip Sun) and Benjamin Sun (the younger brother of Philip Sun) were numerous ("Sun Family Companies"). I am satisfied

that no one other than Philip Sun was in charge of the day-to-day operations of these companies, took any significant role in the management of these companies, or was in a position to withdraw cash or capital from these companies in order to fund personal and family expenditures. In his January 30, 2004 Examination for Discovery, Philip Sun was asked to confirm that he ran the businesses of the various Sun Family Companies and he stated: "Yes. Basically operated the shopping centre and the golf centre.". When asked whether he did all of the dealings with the financial institutions for the Sun Family Companies, Philip Sun stated: "Most of the time.". When asked whether he did the day-to-day administration of the businesses, Philip Sun stated: "Yes."

[71] I find that the income available from the Sun Family Companies, the assets of the companies and the sale proceeds from the sale of the assets of the companies were all available to Philip Sun without restriction. Subject to the reduction of debt against assets, I find that the funds available from the various companies were used by Philip Sun as if income to support his lavish lifestyle prior to when he left Canada for Hong Kong, and were available to Philip Sun as income after 2001. I find that his interest in the Sun Family Companies and his ability to control the income, use of the capital, and the sale proceeds from the sale of the assets of the various Sun Family Companies constitutes a family asset. I also find that Philip Sun had a shareholding interest in some of the Sun Family Companies and that these shareholdings are also a family asset. The difficulty is ascertaining what was still available to Philip Sun as at the date of the triggering event on November 28, 2003. This difficulty is caused solely by the refusal of Philip Sun and the other Defendants to provide the information necessary in order to arrive at any meaningful conclusions in these regards.

[72] The various companies and the trust comprising the Sun Family Companies are as follows:

(a) LCH Development Ltd.

[73] This company was incorporated on April 22, 1989, and was dissolved on December 20, 2002. Philip Sun was the sole director, shareholder, and the President/Secretary. While Philip Sun had previously income from this company, I am satisfied that it was dissolved prior to November 28, 2003. I find it to be a family asset, but I also find that it has no value.

(b) LCH Trading Ltd.

[74] Philip Sun described this company as being inactive since incorporation, and that dissolution of the company had commenced. There is no information which would allow me to conclude that there was any residual interest in this company as at November 28, 2003, even though I find it to be a family asset.

(c) 8678 Investments Ltd.

- [75] 86781 Investments Ltd. ("8678") was incorporated on April 21, 1989. 100% of the shares of this company were owned by 8778 Investments Ltd. ("8778"). The directors of the company were Jenny Sun and Philip Sun, with Jenny Sun serving as Secretary and Philip Sun serving as President. Philip Sun testified that this company was running a retail shop in the Oakridge Shopping Centre called "The Links Golf & Skiware Club", but that this venture lost in the neighbourhood of \$350,000.00 to \$400,000.00.
- [76] 8678 was dissolved for failure to file annual reports on September 12, 2003. In his January 19, 2004 sworn Financial Statement, Philip Sun states that this company value. I cannot conclude that it had any value as at November 28, 2003, even though I find it to be a family asset.
- (d) Hastings Golf Centre Ltd.
- [77] Hastings Golf was owned 100% by 8778. and Hastings Golf was the bare trustee for 8778. The financing for this golf driving range project was \$5,180,000.00, which was arranged through 8778. Hastings Golf was dissolved on September 27, 2002. In his January 19, 2004 sworn Financial Statement, Philip Sun states that Hastings Golf had no value.
- [78] Philip Sun confirmed that he did not receive a salary from this company, but that he took money out of the operation. Philip Sun stated that he did not know how such withdrawals were recorded in the accounting records of the company: "I produce a slip, and those slips are collected at the end of the year and provided to the accountant. How they are entered, I don't know." I find that substantial cash was available from Hastings Golf and that Philip Sun made that cash available to himself in order that he could support his and Ms. Wu's lavish lifestyle. The records for Hastings Golf were not produced so that it is impossible to ascertain how much money Philip Sun took from the company, either by way of cash, dividends or capital withdrawals. By virtue of the relationship between Philip Sun and this company, including his ability to remove cash from the company and use the assets of the company to support the funds available to the family, I find that it was a family asset.
- [79] Hastings Golf was sold in 2000. As most of the documents relating to the sale are not in evidence, it is impossible to ascertain with any accuracy the ultimate disposition of sale proceeds. In evidence are the trust account records of the law firm acting for Hastings Golf relating to the sale of Hastings Golf, indicating receipt of the sum of \$4,122,996.86 on January 21, 2000, the payment of the Royal Bank of Canada of \$2,847,471.37 on the same day, and the balance of the proceeds of \$1,252,751.90 paid to 8778 on the same date. I am unable to ascertain whether the \$4,122,996.86 was the full purchase price for Hastings Golf, whether the \$2,847,471.37 to the Royal Bank of Canada satisfied all debts owing to it from all of the Sun Family Companies, or the ultimate disposition of \$1,252,751.90 once that amount was paid to 8778.
- (e) 8778 Investments Ltd.

- [80] The Sun Family Trust ("Trust") was the 75% shareholder of 8778 with Philip Sun holding the remaining 25%. 8778 was dissolved on September 27, 2002. Philip Sun was a Director and the President of 8778. By an August 14, 1996 Guarantee and Postponement of Claim with respect to the principle sum of \$2,000,000, Charles Sun, Catherine Sun and Philip Sun guaranteed the debts, liabilities and obligations of 8778 to the Royal Bank of Canada. 8778 held 100% of the shares of 8678 and 100% of the shares of Hastings Golf. Under cross-examination at Trial, Charles Sun was asked whether Philip had a 25% interest in 8778 in November, 1998 and he replied: "I don't remember". "I only know that his name is in it, but how many percent he have, I don't know." This testimony of Charles Sun was typical of his testimony. Although he purports to be a successful businessman, he pretended that he had absolutely no recollection of virtually anything relating to the matters in dispute between the parties. Consistently, I find him to be a witness whose testimony was incomplete and inconsistent at best and misleading and deceptive at worst.
- [81] Philip Sun testified that the business of Hastings Golf was operated out of 8778 and that the project was financed by his father and also from bank loans and mortgages. The financial statements of 8778 indicate the following assets and liabilities for the fiscal years ending July 31: ASSETS Year Inventory Due From 8678 Fixed Assets Due From LCH Investment In Affiliated Companies 1995 \$239,047 \$5,400 \$4,435,028 - - 1996 \$218,767 \$5,400 \$4,230,480 \$30,300 - 1997 \$393,360 \$5,400 \$4,019,046 \$30,300 - 1998 \$429,313 - \$3,781,459 \$35,700 \$745,000 1999 \$583,257 - \$3,536,835 \$35,700 \$745,100 2000 - - \$7,635 \$35,700 \$686 LIABILITIES Year Current Due To Yao Tsai Loan From Affiliated Company Due To Shareholders Bank Loan Payable 1995 \$79,610 \$5,728,146 - \$450,970 - 1996 \$69,866 \$6,280,267 - \$375,610 - 1997 \$81,590 \$4,499,267 - \$631,817 \$1,955,890 1998 \$198,334 \$1,931,603 \$3,613,294 \$1,892,521 1999 \$1,971,603 \$3,961,846 \$1,781,161 2000 \$55,963 - \$152,414 \$3,554,505 - 2001 \$55,963 - \$152,414 \$3,548,344 -
- [82] The investment in Hastings Golf at cost is shown as \$745,000 and the Investment in 8678 at cost is shown as \$100. In the Statements of Operations and Deficits, the following is recorded: Year Gross Sales Cost of Goods Sold Bank Charges and Interest Wages 1995 \$282,839 \$30,384 \$397,428 \$155,812 1996 \$810,463 \$260,466 \$257,358 \$262,834 1997 \$1,009,841 \$275,015 \$189,985 \$363,386 1998 \$979,720 \$272,685 \$20,036 \$344,827 1999 \$902,616 \$190,751 \$19,579 \$153,980 2000 \$371,670 \$608,002 \$4,810 \$47,811
- [83] Although I conclude that \$1,252,751.90 was paid to 8778 on the sale of Hastings Golf, I am unable to ascertain where that amount was deposited, whether those funds were ultimately disbursed, and, if disbursed, to whom the funds were disbursed. Specifically, I can make no finding as to whether Philip Sun received 25% of that amount by virtue of his shareholdings in 8778, or whether the August 14, 1996 Guarantee and Postponement of Claim with respect to \$2,000,000.00 was released by the Royal Bank of Canada as a result of the payment to it on January 21, 2000.

- [84] In his January 19, 2004 sworn Financial Statement, Philip Sun states that 8778 has been dissolved, and that it has no value. To the extent that funds from the sale of Hastings Golf were made available to Philip Sun and to the extent that the interest of Philip Sun in 8778 can be traced into the accounts maintained by other Sun Family Companies, I find that the 25% interest of such funds as at November 28, 2003 constitutes a family asset. I also find that the ability of Philip Sun to extract funds out of 8778 without regard to his 25% interest in that company constitutes a family asset as I am satisfied that the funds extracted from 8778 were used by Philip Sun for his own personal benefit and the benefit of Ms. Wu and their son.
- (f) B.P.Y.A. 1089 Holdings Ltd.
- [85] B.P.Y.A. 1089 Holdings Ltd. ("B.P.Y.A.") was incorporated in 2003 with Catherine Sun, Charles Sun and Philip Sun as Directors, Catherine Sun as President, and Philip Sun as Secretary. It is stated that 100% of the shares were held by Charles Sun and that B.P.Y.A. was the bare trustee for the Trust.
- [86] In an April 30, 1993 Directors' Consent Resolution, B.P.Y.A. resolved to purchase from Yao Tsai Company Limited ("Yao Tsai") the beneficial interest in the Surlang Shopping Centre ("Surlang") for \$5,250,000.00. In that document, Yao Tsai acknowledged that it would have no interest "beneficial or otherwise" in the property and that, thereafter B.P.Y.A. would be the absolute beneficial owner of Surlang.
- [87] At his January 30, 2004 Examination for Discovery, Philip Sun stated that Surlang was purchased by Yao Tsai in October 1989, that stratification of Surlang was completed in February 2001, that strata units began to be sold, that five had been sold and that five were left to be sold by 2004. Philip Sun confirmed that there were five units left at the time of the sale of the Drummond property in September 2003 but stated that no units were left at the time of the Trial. Under cross-examination, Philip Sun was asked about the "approximate net sale proceeds of the sale of the units since 2003" and he stated: "I don't have the idea". As to where that information was available, he stated: "I guess that would reflect on the financial statements". As to where the documents were, he stated: "I guess they're at the lawyer's office".
- [88] Under cross-examination at Trial, Charles Sun could not recall whether each of the units had been sold and could not recall the name of the financial institution where deposits would have been made: "I don't know the name of the bank". He stated that the monies were used for his grandson's fees at school. He also stated: "My wife responsible in handling matters in Vancouver." "I gave the power of attorney to my wife. You have to ask my wife. She would know." "I believe my wife might have given the power of attorney over to him [Philip Sun]." "This is between my wife and my son. I have no knowledge of it." To the suggestion that Philip Sun could use the money in Canada any way he chooses, Charles Sun under cross-examination stated: "That I don't know. That is my wife's matter." "I don't know."

- [89] Again Charles Sun showed throughout a shocking and unexplainable lack of detail regarding his investments and the investments of his family in Canada. As well, he was simply not believable regarding what authority he had given to Philip Sun to operate the Sun Family Companies as if Philip Sun was the sole Director, the sole shareholder, and the sole payee of funds from the companies.
- [90] Indicative of his feigned memory of events, the number of conversations that Charles Sun had with Philip Sun about the Sun Family Companies appears to have varied greatly. On the first day of his cross-examination, Charles Sun stated that he rarely spoke to his son about matters, whereas on the second day of his cross-examination he stated that Philip Sun briefed him on a regular basis, perhaps as often as monthly. As to the role of Catherine Sun and Philip Sun regarding Surlang, Charles Sun stated: "I told her that I did not have time to manage my business in Vancouver, so you look after it." Charles Sun stated at Trial that he told Catherine Sun to sell Surlang, to pay back the bank what was owed, and to remit any amount available back to Hong Kong. Charles Sun stated that there had been no remittances back to Hong Kong. Charles Sun was also adamant that it was his wife and not his son that had instructions to deal with Surlang. That appears to be other than in accordance with the testimony of Philip Sun and the few documents which are available regarding the sale of strata units in Surlang.
- [91] When units of Surlang were sold, the transfer documents were executed on behalf of Yao Tsai by Philip Sun. The various documents relating to these sales which are in evidence show the following: Strata Lot Sale Proceeds Date Of Sale Proceeds Paid To 3 \$1,100,759.00 17 September 2001 Vancity 7 \$249,185.10 3 July 2002 Vancity 6 \$360,325.72 16 March 2006 Vancity 9 \$308,322.50 16 May 2006 Vancity
- [92] The banking records for the Trust for the period December 24, 1999 through February 23, 2001 are in evidence relating to the account maintained at the Royal Bank of Canada showing deposits including a deposit on January 24, 2000 of \$1,100,000.00, and a deposit of a cheque from Worthington & Co. for \$486,573.33 on February 20, 2001.
- [93] When the Royal Bank of Canada accounts were closed, further deposits were made into an account at Vancouver City Savings Credit Union ("Vancity"). A \$1,000,000.00 deposit into an account at Vancity was thought by Philip Sun to be the sale of "one or more of the units in the shopping centre".
- [94] The Vancity account records and the bank records for Surlang for all of the pertinent periods of time are not in evidence so I am unable to ascertain with certainty how many Strata Lots were available for sale, if and when they were sold, the sale proceeds from sales, whether some or all of the debts were satisfied as a result of the receipt of sale proceeds, where all of the proceeds were deposited, and, once the funds were deposited, what funds were made available and to whom.

- [95] It is not in evidence to what extent the sale proceeds were then available to Philip Sun. It is not in evidence what units had been sold by November 28, 2003, what units remained unsold by that date, the total proceeds available from the sale of those units, and what portion of the sale proceeds were made available to Philip Sun. A Vancity "Payout Statement" dated May 4, 2006 shows that the principal balance and accrued interest owing as at that date was zero. Because funds from the sale of Lot 9 were received after May 4, 2006, it is not known what happened with the sale proceeds from the sale of that Strata Lot. Similarly, it is not known whether there were other lots available for sale, and what happened to the sale proceeds from those sales.
- [96] Because Philip Sun throughout had unlimited access to funds that had initially been deposited with the Royal Bank of Canada and funds that were later deposited with Vancity and because Philip Sun used those funds for personal and family expenses, I find that any funds available from the sale of strata units or Surlang that had not been sold by November 28, 2003 were family assets. As it was the testimony of Philip Sun that five of the Surlang units were left to be sold by 2004, and because the evidence relating to Strata Lots 6 and 9 allows me to conclude that the average net sale proceeds available from those two Strata Lots was \$334,324.11, I find that the net sale proceeds for the five Strata Lots that remained available after November 28, 2003 was \$1,671,620.50, that this amount constituted a family asset, and that this sum was ultimately received by Philip Sun. The accuracy of this figure is reinforced by the fact that the balance sheet for the Trust shows the value of "Capital Assets" without amortization as being \$1,975,830.00 as at the end of 2002, and \$1,538,112.00 as at the end of fiscal year 2003. Based on the balance sheet in evidence for the Trust, I can also conclude that there must have been a sale of further strata units during 2004 as the "Capital Assets" of the Trust for the fiscal year ending 2004 was \$1,034,639.00. Information subsequent to the fiscal year ending 2004 is not available.
- (g) The Sun Family Trust
- [97] In an April 23, 1993 Trust Deed, B.P.Y.A. was named as the Trustee under the Trust and Charles and Catherine Sun as well as their three children were noted as being the "Eligible Capital Beneficiaries" and the "Eligible Income Beneficiaries", the "Perpetuity Date" was 80 years from the date of the Deed or "such earlier date as the Trustee may in its absolute discretion appoint in writing to be the Perpetuity Date", with the Capital Beneficiaries and the Income Beneficiaries in a position to receive capital income from the Trust "in such proportions or manner as the Trustee shall in its absolute discretion from time to time think it fit". In his January 19, 2004 sworn Financial Statement, Philip Sun lists the "The Sun Family Trust (Beneficiary of)" as "Business Interest" but having an "Unknown" value.
- [98] At his March 23, 2006 Examination for Discovery, Philip Sun was asked to determine the assets of the Trust and he stated: "I'm not allowed to answer that question". "Because I am not the owner of the company." When asked whether the Trust was a company, Philip Sun stated: "I don't know". As to ownership, Philip Sun stated: "I will tell you right now that my father owns The Sun Family Trust, 100%." When asked on what basis he could make that

statement, he stated that his father had told him. However, he could not recall when he had been told that and he could not say whether he had been told that since October 26, 2005.

[99] Philip Sun testified that, to his knowledge, no payments had been made to the beneficiaries of the Trust, no steps have been taken to wind up the Trust, and there appeared to be no income available from the Trust. Under cross-examination, Charles Sun was asked whether he told his son Philip that he was not permitted to answer questions about the Trust and he stated: "No, I did not. I seldom talk to my son like that."

[100] A number of offers to finance addressed to the Trust were in evidence. These letters are from the Royal Bank of Canada and are dated February 3, 1997, February 26, 1999, and January 29, 2001. Two of the letters are directed to the attention of Philip Sun. The initial credit facility offered was \$3,100,000.00. The security including a General Security Agreement, a Collateral First Mortgage of \$3,100,000.00 against Surlang, guarantees jointly and severally of \$1,500,000.00 from Charles and Catherine Sun, and a guarantee of \$3,100,000.00 from Yao Tsai.

[101] When Drummond was transferred to Philip Sun on February 28, 1999, Philip Sun granted a \$1,500,000.00 mortgage in favour of the Royal Bank of Canada against Drummond in support of a new guarantee. When changes were made by the Royal Bank of Canada relating to the credit facility, Philip Sun executed a further Guarantee and Postponement of Claim supported by a demand collateral first mortgage in the amount of \$1,500,000.00 against Drummond. The Royal Bank of Canada security was subsequently discharged from Surlang and replaced by a mortgage in favour of Vancity in the amount of \$2,000,000.00.

[102] The financial statements of the Trust in evidence set out the following: BALANCE SHEET
 2001 2002 2003 2004 Current Assets Cash 72,247 27,425 81,820 Capital Assets Land 974,015
 750,971 620,031 415,883 Buildings 1,503,733 1,224,859 918,081 618,756 2,477,748 1,975,830
 1,538,112 1,034,639 Less Amortization (447,883) (399,223) (323,987) (234,373) 2,029,865
 1,576,607 1,214,125 800,266 Total Assets 2,104,062 1,604,708 1,298,437 801,824 Current
 Liabilities Accounts Payable 4,315 16,010 14,182 Loans Payable 868,329 571,084 375,938
 45,819 Loans from Beneficiaries 3,382,360 3,219,543 3,061,430 2,848,149 4,255,004 3,806,637
 3,451,550 2,905,696 Deficit (2,150,942) (2,201,929) (2,153,113) (2,103,872) STATEMENT OF
 OPERATIONS AND DEFICIT 2000 2001 2002 2003 2004 Revenue Rental 166,223 187,621
 119,450 103,545 53,356 Other 8,271 1,365 178 511 153 174,494 188,986 119,628 104,056 53,509
 Expenses Amortization 102,397 43,994 34,402 24,754 16,016 Bank Charges 13,400 10,837
 1,038 900 1,189 Loan Interest 169,909 110,061 35,941 29,075 7,401 Management fees 17,227
 12,500 12,000 8,000 5,014 Office/Sundry 9,607 5,495 8,452 490 1,529 Professional fees 1,308
 10,406 11,211 4,567 2,799 Property taxes 57,457 38,346 29,820 25,582 17,495 Repairs/
 Maintenance 103,395 35,504 26,675 21,379 12,778 Strata fees 37,058 29,756 28,610 19,819
 Other (Storage) 5,797 529,796 307,264 190,314 148,752 98,383 Recovery of Expenses (79,439)
 (81,636) (46,623) (53,400) (38,915) 450,357 225,628 143,691 95,352 59,468 Income (Loss) from
 Operations (36,642) (24,063) 8,704 (5,959) Gain (Loss) on Asset Disposal (674,855) (26,924)
 40,112 55,200 Gain(Loss) for year (275,863) (711,497) (50,987) 48,816 49,241 Deficit at

beginning of the year (1,163,582) (1,439,445) (2,150,942) (2,201,929) (2,153,113) Deficit at year end (1,439,445) (2,150,942) (2,201,929) (2,153,113) (2,103,872)

[103] Advances were made by Yao Tsai as well as from "Beneficiaries". However, there is no indication in the financial records of the Trust as to which of the five "Eligible Capital Beneficiaries" or of the "Eligible Income Beneficiaries" made those advances. Year
Advances From Yao Tsai Advances From Beneficiaries Bank Loan Or Mortgage Payable 1993
\$1,533,588 \$751,542 \$3,175,006 1994 \$1,667,085 \$726,542 \$3,141,553 1995 - \$2,457,627
\$3,104,716 1996 - \$2,527,627 \$3,064,151 1997 - \$2,537,278 \$3,064,279 1998 - \$2,514,601
\$3,009,318 1999 - \$2,683,101 \$2,965,938 2000 - \$2,945,276 \$1,865,938 2001 - \$2,382,360
\$868,329 2002 - \$2,219,543 \$571,084 2003 - \$2,061,430 \$375,938 2004 - \$2,848,149 \$45,819 2005
- \$2,546,233 \$54,424

[104] It is clear that substantial payments were being made against the debt of the Trust between when Surlang was stratified and 2003. It is also evident that substantial payments were made against the debt of the Trust after November 28, 2003. The Trust had land and buildings with an original purchase value of \$1,034,639.00 in 2004. I am not able to ascertain what assets were sold subsequent to 2003, although it appears that this would include the sale of Strata Lot 6 on March 16, 2006 (\$360,325.72) and Strata Lot 9 on May 16, 2006 (\$308,322.50). I am also not able to ascertain the extent to which funds available in the Trust were then made available to Philip Sun. Based on the finding that Philip Sun had access to sale proceeds from the sale of Strata Lots of Surlang once those amounts were deposited into either the Royal Bank of Canada or Vancity, I find that the interest of Philip Sun in the Trust was a family asset. I find this to be the case not because Philip Sun was a beneficiary under a discretionary trust, but because I find that Philip Sun had unlimited access to funds available in the Trust. I also find it to be the case because funds available in the Trust were transferred to Yao Tsai and subsequently transferred out of Yao Tsai to Philip Sun in order that the funds could be used to pay family debts, provide family income, and later to provide funds directly to Philip Sun for his personal use.

(h) Yao Tsai Company Limited

[105] This company was originally incorporated on September 16, 1997 as "Hong Kong Lao Ching Hing Restaurant Ltd.". There was a name change on September 16, 1987 to Yao Tsai. The shareholders of Yao Tsai are Charles Sun (35%), Catherine Sun (35%), Philip Sun (10%), Jenny Sun (10%), and Benjamin Sun (10%). At his March 24, 2006 Examination for Discovery, Philip Sun confirmed that he was a 10% shareholder in Yao Tsai, but stated: "I only just found out not too long ago."

- [106] The October 31, 1997 annual general meeting elected Charles Sun and Catherine Sun as Directors and appointed Charles Sun as he President and Catherine Sun as Secretary. In a business account application form completed by Philip Sun on March 15, 2001, Vancity was advised that Philip Sun was the sole Director. However, the October 31, 2001 annual general meeting of Yao Tsai saw the appointment of Charles Sun, Catherine Sun and Philip Sun as Directors.
- [107] There were extensive advances into Yao Tsai by its various shareholders although Philip Sun was adamant that he made no advances to Yao Tsai. Once advances from shareholders were received by Yao Tsai, there were numerous advances then made to various other of the Sun Family Companies. In evidence were a number of financial statements prepared by Lam Lo Nishio, Chartered Accountants. All of the statements carried the following "Notice to Reader": "We have not audited, reviewed or otherwise attempted to verify the accuracy or completeness of such information [provided by management]." The advances from shareholders, the bank loan, the mortgage payable, are shown in those statements as follows: YEAR ADVANCES FROM SHAREHOLDERS BANK LOAN MORTGAGE PAYABLE 1991 \$1,394,886 - 1992 \$1,442,513 \$310,000 1993 Ø Æ Ø 1994 - \$2,500,000 - 1995 \$4,503,742 \$3,050,000 - 1996 \$4,378,742 \$4,035,000 - 1997 \$5,790,768 \$990,000 - 1998 \$1,734,145 1999 \$1,775,057 - - 2000 \$1,777,344 - -
- [108] The April 30, 1998 balance sheet indicates advances to the Trust (\$1,895,603.00), 8778 (\$2,581,231.00), 8678 (\$370,838.00), and LCH Development Ltd. (\$215,485.00). The "Trial Balance as of April 30, 1999" and as at April 30, 2000 show advances to 8778 as \$1,971,603. The April 20, 2001 balance sheet records a loan receivable of \$152,414.00, cash of \$43,796.00, and retained earnings of \$186,704.00. If the balance sheets are accurate, it is apparent that virtually all of the advances previously made by Yao Tsai to the Trust, 8778, 8678, and LCH Developments Ltd. have been paid, save and except \$152,414.00.
- [109] Until April 2001, the financial institution of Yao Tsai was the Royal Bank of Canada. For the period April 27, 1992 through April 29, 1993, deposits into the Royal Bank of Canada account are shown as \$1,648,037.25, withdrawals as \$1,644,845.37 (including a total of \$1,027,786.94 relating to Drummond for items such as deposit for kitchen cabinets, garden design fee, engineering fee, furniture deposit, rock work, iron work, tree service, Milus Construction, security guard, millwork, carpet, and TV room cabinet).
- [110] In evidence was a June 17, 1994 "offer to finance" from the Royal Bank of Canada offering a total of \$1,800,000.00 for "Interim Construction Loans" and \$5,000,000.00 for "Operating Loans and/or Letters of Credit". The "Purpose" of the "Offer to Finance" was noted as being: (a) "to assist with the purchase of a residential property at Drummond, Vancouver, BC" and (b) "to assist with the construction of a Driving Range at Hastings and Kensington to be owned and operated by Hastings Golf Centre Ltd.". The "Interim Construction" portion of the loan was subsequently amended to \$800,000 by a November 29, 1994 Offer to Finance and to \$1,300,000 in a January 8, 1995 Offer to Finance. Security for the advances included a "Guarantee and Postponement of Claim in an amount of \$2,800,000.00" signed by Philip

Sun, Charles Sun and Catherine Sun, a collateral mortgage for \$2,500,000.00 on Drummond executed by Catherine Sun, and a hypothecation of Canadian Treasury Bills totalling \$4,000,000.00 to be placed with the Hong Kong Branch of the Bank. I am satisfied that the Canadian T-Bills were property of either Charles Sun or of Charles Sun and Catherine Sun.

- [111] With variations, further offers to finance were received from the Royal Bank of Canada on November 29, 1994, January 18, 1995, August 12, 1996, July 30, 1998, February 26, 1999. All of the documents from the Royal Bank of Canada were initially received by Philip Sun although he stated at Trial that he then forwarded them to his father. The February 26, 1999 letter is addressed specifically to Philip Sun while the August 12, 1996 and the July 30, 1998 letters are addressed to Charles Sun.
- [112] In an October 25, 1996 letter addressed to the Royal Bank of Canada (Hong Kong branch), Charles Sun requested a liquidation of the Canadian Treasury Bills held with the proceeds of \$756,818.05 to be credited into his personal account and the balance of \$1,508,541.87 to the Royal Bank of Canada, Oakridge Asian Banking Centre. The balance owing to the Royal Bank of Canada was paid in full in 2001 and its security released.
- [113] The financial institution for Yao Tsai then became Vancity. On April 2, 2001, Yao Tsai executed a mortgage in favour of Vancity in the amount of \$2,000,000 with an interest rate of prime plus 0.80% per annum charging Strata Lots 2 through 10 of Surlang. From that, I can assume that Lot 1 and any Strata Lots numbered above Strata Lot 10 had already been sold and were not available to be charged by the Vancity security and that Strata Lots 2 through 10 of Surlang remained unsold.
- [114] The Vancity statements for Yao Tsai are in evidence for the period March 2001 through June 2005, but not beyond that date. The loan amounts shown on the statements reflects a \$2,000,000 loan "Loan No. 1" at 7.3% fixed with a renewal date of April 9, 2002. On September 17, 2001, the payment of \$1,100,759 was made after the sale Strata of Lot 3 at Surlang. Thereafter, the balance owing was in the neighbourhood of \$875,000. When Strata Lot 7 of Surlang was sold, the sum of \$249,185.10 was used to pay down this loan on July 3, 2002. The loan was paid in full on May 4, 2004 when \$370,186.62 was transferred out of the "Chequing Savings" portion of the account maintained at Vancity. I find that the loan could be paid in full by virtue of a sale of a further Strata Lot or Strata Lots of Surlang.
- [115] Thereafter, funds available from sales of Strata Lots at Surlang were available to Philip Sun as funds were transferred out of the chequing/savings account maintained by Yao Tsai at Vancity to the personal accounts or to the credit or benefit of Philip Sun. Philip Sun had established a personal account with the Royal Bank of Canada, with a credit limit of \$250,000.00 in effect up until October 2000, and then up to \$350,000.00. The account statements for the period May 2, 2000 through February 28, 2001 were in evidence, and showing 2000 "Withdrawals & Adjustments" of \$40,000.00 (May), \$85,000.00 (June), \$37,000.00 (July), \$44,500.00 (August), \$25,500.00 (September), \$31,000.00 (October), \$102,000.00 (November), and \$10,000.00 (December).

- [116] As the account was fully drawn as of the end of December, 2002, only interest payments are reflected in the January through February, 2001 statements that are in evidence. Although I do not have evidence in that regard, I anticipate that this line of credit was paid in full and the accounts of Yao Tsai were transferred to Vancity.
- [117] In this regard, Philip Sun established account no. 82727 at the West Pender Street branch of Vancity, including a line of credit in the initial amount of \$350,00.00. The line of credit with Vancity was secured by a mortgage registered against Drummond. A number of transfers were made out of the Yao Tsai Vancity account into this personal account. These transfers out of the Yao Tsai Vancity account took place before and after the balance owing to Vancity by Yao Tsai had been satisfied in full on May 4, 2004.
- [118] Those transfers included \$140,000 transferred on November 12, 2002. Subsequently, other funds were transferred directly into this personal account or were deposits made into this personal account by cheques payable to Philip Sun: \$30,000.00 (September 7, 2003 - Phillip Sun), \$20,000.00 (October 21, 2003 - Philip Sun), \$30,000.00 (December 1, 2003 - Philip Sun), \$20,000.00 (December 27, 2004 - Philip Sun), \$30,000.00 (February 21, 2005 - Philip Sun), \$20,000.00 (February 21, 2005 - Philip Sun), \$15,000.00 (June 8, 2005 - Philip Sun), and \$20,000.00 (March 1, 2005 - Philip Sun).
- [119] Various other amounts were withdrawn from the Yao Tsai Vancity account to pay what appear to be personal expenses of Philip Sun: \$13,400.00 (August 24, 2003 - Albert Lam re "Payment of loan"), \$8,000.00 (December 1, 2003 - Transportaxion Lease Systems Ltd. - "Buyout payment for Range Rover - 8778 Investments Ltd."), \$20,000.00 (December 4, 2003 - Chen & Leung - "Philip Sun No. 66.464"), and \$1,000.00 (March 8, 2005 - to the school of their son as a deposit for the 2005-2006 tuition).
- [120] Despite the fact that Philip Sun was only a 10% shareholder in Yao Tsai, Philip Sun had unlimited access to the Vancity Yao Tsai account and regularly withdrew monies from that account to be deposited in his own account with Vancity or to pay for family or personal expenses. As that is the case, I conclude that the balance available in the Yao Tsai Vancity account as at November 28, 2003 was a family asset. Unfortunately, I am not able to ascertain what that balance was at that date, but I estimate that it was in an amount in the neighbourhood of \$250,000.00 to \$300,000.00. Under cross-examination at Trial, Philip Sun estimated that there was approximately \$100,000.00 in the Yao Tsai account at December 2006.
- [121] Many of the funds drawn out of the personal Vancity account were deposited into a personal account maintained by Philip Sun at the Royal Bank of Canada under account no. 5196266, with the amounts payable then deposited into that account as follows: PAYABLE TO PHILIP SUN August 23, 2001 \$20,000 August 30, 2001 \$40,000 October 8, 2001 \$30,000 December 13, 2001 \$30,000 February 24, 2002 \$20,000 March 5, 2002 \$30,000 June 3, 2002 \$20,000 June 4, 2002 \$30,000 July 1, 2002 \$22,000 August 5, 2002 \$20,000 September 5, 2002 \$10,000 October 14, 2002 \$6,000 October 29, 2002 \$6,000 November 15, 2002 \$40,000

December 27, 2002 \$20,000 January 15, 2003 \$15,000 February 19, 2003 \$10,000 March 13, 2003 \$10,000 April 7, 2003 \$10,000 June 1, 2003 \$6,000 June 20, 2003 \$50,000

- [122] In addition to the cheques payable to Philip Sun and to Transportaxion Lease Systems Inc. for vehicle lease payments, the following cheques were issued out of the account: 8778 \$7,500 Aug 30, 2001 City of Vancouver \$12,866 Feb 4, 2002 Albert Lam \$8,000 Jul 1, 2002 Vancity Account #2 \$2,000 Jul 1, 2002 Vanity Account #2 \$590 Sep 7, 2002 Vancity Account #2 \$4,000 Nov 23, 2002 City of Vancouver \$13,454 Feb 4, 2003 City of Vancouver \$14,503.11 Jul 3, 2003
- [123] By June 18, 2003, the balance owing under the Vancity Line of Credit reached \$349,198.05 and there was outstanding current and past due interest charges totalling \$3,144.61. The Line of Credit was increased to \$500,000 and the mortgage registered against Drummond was modified accordingly.
- [124] After July, 2003, cheques of \$1,111.51 regularly came out of this account payable to Transportaxion Lease Systems Inc. On September 19, 2003 \$501,192.73 was deposited into the account, perhaps from the proceeds from the sale of further Surlang strata lots.
- [125] The statement at December 31, 2004 indicates a balance of less than \$400 in that account for the period December 2003 through December 2004. The statements after that date are not in evidence.
- [126] At Trial, Philip Sun as asked whose money did it consider it to be when he drew money on the Line of Credit, and he then stated: "My father's." However, a number of cheques were referred to Philip Sun during cross-examination and, although he stated that they were for personal spending and for "all purposes in Vancouver", he could not recall the specific purpose of the various cheques noted above. Philip Sun also stated that he had not told Ms. Wu regarding his \$350,000.00 or \$500,000.00 Line of Credit at Vancity because it was through his "father's support", "it's his money that he's supporting us", and "I didn't think it was her concern".
- [127] Some of the funds withdrawn from the Vancity account were deposited into Royal Bank of Canada account no. 5196266. In evidence are the bank statements relating to this account for the period August, 2003 through October, 2006. Out of this account, Philip Sun was regularly paying the dues to Marine Drive Golf Course, the amounts payable for child and spousal support to the solicitors for Ms. Woo, and miscellaneous expenses including Pacific Blue Cross payments. Additionally, there was a cheque on December 23, 2004 in the amount of \$10,665.77 payable to Lan Lo and Nishio Charter Accountants. There was also a series of withdraws each month towards the end of the month with notations either that they were a "transfer" or that they were "Payment". There were no explanation as to what accounts or what payments were being made by these transfers.

[128] The amounts deposited into this account are shown as follows: Funds Deposited Into Royal Bank Account #5196266

Date	Amount	Balance In Account
September 15, 2002	\$30,000.00	\$30,000.00
October 28, 2002	\$30,895.28	\$20,370.09
December 9, 2003	\$20,370.09	\$23,588.16
February 11, 2004	\$30,000.00	\$38,743.49
March 12, 2004	\$10,628.70	\$11,260.41
April 22, 2004	\$10,000.00	\$10,537.92
May 7, 2004	\$10,029.07	\$15,823.53
June 28, 2004	Credit Memo	\$20,000.00
July 22, 2004	\$21,154.29	\$25,086.04
October 6, 2004	\$15,000.00 (C.M.)	\$24,542.10
November 1, 2004	\$25,086.04	\$12,774.14
December 17, 2004	\$10,000.00 (C.M.)	\$15,000.00
January 15, 2004	\$19,967.73	\$15,194.85
February 21, 2005	\$50,000.00 (C.M.)	\$62,569.69
March 31, 2005	\$15,000.00 (C.M.)	\$32,116.73
April 26, 2005	Branch to Branch Transfer	\$30,000.00
June 2, 2005	\$31,765.61	\$23,623.96
June 10, 2005	\$20,000.00	\$16,405.09
	\$31,465.77	\$15,000.00 (C.M.)
		\$15,000.00

[129] Philip Sun describes this as the "primary account that I use for making payments for various things". He stated that the deposits into the account were coming from the account with Vancity maintained by the Trust. Included within the cheques written on the account was a \$90,000.00 payment to "a lawyer". I am satisfied that the funds available in this account were family assets which were being used by Philip Sun to pay for personal expenses he was incurring.

(i) Further Evidence Regarding Entitlement to Funds

[130] In 1996 and 1997, correspondence between the corporate solicitor for the Sun Family Companies and the accountant for those companies provides further evidence that monies were first provided to Philip Sun, and then advanced by Philip Sun to the various Sun Family Companies. The February 2, 1996 correspondence between Mr. Ing, of Clark Wilson, and Jane Chong of Coopers & Lybrand, the accountant for the various Sun Family Companies, set out what was assumed to be the "Corporate Structure" of the various Sun Family Companies, and then dealt with "Intercompany Advances" as follows:

2. Letter Agreements Required for Intercompany Advances Please draft simple letter agreements to evidence the following intercompany or shareholder loans or advances:

- i. Loan from Philip Sun to Yao Tsai (or 8778??) Philip loaned \$5,300,000 loan to ?? on April?, 1995. The loan is non- interest bearing, has no fixed date of repayment, but is due 30 days after demand. Borrower can repay at anytime without penalty. ii. Advances from Yao Tsai to the Sun Family Trust Yao Tsai borrows from the Royal Sank and in turn lends to the Sun Family Trust as the latter's cash flow needs dictate. The trust will pay Yao Tsai interest equal to the interest charged by the Royal Bank (i.e. at cost to Yao Tsai). The agreement should be dated with effect from January 1, 1994. iii. Advances from Yao Tsai to 8778, 8678 and LCH Development Yao Tsai borrows from the Royal Bank and in turn lends to 8778, 8678 and LCH Development as the latter's cash flow needs dictate. 8778, 8678 and LCH Development will each pay Yao Tsai interest equal to the interest charged by the Royal Bank on their respective balances (i.e. at cost to Yao Tsai). The agreement with 8778 should be dated with effect from February 1, 1994, July 31, 1994 for 8678, and May 1, 1994 for LCH Development.

- [131] There was a follow up letter from Mr. Ing to the Yao Tsai, 8778, and 8678 ("Attention: Philip Sun") on October 18, 1996 from Mr. Ing enclosing a "draft sample Inter-Corporate Loan Agreement and a draft sample Promissory Note for review by Jane Chong and yourself".
- [132] In a March 3, 1997 facsimile transmission to Ken Ing and Philip Sun, Ms. Chong enclosed a promissory note: "... evidence of the loan from Philip Sun to Yao Tsai. Philip Sun is a minority shareholder of Yao Tsai". The Promissory Note which was attached is dated as at April 6, 1995, describes Philip Sun as the "Lender", and states that the principle sum owing without interest was \$5,482,000.
- [133] In an April 22, 1997 letter to Ms. Chong, Mr. Ing, encloses a "Revised Version of the Promissory Note from Yao Tsai to Philip Tsang Yu Sun which was sent by you to our office". As well as an "Inter-Corporate Loan Agreement". The Promissory Note is in draft but shows Philip Sun as the "Lender" and the principle balance owing without interest of \$5,482,000. The Agreement is in draft and shows no company as the "borrower" and no company or individual as the "Lender".
- [134] In a September 2, 1997 facsimile transmission, Loretta Kwok of Clark Wilson forwards a draft Inter-Corporate Loan Agreement and Promissory Note for the review of Leo Cheng of Price Waterhouse with a copy of that letter to "Mr. Philip Sun (Yao Tsai)". In a November 18, 1997 letter to Edward Chan of Price Waterhouse, Mr. Ing forwards an "Amended Loan Agreements" as well as "amended letters of instruction for me to the Yao Tsai and Philip Sun with respect to the Interest Rate".
- [135] In a November 19, 1997 letter from Edward Chan of Price Waterhouse to Philip Sun, Mr. Chan states: I have met with Ken Ing, discussed the terms of the loan agreements which have to be prepared, and looked at 2 drafts of those agreements. I think the documents are being finalized and they will be presented to you for signature within the next day or so. Please review these agreements in detail and convey any comments you may have on them to Ken and/or me. The interest expense charged by Yao Tsai to its affiliates have to be paid by those affiliates to Yao Tsai at least once a year to be deductible for tax purposes. When we release the 93 to 95 financial statements and tax returns of those companies to you, we shall advise you of the unpaid interest of each company. You will then have to advance sufficient funds to those companies to pay the interest to Yao Tsai. Upon receiving the funds from these affiliates, Yao Tsai can then repay its advances from you. At present Yao Tsai has losses available so its interest revenue from the affiliates would not be taxable for now. These losses will be utilized in 3 years or so, at that time we shall have to determine on what basis interest will still be charged by Yao Tsai to the affiliates.
- [136] At his January 30, 2004 Examination for Discovery, Philip Sun was asked whether he had loaned money to Yao Tsai and he stated: "For accounting purposes probably, yes." "You have to ask the accountant, I don't know those answers either. For reasons of accounting." At Trial, Philip Sun stated: "You have to check the accounting. Once you get all the financial statements, you will see where the money went and where the money go." "I am not saying

anything. I don't recall anything." When asked about the statement that he had made at his January 30, 2004 Examination for Discovery that it would be necessary to check the accounting and the financial statements, Philip Sun stated: "It sounds better than I don't know." "I don't know what I meant at that time. I don't recall." Regarding whether he had lent Yao Tsai \$5,482,000.00, Philip Sun stated: "You are assuming there is a loan of \$5,482,000.00, which I do not verify." "I don't know. I am not an accountant."

- [137] Regarding the April 6, 1995 Promissory Note for \$5,482,000.00, Philip Sun stated at Trial that the paper was "unsigned" and "I don't recall" when asked whether he ever signed such a document. He responded that he didn't know who would know and, whether the accountant knew, he stated: "That could have been a draft, that could have been anything. I wouldn't know." Philip Sun was asked why the promissory note in the amount of \$5,482,000.00 was drafted and he answered: "I don't understand the legal consequences of that". He indicated that the accountant and the lawyer prepared the documents and he stated: "Those two people that you mentioned are counselling - they're giving - they're giving advices. I don't understand those things."
- [138] Philip Sun disagreed with the suggestion that they acted on his instructions. On the suggestion that they acted without his instructions, Philip Sun stated: "I don't recall what - who gave instructions to them as far as the actions". He also does not recall meeting with Ms. Chong as referred to in the October 18, 1996 letter. As to whether he ever advised Mr. Ing that he had not loaned that money to Yao Tsai, Philip Sun stated: "I don't recall whether I called Mr. Ing after that day. [April 22, 1997]."
- [139] Under cross-examination at Trial, Philip Sun was asked whether he had ever loaned any money to Yao Tsai and stated: "I did not loan any money to Yao Tsai". When asked whether he had loaned any money before the date of the marriage he responded "yes". When asked whether he had loaned Yao Tsai \$5,482,000.00, he responded "no". As to who had prepared the documents evidencing the loan by him to Yao Tsai, he responded: "I don't recall". He also could not recall whether he was ever presented with any drafts of a promissory note evidencing a loan to Yao Tsai. He also confirmed that he had not taken any steps to obtain copies of any documents prepared by anybody evidencing loans he made to Yao Tsai. It was pointed out to him that he was asked at his Examination for Discovery to inform himself as to any amounts of money he had lent to Yao Tsai and whether he had taken any steps to inform himself, he responded "I don't recall". He was also asked whether he asked Mr. Ing whether there were any documents evidencing loans made by him to Yao Tsai and he stated "no, I did not talk to Mr. Ing""because we are not in good terms at the moment".
- [140] It is simply not believable that Philip Sun would advance the proposition that all of this correspondence between the lawyers and accountant for the Sun Family Companies would be without his knowledge and without his instructions. I have no hesitation in finding that what was prepared was an attempt to commit to writing the arrangements that were in place or should be put in place. I am also satisfied that it was Philip Sun and neither Charles Sun nor Catherine Sun who was providing the instructions and information to the

accountant and to the lawyer.

[141] At Trial, Charles Sun was asked whether he had met the accountant, Michael Lam, and stated: "I think I met him once." As to whether he had ever met Patrick Chen, Charles Sun stated: "I don't know who he is. I can't recall." When asked whether he ever met any of the corporate lawyers of Yao Tsai, Charles Sun stated: "I can't recall, and I don't know who they are. My wife - my wife knows." Regarding the documentation that was being prepared by Ms. Chong and Mr. Ing, Charles Sun under cross-examination stated that he had no knowledge of why Ms. Chong would prepare documents and send them to the company lawyer indicating a loan by Philip Sun of \$5,300,000.00 (in April, 1995): "I had no knowledge about this matter." Regarding advances from Yao Tsai to the Trust, and from Yao Tsai to 8778, 8678 and LCH Development Ltd., Charles Sun stated that he had no knowledge of those advances. When asked whether Yao Tsai ever signed any promissory notes to Philip Sun representing monies that it owed to Philip Sun, Charles Sun under cross-examination stated: "I don't know. I don't know. I never sign any." As to whether he had instructed Ms. Chong to write the memo to Mr. Eng, Charles Sun stated under cross-examination: "I don't know." As to whether he instructed Mr. Ing to take any steps in response to the memorandum from Ms. Chong, Charles Sun stated under cross-examination: "I don't know any of this."

[142] Again, the testimony of Charles Sun is simply not believable. He either did or did not instruct Ms. Chong. To suggest that he did not know whether he had is not believable. Having observed Charles Sun and Philip Sun at Trial, I could never be convinced that Charles Sun had no knowledge of what was being done by Philip Sun, the accountant, and the lawyer.

[143] There is further evidence that advances were made directly to Philip Sun in order that those monies could then be further advanced by Philip Sun to various of the Sun Family Companies. In a document dated April 20, 2000 addressed to Catherine Sun, signed by Philip Sun, and witnessed by a Hong Kong solicitor, Philip Sun confirmed the following: that I have over the period from 1st January 1991 to 31st March 2000 borrowed from my mother CHOID WING TAI a total sum of Canadian Dollar Five Million (CAD 5,000,000) to finance my business operations and activities in Canada including but not limited to the operation of the following companies:

1. 8778 Investments Ltd.,
2. 8678 Investments Ltd.,
3. LCH Development Ltd.,
4. LCH Trading Ltd., and
5. Hastings Golf Centre Ltd. The above sum is repayable within 14 days after CHOI WING TAI has given me a written demand.

- [144] In response to the fact that the promissory note says that he borrowed \$5,000,000.00 from his mother to finance the business operations and whether that was true, Philip Sun stated: "I believe that is true. Also that should also be my father as well." Philip Sun was asked how much he believed he owed his mother and father in April 2000, and he stated "more than \$5,000,000.00". At Trial, Philip Sun testified that he signed the Promissory Note because "my father asked me". As to whether he had had any discussions with his father about the document, Philip Sun stated: "I don't recall". When asked why his father had asked him to sign the document, Philip Sun stated: "No, I don't recall."
- [145] In a second April 20, 2000 document witnessed by a Hong Kong solicitor, Philip Sun stated to "Choi Wing Tai" [Catherine Sun] that he confirmed that: in consideration of your transferring the Property [Drummond] to me for CAD\$1, I am indebted to you for the total sum of CAD\$5,000,000 ("the Loan") as the price of the Property and also the other moneys that I have borrowed from you to finance my business operations and activities in Canada. The Loan is repayable within 14 days after you have given me a written demand. I also confirm that I have agreed to pledge the Property as collateral for the Loan and that I will execute a formal charge of the Property in favour of you or your nominee upon your request.
- [146] What is in evidence was sent by facsimile transmission from 852-2890-2447 on July 18, 2003, at 11:18 p.m. The April 20, 2000 date is written in by hand. The following notation is at the bottom of the document: "E:\Mydocument/Sun Yau Kwok/Philip Sun letter to Choi Wing Tai.doc". Philip Sun stated that he signed this document because "my father asked me to". Because of the failure to call evidence from the lawyer or lawyers who prepared these documents, I am not in a position to conclude that they were prepared and signed by Philip Sun in 2000 as is written on the documents in handwriting. Rather, it seems more likely that the documents were prepared some time during July 2003, when Philip Sun was in the process of selling Drummond. The failure to produce evidence in this regard allows me to assume that the evidence would not be favourable to the Defendants on this question. I find that the documents were prepared long after the transfer of Drummond from Catherine Sun to Philip Sun, and were prepared in an attempt to retroactively change the reason for the transfer of Drummond in order to provide Catherine Sun with some security for the funds that had been advanced to Philip Sun by Charles Sun.
- [147] Regarding the promissory note, Catherine Sun stated at Trial that the document was prepared in Hong Kong: "so we have to wait for Philip to return to Hong Kong before he could sign this document". Regarding the \$5,000,000.00 contained within the two documents, Catherine Sun stated at Trial that this amount was used: "Because at that time we estimated the Drummond property to - worth that much."
- [148] Under cross-examination at Trial, Charles Sun was asked whether he ever sent monies to Philip Sun in each of 1995 through 2002, and, each time, he stated: "I can't recall." There is nothing in evidence which would allow me to conclude that Catherine Sun advanced any funds to Philip Sun. I find that any funds that were advanced to Philip Sun were advanced

by Charles Sun. From these documents, it is clear that Catherine Sun and Philip Sun are acknowledging that the funds were advanced to Philip Sun before being advanced by Philip Sun to the various Sun Family Companies. I take this as further evidence of the ability of Philip Sun to have complete control over the distribution of funds that were available from the various Sun Family Companies. (II) Former Matrimonial Home (Drummond)

- [149] In 1983, Charles Sun and Catherine Sun had purchased a home on Arbutus Street in their joint names. In March 1986, a property was purchased in their joint names on Osler Street. Once a new home was complete on the property, Charles Sun, Catherine Sun, and their three children moved into the home which had been constructed. On February 28, 1989, Drummond was purchased in the name of Catherine Sun. After Drummond was purchased, a new home was built with funds from Charles Sun and Catherine Sun.
- [150] In 1989, Charles Sun had become a non-resident and that was the reason given why the property was registered in the name of Catherine Sun. In 1999, Catherine Sun became a non-resident and, on March 1, 1999, the title to Drummond was transferred from Catherine Sun to Philip Sun. The question which arises is whether that transfer was by way of a gift, or whether Catherine Sun retained some interest in Drummond even though Drummond had been transferred to Philip Sun.

(a) Purchase of Drummond

- [151] I find that the purchase price for Drummond was provided by Charles Sun and Catherine Sun. Charles and Catherine Sun used their funds of \$298,000.00 in March, 1986, to purchase their first home, and \$995,000.00 in February, 1989, to purchase their next home which was subject to a \$500,000.00 mortgage. That property was subsequently re-mortgaged for \$800,000.00 in June, 1991 and was sold in July, 1992 for \$1,455,000.00. Catherine Sun executed a mortgage against Drummond for \$2,500,000.00 in favour of the Royal Bank of Canada on May 3, 1994 in support of her guarantees of the indebtedness of the various Sun Family Companies.
- [152] At Trial, Catherine Sun testified that she came to Canada in 1984, and that she would reside in Canada about six months out of the year between then and when Drummond was purchased. She testified that Drummond was purchased from the proceeds from the sale of the Osler property, from the money that her husband sent from Hong Kong, and from borrowings from the Royal Bank of Canada.
- [153] As to why Drummond was registered in her name alone, Catherine Sun stated: "Because my husband by then had decided to become a non-resident. That's why it was only in my name." Catherine Sun stated that Charles Sun made the decision that Drummond would be registered in her name.
- [154] At Trial, Charles Sun was asked whether, when he became a non-resident, it meant that he had no interest in a home in Canada, and he stated: Not in my - not in my personal name. So whether I was using my wife's name or Philip's name, they were just holding the

property on my behalf. That is a traditional Chinese concept." "... That's why I used my wife and my son's name. They - in the Drummond property, every penny belonged to me."

"That's a traditional Chinese concept. To own a property, you don't need to use your own name.

- [155] In this regard, Charles Sun confirmed that he never advised any Canadian government department that he had an interest in Drummond. Charles Sun also stated at Trial under cross-examination: "I can tell you that I can trust my wife, but I cannot trust my son. So that's why I asked him to write me an IOU for \$5,000,000.00." As to who he considered the owner of Drummond, Charles Sun stated at Trial: "I was using my wife's name, and the owner would be of course me and my wife." As to why the house was in the name of Catherine Sun, Charles Sun stated: "Because I had been, like, trying to become a non-resident for a long time " and that the advice he received was that "if I had any property in Canada, then I could not become a non-resident." Charles Sun was asked whether he took any formal steps or filed any papers to become a non-resident and he responded: "No."

(b) Transfer of Drummond to Philip Sun

- [156] In his October 27, 2006 report, Dr. Elterman states that he was advised by Philip Sun that: "The house had been transferred to him in 1999 for immigration reasons". Consistent with the registration of Drummond in the name of Catherine Sun so that Charles Sun could obtain non-resident status, I find that the reason for the transfer of Drummond from Catherine Sun to Philip Sun was so that Catherine Sun could obtain the same status. In this regard, Catherine Sun stated at Trial: "Because I intended to become a non-resident." "My accountant ... made the suggestion if I were to become a non-resident, I am not allowed to own properties in Canada." Catherine Sun confirmed that her accountant was Jane Chong. Catherine Sun stated that, because Charles Sun was a non-resident and had returned to Hong Kong, the advice that she had received was: "... as husband and wife, I should do the same and return to Hong Kong and be a non-resident in that sense."
- [157] In a February 24, 1999 letter to Philip Sun, his counsel confirmed instructions having been received from Philip Sun to convey Drummond from Catherine Sun to Philip Sun. The "conveyance file - opening form" for the solicitors handling the transfer noted that the client was Philip Sun but that instructions were taken from: "Clients (Mr. Sun & Mrs. Sun)." It was also noted that the lawyer for Catherine Sun was with another firm. Under the heading "Comments" there is a notation: "Transfer from mother to son checked accountant, no clearance cert. required. Family transfer. Accountant: Michael Lam . ". In a 3/2/1999 note to file, the lawyer handling the matter for Philip Sun noted: "Mrs. Sun is now non-resident. Has checked with their accountant. Have received opinion that clearance certificate is not required because it's a family transfer. Acct. is Michael Lam" In a February 25, 1999 "Acknowledgement of Legal Representation", Catherine Sun acknowledged that she recognized that the law firm acting on the transfer were the solicitors for Philip Sun and "You have advised me to obtain independent legal representation but I have chosen not to do so."

- [158] The Freehold Transfer from Catherine Sun to Philip Sun was executed by Catherine Sun on February 25, 1999 and was registered in the Land Title Office on March 1, 1999. On the transfer, the "Market Value" was shown as \$4,252,666.00 and the "Consideration" was shown as "\$1.00 and other good and valuable consideration".
- [159] It was necessary to obtain the approval of the Royal Bank of Canada who held a May 3, 1994 mortgage that had been granted by Catherine Sun. In documents executed by Charles Sun, Catherine Sun, Philip Sun and Hastings Golf, the mortgage remained registered against Drummond despite the transfer of that property from Catherine Sun to Philip Sun. In a February 25, 1999 document which was signed at the same time that Drummond was transferred from Catherine Sun to Philip Sun, each of Catherine Sun, Charles Sun, Philip Sun and Hastings Golf consented to the transfer of Drummond, noting that Catherine Sun had granted a mortgage against Drummond for \$2,500,000.00 as collateral security for a guarantee she had executed regarding Yao Tsai and 8778. In the same document, Charles Sun, Catherine Sun, Philip Sun and Hastings Golf acknowledged that a Debt Service Agreement with the Royal Bank of Canada constituted a continuing, valid and binding obligation on each of them, despite the transfer of Drummond from Catherine Sun to Philip Sun. The law firm for the bank rendered an account to Catherine Sun on March 31, 1999 relating to this documentation. The mortgage in favour of the Royal Bank of Canada was subsequently discharged from the title of Drummond on February 16, 2000.
- [160] On July 30, 2001, Philip Sun mortgaged Drummond in favour of Vancity as part of the transfer from the Royal Bank of Canada to Vancity of the accounts and debt relating to the various Sun Family Companies and of his personal line of credit.
- (c) Was the Transfer from Catherine Sun to Philip Sun of Drummond a Gift? Did Catherine Sun Retain a Vendor's Lien? Is Drummond subject to an Equitable Mortgage in Favour of Catherine Sun?
- [161] I have concluded that the transfer of Drummond from Catherine Sun to Philip Sun was a gift and that neither Charles Sun nor Catherine Sun retained any interest in Drummond or the ultimate sale proceeds from Drummond. In *Pecore v. Pecore*, [2007] 1 S.C.R. 795 and *Madsen Estate v. Saylor*, [2007] 1 S.C.R. 838, the Court established a number of principles dealing with the presumption of advancement, where a transfer is made from parent to child: (a) the rebuttable presumption of advancement and resulting trust continues to have a role to play in resolving disputes over gratuitous transfers where evidence of the transferor's intention is unavailable or unpersuasive; (b) the rebuttable presumption of resulting trust is the general rule for gratuitous transfers; (c) the presumption of advancement applies to children under the age of majority but does not apply in respect of independent adult children as the principle justification for the presumption of advancement is the parental obligation to support dependent children; (d) there is a rebuttable presumption that the adult child is holding the property in trust for the parent to facilitate the free and efficient management of the affairs of the parent where assets are transferred into joint accounts; (e) evidence of an affectionate relationship between the

transferor and the transferee may be relevant in the determination of whether the presumption of resulting trust has been rebutted; (f) while dependency of an adult child on a parent will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of resulting trust; (g) the civil standard of proof is applicable to rebut both presumptions; (h) the trial judge must begin an inquiry where a gratuitous transfer is being challenged by determining the proper presumption to apply and then weigh all of the evidence relating to the actual intention of the transfer to determine whether the presumption has been rebutted and, while evidence of intention that arises subsequent to the transfer is admissible, it is the intention of the transferor at the time of the transfer which is relevant.

- [162] The New Brunswick Court of Appeal in *D.L.M. v. J.A.M.* (2008) 289 D.L.R. (4th) 37 distinguished the approach taken in *Pecore*, supra, in the context of parents paying debts on behalf of a married couple during the course of the marriage: Since the Supreme Court of Canada in *Pecore* restricts the applicability of the presumption to when a parent advances funds to a minor child, other criteria must be applied to determine whether a transfer to an adult child is a loan or a gift. The Supreme Court cases involved money placed in joint accounts; the factual context in the case before us differs because the parents paid debts for their son and daughter-in-law during the course of the marriage. Several cases have dealt with the characterization of transfers of money made by parents to their children arising in disputes over the division of marital property. None was decided on the basis of a presumption of advancement. (at para. 18)
- [163] The Court in *D.L.M.* then applied the criteria set out in *Locke v. Locke* [2000] B.C.J. (Q.L.) No. 1850 (S.C.): (a) whether there were any contemporaneous documents evidencing a loan; (b) whether the manner for repayment is specified; (c) whether there is security held for the loan; (d) whether there are advances to one child and not others, or advances of unequal amounts to various children; (e) whether there has been any demand for payment before the separation of the parties; (f) whether there has been any partial repayment; and (g) whether there was any expectation, or likelihood, of repayment.
- [164] Whether the approach in *Pecore*, supra, or the approach in *D.L.M.*, supra, is taken, I am satisfied that the transfer was a gift and that there was no resulting trust. Here, there is evidence of the intention of Catherine Sun. I accept the evidence of Catherine Sun at Trial that she was advised that she had to divest Catherine Sun of all Canadian assets. The transfer of Drummond of the legal and equitable interest in Drummond to Philip Sun was part of the procedure to divest Catherine Sun of all Canadian assets. Just as Charles Sun had divested himself of Canadian assets in 1989, so also Catherine Sun did so in 1999. The subsequent actions by Catherine Sun and Philip Sun are all consistent with the transfer of Drummond being a gift.

- [165] No mortgage in favour of Catherine Sun was registered against Drummond at the time of the conveyance. The full consideration of "\$1.00 and other good and valuable consideration" was paid, so that it was not contemplated that there would be further sums payable. There are no contemporaneous documents from accounting or legal advisors to show that the transaction was other than a gift.
- [166] In the context of the Royal Bank of Canada mortgage registered against Drummond in support of other arrangements made with that bank, Catherine Sun consented to the transfer to Philip Sun without in any way indicating that she retained any interest in Drummond. Subsequently, the \$2,500,000.00 mortgage against Drummond was discharged on February 16, 2000 when the financial arrangements of the various Sun Family Companies were transferred from the Royal Bank of Canada to Vancity. To the knowledge of Catherine Sun, Philip Sun executed a Guarantee for \$1,500,000.00 to support the Trust debt relating to Surlang one day after the transfer to him of Drummond. To the knowledge of Catherine Sun, Drummond was mortgaged by Philip Sun to Vancity on July 30, 2001.
- [167] The evidence of the intention of Catherine Sun is available. First, she was a party to financial institution documentation which acknowledged that Philip Sun had the legal and beneficial ownership of Drummond and that she retained no interest. Second, debt instruments were subsequently executed by Philip Sun acknowledging indebtedness in one case and acknowledging the requirement that he would mortgage Drummond to provide security for the debt owing. Third, the evidence of Catherine Sun was that the transfer was necessary, as she was not in a position to have an interest in land in order that she could establish that she was no longer resident in Canada. Fourth, this is not a case where Philip Sun is holding Drummond in trust for Catherine Sun and/or Charles Sun to facilitate the free and efficient management of the affairs of his parents - there was no joint account and no evidence that Catherine Sun or Charles Sun retained any interest in Drummond. Fifth, there is very strong evidence that funds were advanced to Philip Sun in order that he could invest them in various entities so that, along with borrowings guaranteed by his parents, Philip Sun relied heavily on the largesse of his parents to support his efforts to develop various enterprises in Canada. Sixth, no debt to either parent reflected in the financial information that was presented to the various financial institutions that Philip Sun was dealing with in relation to his business and personal interests.
- [168] If the criteria set out in *Locke*, supra, as adopted in *D.L.M.*, supra, apply, then it is clear that there were no contemporaneous documents evidencing a loan, there was no security held for a loan, there had not been any demand for payment before Philip Sun and Ms. Wu separated, and there is no indication of the likelihood of repayment other than the fact that Philip Sun continues to be employed by his father.

- [169] The question of whether a rebuttable presumption has been shown on a balance of probabilities is made more difficult because Philip Sun supports the submission made by Catherine Sun. However, in these family proceedings, I am satisfied that the position advanced on behalf of Ms. Wu is available to rebut the presumption of resulting trust if such a presumption must be rebutted.
- [170] The civil standard of proof has been met - any applicable presumption has been rebutted. It may well be that Philip Sun feels an obligation to repay his parents, but I am satisfied that this is not, in itself, enough to show that a loan exists. As stated in *Reain v. Reain*, 20 R.F.L. (4th) 30 (Ont. Gen. Div.), quoting the Ontario Court of Appeal decision in *Reynolds v. Reynolds* (1995) 13 R.F.L. (4th) 179, at para. 182: Without an agreement there can be no debt. It would be a dangerous precedent to permit moral family obligations to creep into equalization calculations, no matter how deserving the recipient may be.
- [171] In the alternative, Catherine Sun submits that, if the Court finds that the transfer of Drummond from Catherine Sun to Philip Sun was a gift, then Catherine Sun retained a vendor's lien against Drummond. In this regard, Southin J.A. on behalf of the Court stated in *Chu v. Chen* (2004), 28 B.C.L.R. (4th) 24 (B.C.C.A.): If a vendor's lien is an equitable interest in land, it is, in principle, difficult to see how its owner can lose the right, as against the purchaser, to enforce it save by having discharged it, any more than the possessor of an equity of redemption in the absence of a foreclosure in equity can lose it save by discharge. (at para. 39)
- [172] In *Gordon v. Hipwell et al.* (1952) 5 W.W.R. (N.S.) 433, Robertson J.A., on behalf of the majority, confirmed that: "the vendor has a lien attaching immediately upon the land when the purchase-price remains unpaid" (at p. 454). Robertson J.A. also confirmed that the purchaser stands in the position as a trustee for the unpaid vendor: In *Evans v. Tweedy* (1838), 1 Beav. 55 at p. 58, 48 E.R. 859, it is said by the Master of the Rolls, with respect to a Hen for unpaid purchase-money, it has undoubtedly been considered as making a vendee or his heir a trustee for the vendor. At pp. 206-7 of Keeton's *Law of Trusts*, 5th ed., it is stated: "It will be remembered that in the course of his judgment in *Shaw v. Foster* (1872) L.R. 5 H.L. 321, 356, Lord-Cairns observed that the vendor is not a dormant trustee, but one who has a personal and substantial interest of his own in the property to protect. This interest of the vendor is his right to the purchase-money, and in many cases that interest is protected by a lien, which may be exercised not only before the vendor has conveyed, but afterwards, although in this last case the relationship of the parties will be reversed as a result of the transfer of the legal estate, so that the purchaser will now become a trustee pro tanto for the vendor for what is unpaid, unless the vendor by his words or conduct plainly shows an intention to renounce his lien, and intends to rely upon some other security, or upon the personal credit of the purchaser."
- [173] I find that Catherine Sun did not retain a vendor's lien against Drummond. First, I am satisfied that the contemplated consideration of \$1.00 and other good and valuable consideration was received by Catherine Sun so that she is not in a position to claim that

the "purchase-price remains unpaid". Second, Catherine Sun had been advised that she could have no interest in land in order that she would be classified as a non-resident. This position is inconsistent with Philip Sun holding the equity in Drummond in trust for Catherine Sun. Third, the desire to obtain non-resident status amounts to a renouncing of any vendor's lien, and a reliance instead upon the alleged indebtedness owing from Philip Sun to Catherine Sun.

- [174] In an April 20, 2000 document witnessed by a Hong Kong solicitor, Philip Sun stated to "Choi Wing Tai" [Catherine Sun] that he confirmed that: in consideration of your transferring the Property [Drummond] to me for CAD\$1, I am indebted to you for the total sum of CAD\$5,000,000 ("the Loan") as the price of the Property and also the other moneys that I have borrowed from you to finance my business operations and activities in Canada. The Loan is repayable within 14 days after you have given me a written demand. I also confirm that I have agreed to pledge the Property as collateral for the Loan and that I will execute a formal charge of the Property in favour of you or your nominee upon your request.
- [175] It is not the case that the promise contained in this document amounts to an abandonment of the equitable right of Catherine Sun to have a lien for the unpaid purchase price relating to the transfer of Drummond. In *Galt v. Erie and Niagara Railway Co.*, [1869] Ch 637, Spragge, V.C. stated: It is the prima facie equitable right of the vendor to have a lien for his purchase money upon the land sold, and I see nothing in authority or in reason for its being lost upon a mortgage being taken: the mortgage may well be taken as a cumulative security and remedy. There is in my judgment nothing in the taking of a mortgage from which it is to be inferred that the parties intended that there should be no lien. It is necessary to go that length or the lien will continue to subsist. (at p. 638)
- [176] However, I find that the April 2000 document does not in any way affect the previous abandonment by Catherine Sun of a vendor's lien against Drummond. Rather, it is an attempt to establish an equitable mortgage in favour of Catherine Sun. In this regard, the learned author in *Di Castri*, *Registration of Title to Land*, vol. 2 (Thomson-Carswell - Toronto) states: In equity, an equitable mortgage is created by a written agreement for valuable consideration (a) to execute, when required, a legal mortgage, or (b) that specified property is to stand charged as a security for a specified sum. On the right facts, an informal or an imperfectly drawn mortgage may also operate as an equitable mortgage by way of an agreement to mortgage. (footnotes omitted) (at p. 13-3)
- [177] Even if I could find that this document was prepared in the year 2000 rather than in 2003, it is a document which attempts to establish a right to a mortgage almost 15 months after the transfer of Drummond from Catherine Sun to Philip Sun. On the assumption that the document could not be considered an attempt to fraudulently prefer Catherine Sun over other creditors, I find that no demand was ever made under the "Loan" and no "request" was made by Catherine Sun for Philip Sun to "execute a formal charge of the Property ...". Additionally, the \$5,000,000.00 which is defined as the "Loan" is stated to represent the "price of the Property and also the other monies that I have borrowed from you to finance

my business operations and activities in Canada". These provisions are other than in accordance with the facts that I have found. First, the "Market Value" on the documents registered in the Land Title Office was \$4,252,666.00. Second, no monies were provided by Catherine Sun to Philip Sun relating to his business operations and activities in Canada. Third, the advances from Charles Sun to Philip Sun relating to his business operations and activities in Canada were stated to be in excess of \$5,000,000.00. Even assuming that I could make a finding that the April 20, 2000 document constituted an equitable mortgage, I find that no legal mortgage was ever demanded or given so that the subsequent sale of Drummond brought to an end any claim that Catherine Sun could have as against Drummond or against the proceeds from the sale of Drummond.

(d) Listing of Drummond by Philip Sun

[178] Philip Sun entered into an MLS agreement in March 1999 to expire on October 11, 1999 with a listing price of \$5,988,000 and a commission payable at a rate of 7% on the first \$100,000 and 2.5% on the balance. A September 15, 2000 MLS listing also set out a listing price of \$5,980,000.00. A March 17, 2003 MLS listing had a listing price of \$4,480,000.00. All listings showed the finished area in the home as being 12,224 square feet made up of 6,824 square feet on the main floor, 5,940 square feet on the second floor, and 460 square feet in the basement. The master bedroom is shown as being 32 feet by 16 feet and the other bedrooms are shown as being 13 by 11 feet on the main floor and three bedrooms on the second floor - 12 by 10, 27 by 17, and 22 by 17.

[179] At her November 15, 2005 Examination for Discovery, Ms. Wu stated that Philip Sun told her in late June 2003 that they would be moving by September 2003 and that this was the first time anyone spoke to her about moving or selling Drummond or purchasing any property since Philip Sun told her in 2002 that the property was going to be listed for sale. She stated that the first time that she was aware that the property had been listed for sale was in 2002, that Philip did not explain to her why he wanted to list the property for sale, and that when asked "Did you ask him why?", Ms. Wu testified "No." Ms. Wu stated that what Philip Sun meant when he told her that "he just wanted to test the market" was that: "he just wanted to test the market, test his design, good quality, because it's award winning house, and there is no -- no mention of anything else. No rush. No mention of nothing else. Just testing."

(e) Sale of Drummond

[180] Catherine Sun came to Vancouver in the late Spring of 2003. Both Philip Sun and Catherine Sun stated at Trial that the purpose of her trip was to arrange for the sale of Drummond. At her November 15, 2005 Examination for Discovery, Ms. Wu stated that she was never told that Catherine Sun had come to Vancouver for the purpose of selling Drummond. Under cross-examination at Trial, Philip Sun confirmed that he did not tell Ms. Wu that an offer had been received on Drummond, or that he was negotiating with the possible purchaser. He stated this was the case "because it is not my decision that the house be sold". However, Philip Sun admitted that he was the individual who worked with the realtor: "Yes, and I

conveyed the message to my parents". As to why he did not tell Ms. Wu about the negotiations, Philip Sun stated: "Because it was my parent's house."

- [181] A June 10, 2003 Contract of Purchase and Sale provided for a deposit of \$200,000.00, a \$3,400,000.00 purchase price, a possession date of August 1, 2003, and a completion date of September 18, 2003. I cannot reach the conclusion that Ms. Wu was fully apprised of the fact that Drummond had been sold and that a possession date of August 1, 2003 was in place. However, Ms. Wu became aware of the sale.

(f) Commencement of These Proceedings

- [182] A Certificate of Lis Pendens ("CPL") was filed against Drummond by Ms. Wu on June 25, 2003 when these proceedings were commenced. In her July 9, 2003 Affidavit, Ms. Wu states: I was aware that the Defendant [Philip Sun] was trying to list our matrimonial home for sale. It has been on the market for some time. Because of this, I asked the Defendant on many occasions in person and by phone when the Defendant was in Hong Kong what he was going to do to replace the matrimonial residence. The Defendant would always assure me that once the matrimonial home was sold, he would use the money to re-purchase another home for me and ... [our son]. The Defendant suggested buying a place for ... [our son] and me in South Granville and I told him that I preferred the Shaughnessy area. We had these discussions about replacing the matrimonial home for some time now. I was informed by my mother-in-law that the Defendant and my matrimonial home was being sold and the completion date would be in August or September 2003. The list price for the sale is \$4.48 million but I do not know any of the details of the sale or what the purchase price is. I am aware that there is a mortgage on our matrimonial home but I do not know the amount of the mortgage. In June 2003, the Defendant told me on the phone to go with my mother-in-law to view an apartment in Kerrisdale and that this is where ...[my son] and I would be living once the matrimonial home was sold. I was shocked as the Defendant had always assured me that he would replace the matrimonial home with another home not an apartment. In addition to this, my mother-in-law informed me that the apartment would have a mortgage attached to it. I am in no position to carry a mortgage on a property as I am not currently employed having been a stay at home mother taking care of my child at the request of the Defendant. My mother-in-law informed me that she would take care of the mortgage, but that is no consolation to me because if the mortgage payments are not made, the bank would foreclose on the apartment. I do not have any idea if the Defendant has in fact purchased the Kerrisdale apartment. After being informed by my mother-in-law that the Defendant was replacing our matrimonial home with an apartment, I called the Defendant to see if this was true as it was against what the Defendant and I had discussed previously. I was able to get ahold of the Defendant on this occasion and the Defendant confirmed that he was not going to purchase another home with the proceeds of sale and that I should take the Kerrisdale apartment or leave it. I told the Defendant that that was not what we had agreed on previously and that I could not have a property with a mortgage. In addition, the title of the property would not even be 100% in my name. The Defendant told

me too bad. I was very upset with this.

[183] In her July 28, 2003 Affidavit, Ms. Wu stated that the CPL was filed on June 25, 2003: "... after I was informed by the Defendant that the matrimonial home was not going to be replaced with another house but a small apartment which the Defendant told me to take it or leave it." Regarding the replacement dwelling, Ms. Wu stated: At the time that the Defendant told me about the Kerrisdale apartment, I was informed by the Defendant that it was not going to be in my name but in his mother's name and that a substantial mortgage would be used to finance the purchase of the apartment. The Defendant expected to take all of the money from the sale of our matrimonial home back to Hong Kong.

(g) Removal of Furnishings

[184] In a July 28, 2003 letter to the solicitors for Defendants, counsel for Ms. Wu stated: We have been advised by our client that her mother-in-law left a note purporting to advise that Tania [Wu] and her son will be moving out of the matrimonial home on July 29, 2003 and that a moving truck will be attending in the morning. In the circumstances, we object to your clients' actions and advised that our client is not moving out on July 29, 2003 and will not permit the remaining furnishings, however sparse due to your client's previous actions, to be moved out [sic] in the morning. Our client is entitled as a right to remain in the matrimonial home unless otherwise ordered by the Courts. The matrimonial home is her residence.

[185] A July 28, 2003 response from the solicitor for Philip Sun stated: "our client intends to fulfill his obligations under the sale contract and would like to proceed with the move of any items not normally used by your client. Your client's personal possessions and furnishings will not be moved out tomorrow. Our client will keep a list of the moved items and will make the list available to you."

[186] In a July 30, 2003 letter to counsel for the Defendants, counsel for Ms. Wu advised: We confirm that this morning, we received a call from our client who is frantic after discovering that all of the furnishings that remain in the matrimonial home was removed save and except some bedroom furnishings that remain in our client and ... [her son's] room. The condition of the matrimonial home is described by our client is that the house was in 'stripped bare' and that the only items in the house that remain are fixtures.... As it stands to date, your client's actions of stripping bare the home bare leaves our client with no ability to reside in the matrimonial home until the parties can come to an agreement. On lifting the CPL or until the matter is otherwise determined by the Courts.... This afternoon, we received further disturbing news. Our client has found that all the keys and garage remotes were taken away from the home and that the garage doors were left open. In addition to this, the front entry gate was stripped of the battery to control it. On three occasions today, the security patrol were called to the house. There is no reason for the state of the house to be left in that manner. Our client and her son are still residing in the matrimonial home as you know. They are entitled to be secured in their residence. We have

now received information that all electrical power has been taken away from the house. There is no electricity and therefore no alarm. Your client's actions are completely deplorable. The sale of the home is not closed and there is no reason for the electricity to be turned off in light of our past conversations and notice to you that our client was to remain in the home until an agreement was reached or by Court application.

(h) Completion of the Sale

- [187] Philip Sun had opened a conveyancing file with Messrs. Chen & Leung on June 25, 2003. So that the sale could complete, it was necessary to discharge the CPL of Ms. Wu. It was subsequently proposed that counsel for Philip Sun would hold the net proceeds after the debts owing to Vancity had been paid in full and the cost of purchasing West 40th was paid. Regarding the latter property, counsel for Philip Sun advised: "the W. 40th Avenue Property will be in Mr. Sun's name for now. Your client may file a Lis Pendens against the W. 40th Avenue Property concurrently on completion date".
- [188] \$501,192.73 of the sale proceeds from the Drummond was subsequently used to pay the full balance owing under the Vancity line of credit of Philip Sun. The firm of Chen & Leung, the solicitors for Philip Sun, hold the balance of the sale proceeds from the sale of Drummond, being the sum of \$3,062,833.31 as at October, 2006.
- [189] Despite the initial advice that West 40th would be registered in the name of Philip Sun, the registered owner of West 40th became Catherine Sun. There is no explanation in evidence why it was not a condition of the removal of the CPL that West 40th would be registered in the name of Philip Sun. \$618,000.00 out of the sale proceeds from Drummond was paid on or about July 25, 2003 to complete the purchase of West 40th. The contract of purchase and sale for West 40th was dated July 2, 2003, and a \$50,000.00 deposit to secure the contract was paid on July 10, 2003 out of the Yao Tsai Vancity account. There were further funds taken out of the Yao Tsai Vancity account relating to West 40th. Both amounts were payable to Medallion Management Inc., the property manager for West 40th: February 15, 2005 (\$15,000.00) and June 7, 2005 (\$15,000.00). Philip Sun confirmed that these amounts were paid for the maintenance on West 40th.
- [190] Although Catherine Sun and Charles Sun lived in Drummond from time to time as did the two siblings of Philip Sun, I have no hesitation in coming to the conclusion that Drummond was the family home for Philip Sun, Ms. Wu and their son. I find that Drummond was a family asset and that the funds presently held by Messrs. Chen & Leung replaced the family asset when the sale of Drummond was completed. I find that the funds held as at the date of the triggering event on November 28, 2003 constitute a family asset in replacement of the family asset constituted by Drummond. I also find that West 40th is a family asset in that proceeds from the sale of Drummond were used to purchase West 40th. I also find that West 40th is a family asset in that funds withdrawn from the Yao Tsai Vancity account were used to purchase West 40th. As I find that the funds available in the Yao Tsai Vancity account were a family asset. There is no up-to-date information on the current market

value of West 40th, although the estimate was that it was worth in the neighbourhood of \$1,000,000.00. I use that estimate in calculating the value of the family asset in the absence of any other information regarding the value of West 40th.

(i) Sale Price for Drummond

[191] Ms. Wu raises the possibility that Drummond was sold for too low a price. As a result, Ms. Wu wants the difference between the original listing price of \$5,988,000.00 and the eventual selling price of \$3,400,000.00, being compensation of \$2,680,000.00. I am satisfied that her submission is without merit. It has not been shown on the evidence that Drummond was sold for less than market value. There is no appraisal or market opinion relating to market value in 2003. Ms. Wu complains of the fact that no "for sale" sign was put on the property. The fact that no "for sale" sign was put up on the property does not indicate a failure to properly market it. In this regard, I am satisfied that the property was listed on MLS so that a sign on the property would not appreciably add to the possibility that it would be sold.

(III) Furniture and Other Contents of Drummond

[192] Zurich Insurance Company Renewal Declarations were in evidence showing the following coverage for "Personal Property": 13/05/99 through 13/05/00 (\$1,985,900) and 13/05/00 to 13/05/01 (\$2,046,100). In her July 9, 2003 Affidavit, Ms. Wu states: ... our matrimonial home was heavily furnished with many very expensive furnishings. Many of these furnishings are being packed up and taken away by my mother-in-law. My mother-in-law has given some of the furnishings to my sister-in-law and told me that some of the furnishings are being put to storage, but I have never seen the storage locker and I do not believe my mother-in-law. I am aware that the wife of the new buyer is going to purchase some of the furniture from the matrimonial home as she called and left me a message to give to my mother-in-law to confirm that they (the buyers) would purchase some of the furniture along with the house.

[193] In her July 28, 2003 Affidavit, Ms. Wu states: Many of the furnishings in our matrimonial home were purchased by me and the Defendant throughout the course of our marriage from our family funds and credit cards. The Defendant and I would go on extensive shopping sprees to purchase furnishings. The Defendant had very expensive tastes in furniture, wine, art, painting, décor (i.e. Lalique vases) and always purchased expensive items. Other furnishings were given to us as gifts during our marriage. Again, when our furnishings apparently were being sold, given away or allegedly placed into storage, I had no say in the matter at all.

[194] At Trial, Catherine Sun stated that the Chinese traditional furniture was purchased by her and her husband but that the Western style furniture was purchased by her and Philip Sun. At Trial, Ms. Wu testified that she had requested a list of the furniture that had been removed from the matrimonial residence but that such a list had never been provided.

[195] From the insurance policies in evidence, it is impossible to ascertain what personal property was included in the insurance coverage purchased, what portion of that related to furnishings, art, etc., what portion was available to Ms. Wu and her son and is presently at

West 40th, and what part of the insured amount relates to property that was subsequently sold to the purchasers of Drummond. If furnishings and other items were sold, it is not in evidence as to the disposition of those sale proceeds. I conclude that the furnishings in Drummond were family assets. Ms. Wu would be entitled to a share of what had not been sold by November 28, 2003, and/or to a share of any sale proceeds relating to the sale of any furnishings.

- [196] I am not in a position to quantify the value of the "personal property" that relates to furnishings, equipment, chattels, art, etc. Because Philip Sun has not produced the evidence which would allow me to conclude that these family assets are worth less than the \$2,046,100.00 that was declared in the Renewal Declaration for the period ending 13/05/01, I conclude that these family assets are worth \$2,046,100.00. Based on the evidence of Ms. Wu which was not contradicted and based on what is set out in the July 30, 2003 letter to counsel for the Defendants from counsel for Ms. Wu, I am satisfied that what was retained and what was available to Ms. Wu and her son is no more than 10% of that total. (IV) The Insurance Policy of Philip Sun
- [197] Under cross-examination, Philip Sun admitted that he had an insurance policy and that he believed it had a cash surrender value. He stated that the beneficiary under the insurance policy was his son. The amount of the cash surrender value and the policy itself was not in evidence. In the circumstances, I order that Philip Sun continue to maintain the insurance policy, and that his son remain the beneficiary under the same. Philip Sun will not be at liberty to arrange for the receipt of any cash surrender value which might be available. (V) The 1989 Jaguar Automobile
- [198] In his January 19, 2004 sworn Financial Statement, Philip Sun lists as an asset a 1989 Jaguar automobile having a value of \$10,000.00, but provides the following further note: "In trust for mother". At Trial, Philip Sun stated that the Jaguar was originally owned by his mother, having been a gift from his father to her, that the car was transferred over to him "for safe-keeping", but that the car was not operable. In the Amended Counterclaim, Philip Sun seeks a declaration that the vehicle is held by him in trust for the benefit of his mother, and that his mother was the sole beneficial owner of the vehicle. To the extent that Philip Sun retains any interest in the Jaguar vehicle, I find it to be a family asset. (VI) Assets of Philip Sun in China or Hong Kong
- [199] In his 2005 sworn Financial Statement, Philip Sun states that he had as assets: "speculative investment/business ventures in China". While Ms. Wu was of the view that these interests had substantial value, there was no such evidence before the Court. To the extent that proceeds from the sale of assets belonging to the Sun Family Companies were used to purchase these assets in China, I find that they are family assets. I am not in a position to value those assets because of the non-disclosure by Philip Sun of the same. However, taking into account the principle established in *Laxton*, supra, I find that these undisclosed assets and other undisclosed assets have a value equal to the \$1,671,620.50 in family assets which have been disclosed by Philip Sun and which I find were family assets received by Philip

Sun and either spent or transferred by him. (VII) Club Memberships of Philip Sun

- [200] Ms. Wu submitted that Philip Sun has a membership in Marine Drive Golf Course, and that it should either be sold with all of the funds going to her or it should be converted so that their son can become a junior member at this Club. There was nothing in evidence relating to this alleged interest other than the fact that their son had taken lessons at the Club from time to time and that Philip Sun entertained there from time to time. There is also nothing in evidence which would allow me to conclude that the membership can be sold or converted. I find that any memberships at Marine Drive Golf Club or any other clubs that existed as at November 28, 2003 are family assets. (VIII) Membership of Ms. Wu in the Arbutus Club
- [201] I find that the membership of Ms. Wu in the Arbutus Club is a family asset. The Order made splitting the asset so that Ms. Wu will have her membership and Philip Sun will have a membership which will be made available to their son is continued. (IX) Various Bank Accounts Maintained by the Parties
- [202] It is impossible for me to find with any certainty the amount in the bank accounts maintained by the parties as at November 28, 2003. It is also impossible for me to ascertain the balances available to Philip Sun in the various accounts maintained on behalf of the Sun Family Companies net of any debt owing. (X) The RRSP of Ms. Wu
- [203] Ms. Wu could not remember how much was in her RRSP when she married and she indicated that she had cashed it in at the end of 2005 but that it had maybe \$1,000.00 or \$2,000.00 remaining in it. Counsel for Philip Sun stated that there had been about \$19,000.00 in the RRSP so that approximately \$18,000.00 was withdrawn from it starting October 2005. Ms. Wu stated that she had not filed an income tax return so that any monies withheld when the RRSP was collapsed have not been returned to her by virtue of her having no income so that no taxes were payable. I find that the balance owing in the RRSP as at November 28, 2003 was a family asset. (XI) The Mercedes Vehicle of Ms. Wu
- [204] It is estimated that this vehicle is worth in the neighbourhood of \$10,000.00. I find that it is a family asset, and that it has been used by Ms. Wu since it was purchased in the late 1990s. (XII) Travel Points of the Parties
- [205] It was submitted that both parties have travel points accumulated as a result of purchases and travel. There is nothing in evidence regarding the points available. (F) ASSETS OF THE PARTIES THAT ARE NOT FAMILY ASSETS
- [206] I find that the interest of Ms. Wu in the Hong Kong property and in Marguerite Street are not family assets. Philip Sun makes no claim that those interests are family assets but, even if he had not abandoned any such claim, I would have been satisfied that they had not been brought into the marriage by Ms. Wu or had in any way contributed to the income of the family.

- [207] Despite the fact that at least \$25,000.00 came out of the Yao Tsai Vancity account on February 15, 2005 to pay the deposit on the property purchased on Valley Drive and despite my finding that the funds in the Yao Tsai Vancity account are family assets, I am satisfied that there is not sufficient evidence before me which would allow me to conclude that the balance of the purchase price came from family assets. In the circumstances, I find that some interest in the Valley Drive property is a family interest, but that any interest which is a family interest will be available solely to Philip Sun. (G) APPORTIONMENT OF FAMILY ASSETS
- [208] Taking into account the relatively short duration of the marriage, the fact that neither party brought a great deal into the marriage, and the fact that significant gifts were received from Catherine Sun and Charles Sun by Philip Sun and Ms. Wu during the marriage, I am satisfied that it would be inappropriate for the family assets to be divided on an even basis. Accordingly, I allocate what I have found to be family assets on the basis of approximately 55% to Philip Sun and approximately 45% to Ms. Wu.
- [209] The following assets of the marriage will be available to Ms. Wu: (a) proceeds from the sale of Drummond (\$3,062,833.31 as at October 2006, plus any accumulated interest on the net sale proceeds from Drummond that were deposited with Messrs. Chen & Leung, with the amount in trust to be paid to Ms. Wu no later than August 14, 2009); (b) clear title to West 40th (valued at approximately \$1,000,000.00); (c) the balance that was available to Ms. Wu in her RRSP (approximately \$19,000.000); (d) the attributed value of furnishings retained by Ms. Wu after Drummond was sold (\$204,610.00); (e) the Mercedes vehicle of Ms. Wu (approximately \$10,000.00); and (f) the travel points available to her (having an unknown value).
- [210] The family assets that will be available to Philip Sun are as follows: (a) his share of the furnishings removed from Drummond (\$1,841,490.00); (b) his interest in the 1989 Jaguar (valued at approximately \$10,000.00); (c) his memberships at various clubs, including Marine Drive Golf Club (unknown value); (d) his interest in the various Sun Family Companies and the bank and credit union accounts maintained on behalf of those Companies (which I have found to be \$1,671,620.50); (e) other assets by virtue of my determination that assets of equal value have not been disclosed by Philip Sun (\$1,671,620.00); (f) the travel points that he had accumulated as at November 28, 2003 (having an unknown value); and (g) his ordered interest in the Arbutus Club (having an unknown value).
- [211] In accordance with the principle established in Laxton, *supra*, the allocation of \$1,671,620.50 relating to undisclosed assets does not amount to reapportionment but, rather, to what must be allocated to Philip Sun by virtue of his non-disclosure of assets and the assumption that there were assets of equal value available to Philip Sun. Regarding the \$1,671,620.50 available to Philip Sun from the various Sun Family Companies, I arrive at this amount based on the remaining unsold units in Surlang, as well as the fact that the Vancity indebtedness relating to the Sun Family Companies was paid in full by May 4, 2004, and that

any personal indebtedness owing by Philip Sun was satisfied no later than December 31, 2004. (H) DEBTS OF THE PARTIES

[212] The indebtedness of Philip Sun is variously described. In his 2006 sworn Financial Statement, Philip Sun describes his debt under this Visa account to be \$30,000.00. He also includes "Debts to parents for living expenses and support payments". He also describes a debt to his parents of \$5,000,000.00. The debts of Ms. Wu include legal fees that she owes, credit card debts, and debts owing to relatives and friends who have supported her since 2003. In the circumstances, I am satisfied that the debts presently owing by the parties to others should be borne by them and not by each other. (I) INCOME OF PHILIP SUN FOR CHILD SUPPORT PURPOSES

[213] The income tax returns for Philip Sun were in evidence showing the following employment income before deductions: \$16,377.79 (1990); \$9,107.53 (1991); and \$9,105.47 (1992). Revenue Canada reported that Philip Sun had total earnings of \$11,589 (1993); nil (1995); nil (1996); nil (1997); nil (1998); nil (1999); nil (2000). The Notice of Assessment of Philip Sun for the tax year 2000 indicates no net or taxable income. Philip Sun received a notice from C.C.R.A. for the 2003 taxation year that no "T-4 type information return in your name" had been received.

[214] Ms. Wu and Philip Sun lived a lavish lifestyle which included a number of golf club memberships, a number of social club memberships, a membership at the Arbutus Club, expensive entertaining, and unlimited access to hundreds of thousands of dollars from various companies. For Philip Sun to report that he had virtually no income for 1995 through 2001 is ludicrous. In addition to lavish expenditures, Philip Sun was providing Ms. Wu with substantial monies on a monthly basis, and had considerable fixed monthly expenses which could not have been covered by the type of income that he was reporting.

[215] Under cross-examination, Ms. Wu testified that Philip Sun was "very generous and easy with cash" and that he had stated to her that he got the cash from Hastings Golf. At Trial, Philip Sun stated that he did not tell Ms. Wu what procedure he had used for withdrawing cash. Philip Sun was asked whether he received a salary from his employment at Hastings Golf for the 1996, 1997 and 1999 tax years, and he testified "no".

[216] By combining the cash and other income that was available to him from the various companies with the capital withdrawals from a number of companies, I can conclude that the income available to Philip Sun for much of the late 1990s and until 2001 was in excess of \$30,000.00 per month. I can also conclude that the cash and capital from a number of companies was readily available to Philip Sun to be used for family expenses.

[217] It is more difficult to reach a similar conclusion regarding his income for the years since 2001, when he left for Hong Kong. The Hong Kong income tax returns of Philip Sun were in evidence indicating for the 2001/2002 year self-income of 286,000 Hong Kong Dollars and tax payable of 840 Hong Kong Dollars. The Notice of Assessment for 2002-2003 indicated self-income of 264,000 Hong Kong Dollars and a net provisional tax of 560 Hong Kong

Dollars. At his January 30, 2004 Examination for Discovery, Philip Sun stated that he was receiving 20,000 Hong Kong dollars a month up until the end of June 2003 when his father's restaurant closed down. When asked what he was doing for income since then, he stated: "Nothing. My father's supporting me."

- [218] At Trial, Philip Sun stated that he had been unemployed since June 2003 and was not receiving a paycheque since the Hong Kong restaurant of his father closed. He stated his expenses as outlined in his sworn Financial Statement were being paid by his father, he was living in an apartment owned by his father, he was not paying rent, he does not own a car so his transportation is by public transit. Philip Sun testified that he had to work in China for his father "for the foreseeable future" because his father had been providing support for him and his family and "that's my way of paying him back".
- [219] Philip Sun has sworn three Financial Statements in these proceedings. The expenses claimed can be summarized as follows: STATEMENT SWORN JAN. 19, 2004 STATEMENT SWORN OCT. 14, 2005 STATEMENT SWORN OCT. 16, 2006 Housing Philip Sun's housing in Hong Kong(shared with brother) \$1,000.00 Rent or mortgage Market Rental Value \$1,000.00 Property taxes ? Property insurance ? Water, sewer, garbage ? Strata fees \$100.00 House repairs and maintenance Other (specify) Plaintiff's housing in Vancouver \$3,000.00 Market Rental Value Mortgage payments \$2,300.00 Property taxes \$316.00 Property insurance Water, sewer, garbage Strata fees \$710.00 House repairs and maintenance Other (specify Sub-total \$100.00 \$4,000.00 \$4,326.00 Utilities Heat and electricity \$200.00 Telephone \$100.00 Cable TV \$50.00 Other (specify), e.g. internet connection \$50.00 Philip Sun's utilities in Hong Kong Heat and electricity \$250.00 \$250.00 Telephone * \$50.00 * \$50.00 Cable TV * \$50.00 * \$50.00 Other: internet connection * \$50.00 * \$50.00 Plaintiff's utilities in Vancouver Heat and electricity \$100.00 \$100.00 Telephone \$250.00 \$250.00 Cable TV \$100.00 \$100.00 Other (specify), e.g. internet connection Sub-total \$400.00 \$850.00 \$850.00 Household expenses Food \$600.00 * \$100.00 * \$100.00 Household supplies * \$100.00 * \$100.00 Meals outside the home (included in "food")- provided at the family's restaurant Furnishings and equipment Other (specify) Sub-total \$600.00 \$200.00 \$200.00 Transportation Public transit, taxis-Transportation in Hong Kong, China and Vancouver \$100.00 * \$200.00 * Gas and oil * Car insurance and licence * Parking * Repairs and maintenance rental * All of the above \$300.00 Lease payments Other (specify) Sub-total \$100.00 \$200.00 \$300.00 Other Charitable donations Vacation Pet care Newspapers, publications Other (specify)Non-resident Golf Club dues * \$150.00 * \$150.00 Sub-total \$0.00 \$150.00 \$150.00 Health MSP premiums \$108.00 \$108.00 Extended health premiums Dental plan premiums Health care (net of coverage) Drugs (net of coverage)(high blood pressure medication) \$20.00 * \$50.00 * \$50.00 Dental care (net of coverage) Other (specify)cigarettes * \$30.00 * \$30.00 Sub-total \$20.00 \$188.00 \$188.00 Personal Clothing(large size clothing made to order in Vancouver which is not available in Asia) \$200.00 \$200.00 Clothing purchased in Asia * \$100.00 * \$100.00 Hair care \$50.00 * \$20.00 * \$20.00 Toiletries cosmetics * \$50.00 * \$50.00 Education (specify) Life insurance Dry cleaning/ laundry ? * \$50.00 * \$50.00 Entertainment/ recreation- including personal business development entertainment \$100.00 * \$500.00 * \$100.00 Gifts Other

(specify) tobacco \$30.00 Sub-total \$180.00 \$920.00 \$520.00 Children Child care Clothing * \$100.00 * \$100.00 Hair care School fees and supplies \$800.00 \$800.00 Entertainment/ Recreation(golf) \$50.00 * \$50.00 Activities and lessons golf lessons \$50.00 Gifts * \$100.00 Insurance Other (specify) counselling- Arbutus Club charges, extracurricular activities, access expenses, etc. \$1,000.00 \$1,500.00 Hollyburn Family Services (supervised access) \$500.00 Dr. Elterman's fees for s.15 report unknown Sub-total \$0.00 \$2,150.00 \$3,000.00 Savings RRSP RESP Other (specify) Sub-total \$0.00 \$0.00 \$0.00 Support payments to others (specify) Spousal & child support-Support payments \$6,000.00 \$2,000.00 \$2,000.00 Sub-total \$6,000.00 \$2,000.00 \$2,000.00 Debt payments (specify) Sub-total \$0.00 \$0.00 \$0.00 TOTAL MONTHLY EXPENSES \$7,400.00 \$10,658.00 \$11,534.00 TOTAL ANNUAL EXPENSES \$88,800.00 \$127,896.00 \$138,408.00

- [220] The October 14, 2005 sworn Financial Statement ("2005 Financial Statement") contained the following statement: My parents cover all of the above-listed expenses for me in Hong Kong and certain expenses for the Plaintiff and [our son] in Vancouver as shown here. Between spring 2001 and June 2003 I worked for my father at his restaurant in Hong Kong. That restaurant closed in June 2003 due to poor economic conditions and the SARS epidemic. Until that date I was receiving a salary from the restaurant and I filed income tax returns. Since June 2003 I have been supported by my parents. I live in an apartment that is owned by them, they cover my other living expenses. Although the \$2,000.00 a month support payments to the Plaintiff are made by me, the funds come from my parents. I am working at my father's restaurant in China at this time. I perform mostly managerial duties. I do not receive a salary. I am also involved in trying to develop speculative investment/business opportunities in China. At this time I do not have an income to support the Plaintiff and [our son]. My expenses and those of the Plaintiff as shown here are paid by my parents. When I stated earlier in this Financial Statement that my income is approximately \$125,000.00, this is my estimate of my parents' contribution to my personal living expenses and those of the Plaintiff, including our accommodations, utilities, private school fees, etc. My parents provide me with a monthly allowance of HK\$10,000.00, or CDN\$1,800, per month. Out of this sum I cover my personal expenses that are marked with an (*) in Part 2: Expenses.
- [221] On his list of assets in the 2005 Financial Statement, Philip Sun lists the following having a "nil" value: Yao Tsai Company Limited (10% interest) and "Speculative investment/business ventures in China". As part of his "Unsecured Debt Particulars" he lists \$5 million as "Debt to parents, approximately", \$18,000 for his Royal Bank Visa account, and as "on-going" for his "Debt to parents for living expenses and support payments."
- [222] The October 16, 2006 sworn Financial Statement contains a similar statement as was contained in the 2005 Financial Statement. His total income is said to be "Approximately \$125,000" with the same notation as to the source of income as was set out in the 2005 Financial Statement. The "Total Annual Expenses" are noted as being \$138,408. Included within the "Unsecured Debt Particulars" is \$30,000 for his Royal Bank Visa account.

- [223] When asked at his Examination for Discovery what efforts he has made to find employment, Philip Sun stated: "What efforts? I'm working about 12 hours a day seeking for opportunity." "Through friends, clients, past friends, past clients, family friends, family clients." However, he confirmed that he had not made any applications for employment. When asked why he hadn't applied for a job he stated: "Because I don't - I just haven't." Asked how he intended to support his family, he stated: "My father's been doing that fine so far." As to whether he would expect his father would continue to support his family, Philip Sun stated: "I don't know what to expect from my father."
- [224] Philip Sun was asked by his counsel whether he had looked for other work since 2000 and he stated: "not - not in any particular way. I thought there was work on the prospect that I mentioned in the - outside of Shanghai, but that was not - that did not become fruitful." Under cross-examination, Philip Sun was asked what efforts he had made to find employment after the close of the restaurant in Hong Kong in 2003 and he stated: "I did not - well, I don't recall making any effort. Or if I did, it wouldn't be very hard after the Hong Kong [restaurant] closed." He was asked whether he made any efforts through third parties and he stated: "no" "simply because what my capability of earning to what my father is being provided to me to support my - [son] and Tania [Wu] and myself is more than ever - than I will ever earn in my own power". Philip Sun was also asked to explain his statement at his Examination for Discovery that he was working 12 hours a day seeking for opportunities, and he responded: "they [friends, clients, past friends, past clients, family friends, family clients] are people that come to the restaurant and I seek". "I talk to them and I - you know, if there was an opportunity I'll seek it out."
- [225] Charles Sun stated that he had "a big investment in China", that he had four managers in his company, and that Philip was "just one of them". Regarding the present employment of Philip Sun in the restaurant in China, Charles Sun stated: "He had no salary. I just paid him personally you know, paid his - pay for his expenses." He stated that Philip Sun was receiving payments of around 20,000 Hong Kong Dollars a month. He also states that, after his living expenses, his plane ticket back and forth, his board and room expenses in Hong Kong, and the amount provided was only his "pocket money".
- [226] I find that Philip Sun has made no efforts to seek employment or income independent of his father since he left Canada for Hong Kong in 2001. In addition to finding that Philip Sun has made no effort to seek employment and that his only income is the monthly allowance provided by his father, I am also satisfied that the income provided by his father is artificially set in accordance with the desire of Charles Sun to limit the amount of spousal and child support that is being paid by Philip Sun. I am satisfied that is not coincidental that the amount that Charles Sun was prepared to provide to Philip Sun is exactly equal to the income that produces the Guideline Income to justify the amount that Philip Sun is prepared to pay for child and spousal support (\$2,000.00 a month plus the payment of other expenses).

- [227] While it is the submission of Ms. Wu that child support should be payable at the rate of \$7,932.00 per month on the basis of an attributed income for Philip Sun of \$1,000,000.00 per year, I can make no such finding. The income I attribute to Philip Sun is in accordance with the findings that I make regarding the monthly expenditures prior to Philip Sun leaving Canada. I find those expenditures to be \$25,000.00 per month made up of about \$4,000.00 paid by Philip Sun directly to Ms. Wu for miscellaneous household expenses, and other expenses being paid by Philip Sun. For purposes of the child support Guidelines, I attribute income to Philip Sun of \$300,000.00.
- [228] Even if I am found to be incorrect in attributing that income to Philip Sun based on his past income and expenditures, I am satisfied that the amount being paid by Philip Sun for various Canadian expenses being incurred by Ms. Wu and their son, plus the amount that is being provided to Philip Sun by his father on a monthly basis produces an attributed amount close to that amount. There was evidence that Philip Sun was receiving the equivalent of \$120,000.00 from Charles Sun. Because that amount is not subject to income tax, I find that the \$120,000.00 is roughly equivalent to \$190,000.00. Over and above that, other amounts being advanced to Philip Sun in order that he can pay other support and extraordinary expenses allow me to conclude that the \$300,000.00 income I attribute to Philip Sun is appropriate. I also come to this conclusion based on the inadequate production of the necessary documentation which would accurately set out what income has been available to Philip Sun since he re-located in Hong Kong and China.
- [229] For child support purposes, the income I attribute to him will require a monthly payment by him for child support of \$2,500.00 (Canadian funds), exclusive of extraordinary expenses and amounts payable relating to the Arbutus Club. I order that Philip Sun provide a series of post-dated cheques for \$2,500.00 payable to Ms. Wu with the first of twelve cheques to be dated July 1, 2009 and on the first day of each and every month thereafter. In order that, before March 1 each year, Philip Sun will provide a series of twelve post-dated cheques payable to Ms. Wu for \$2,500.00.
- [230] On the issue of whether there should be an order requiring Philip Sun to pay child support on a retroactive basis, I am satisfied that such an order should be made but only back to November, 2007. This is the date when the Trial of this matter concluded. I order that child support of \$2,500.00 per month from December 1, 2007 be paid. I order that Philip Sun pay to Ms. Wu the sum of \$47,500.00 in payment of the monthly child support that should have been paid from December 1, 2007 to and including June 30, 2009. Ms. Wu will also be entitled to interest at the rate established by the Registrar of the Court on each payment of \$2,500.00 from the date when such a payment should have been paid to and including June 30, 2009. Those sums are to be paid by Philip Sun by August 14, 2009. (J) INCOME OF MS. WU
- [231] In September, 1997, the Bank called Ms. Wu to see whether she would be interested in a part-time position in her former position as Regulatory Reporting Officer in the Controller's Department. After initial fears about approaching Philip Sun regarding this part-time

employment, Ms. Wu approached him. Ms. Wu described what occurred in her July 9, 2003 Affidavit: When I approached the Defendant about the part-time position, the Defendant flew into a rage screaming and shouting at me and cursing me. I explained to the Defendant that I needed to do this for my self-confidence and that I promised that the household management and taking care of [their son] would not be affected by my working part-time. The Defendant did not support my decision and he ignored me for many weeks after I started working part time. Even after I continued with my part time work, over a long period of time, the Defendant would constantly belittle my job and scream and yell and curse at me for working. He would berate me and scold me saying that my job was low ranking, useless and low-paying. The Defendant knows nothing about my position or what I do. My schedule was 4 days a week for 4 hours a day. I worked part time up until 1999 when I stopped because [our son's] school kept calling me at to pick [him up] right away because of behavioural issues.

- [232] Ms. Wu has not had outside income since 1999. While Ms. Wu is capable of earning income, she has made absolutely no effort to resume employment since 2003. Ms. Wu has done absolutely nothing to fulfill her obligation to become self-sufficient. It is past time when Ms. Wu should be looking to become employed again. She has a first-class education and valuable job skills. It is now time for her to seek full-time employment. I find that her previous full-time income to be \$30,000.00 (Canadian funds). For Guideline purposes, I attribute income of \$30,000.00 per year to Ms. Wu. (K) EXTRAORDINARY EXPENSES
- [233] By an August 6, 2003 Consent Order ("Consent Order"), Philip Sun on a without prejudice basis was to continue to pay the following ongoing extraordinary expenses: (a) tuition and school supplies for their child's private school; (b) private piano lessons at home and at the Academy of Music; (c) tutors for school; (d) counselling sessions with the child's psychologist; (e) all lesson fees and costs for extra-curricular sports activities and equipment for skiing, skating, tennis, golf, soccer and swimming; (f) summer camp; (g) dentist; (h) Medicare and extended health premiums; (i) child care and nanny expenses; and (j) family membership at the Arbutus Club. (I) Amounts Being Paid
- [234] In his January 19, 2004 sworn Financial Statement, Philip Sun lists the following annual and monthly extraordinary expenses totalling \$2,863.00 per month for their son: Annual Monthly Medical/dental insurance premiums attributable to child (MSP and Blue Cross) \$113.00 Health related expenses (over \$100) dentist and other expenses \$50.00 Extraordinary expenses for primary or secondary school (private school) \$700.00 Extraordinary extracurricular expenses (list) Soccer & Hockey \$600.00 Golf \$100.00 Piano lessons, tutors \$400.00 Vancouver Academy of Music \$400.00 Arbutus Club \$500.00 TOTAL MONTHLY EXPENSE: \$2,263.00 TOTAL YEARLY EXPENSE \$27,756.00

- [235] There is a long history of Philip Sun not paying the extraordinary expenses relating to the extracurricular activities of their son, his tuition fees, the MSP payments, payments for a nanny, etc. In evidence is numerous correspondence between the various solicitors for Ms. Wu and the solicitor for Philip Sun relating to the Consent Order and the failure of Philip Sun to pay as scheduled or at all.
- [236] It is also clear that Philip Sun has attempted to avoid expenditures which are absolutely necessary. For instances, their son required significant and urgent dental work. Despite the fact that the child's dentist had been the dentist for the child since birth, Philip Sun confirmed under cross-examination that he had not contacted the dentist because: "I would like a second opinion". However, Philip Sun had not taken any steps to get a second opinion: "no, I haven't had a chance to take [their son] to see a dentist yet".
- [237] Excluding the cost of maintaining a family membership at the Arbutus Club, I set the monthly extraordinary expenses relating to the son of the parties at \$1,500.00 per month. That amount is to be shared on the basis of \$1,365.00 per month (91%) by Philip Sun and \$135.00 per month ((9%) by Ms. Wu. Taking into account my review of the sworn Financial Statements of the parties as well as the actual expenditures for the last 4-5 years, I am satisfied that this amount will satisfy the anticipated annual extraordinary expenses relating to their son. I order that Philip Sun provide a series of post-dated cheques for \$1,365.00 payable to Ms. Wu with the first of 12 cheques to be dated July 1, 2009 and on the first day of each and every month thereafter. On or before March 1 each year, Philip Sun will provide a series of 12 post-dated cheques for that amount payable to Ms. Wu.
- [238] I order this amount as an extraordinary expense despite the fact that many of these expenses would not be considered as extraordinary for parties having a combined income of \$330,000.00. I am satisfied that this order is appropriate in the circumstances by virtue of the fact the combined amount ordered for child support and extraordinary expenses approximates the amount that was being paid by Philip Sun since he left Canada. (II) Arbutus Club
- [239] The use of the Arbutus Club has been a continued irritation between the parties. For their son, there are charges for hockey school, private tennis lessons, private swim lessons, private skating lessons, and various other "Youth Room", "Gymnastics", and "Recreation" programs. While Philip Sun is prepared to support the use of the Club for the activities for his son, he objected to the extensive use of the Club by Ms. Wu at his expense.
- [240] The monthly balances owing have been forwarded to Philip Sun for payment. From time to time, Philip Sun allowed the charges for the Club to be paid by way of a preauthorized payment out of a bank account he maintained. The payment of balances owing to the Arbutus Club has been in arrears on many occasions, and membership privileges have been suspended at least twice. By December, 2005, the arrears owing were \$12,135.98 for what had been charged to the Club during 2005.

- [241] It is clear that Ms. Wu was using the Club extensively and was expecting that Philip Sun would pay for her use of the Club. For instance, there were many weeks where Ms. Wu used the restaurant facilities at the Club on an almost daily basis. As well, there are a number of charges for "Personal Training", "Childminding", "Supervised Child Care", "Massage", "Tanya Sun Pick Up Order", "Women's Basement Locker" and "Spa at Arbutus" for the period January, 2003 through September 2006. Some of the use of the Arbutus Club by Ms. Wu is understandable in view of the fact that Philip Sun has not been providing adequate spousal support.
- [242] The analysis presented on behalf of Philip Sun indicates expenditures as follows: Programs for their son Meal Expenses for their son Food Expense for Ms. Wu Child Care Massage Spa Total 2003 \$1,560.29 \$283.40 \$3,147.36 \$222.77 \$268.85 \$8,425.04 2004 \$3,176.79 \$172.43 \$4,413.77 \$156.15 \$837.55 \$12,031.10 2005 \$4,865.30 \$ 49.96 \$4,096.65 \$ 43.70 \$ 45.00 \$12,155.98 2006 (to September) \$3,954.13 \$ 7.88 \$1,528.53 -- \$107.00 \$8,192.30
- [243] The membership in the Arbutus Club is a family asset. As a result of an October 15, 2008 Order, the family membership was divided into two separate individual memberships, and the rights and privileges of membership extended to children was assigned to the new separate membership account of Philip Sun. Philip Sun will continue to allow their son to use his account for charges relating to hockey school, tennis lessons, swim lessons, skating lessons, use of the "Youth Room", other recreational and athletic programs, and restaurant expenses. Ms. Wu will be entitled to select the activities and programs of their son at the Arbutus Club. So that it is clear that their son will not be using the restaurant facilities in the Club to pay for the meals of Ms. Wu, the restaurant and food charges of their son in any one month are not to exceed \$150.00.
- [244] It was the submission of both parties that a set figure for monthly Club expenses should be established. Philip Sun submitted that \$500 should be the limit whereas Ms. Wu submitted that \$1,100 should be the limit. Miscellaneous and meal expense relating to their son have amounted to expenditures on average of about \$450.00 per month. That figure does not reflect expenses such as tennis and swimming lessons or camp expenses. The difficulty with setting a monthly maximum is that some months will require additional expenditures, whereas some months will require less than any maximum set.
- [245] I do not want to place the son of the parties in a position to have to justify expenditures or to deal with either parent regarding the question of whether what he is charging to his father's account are charges that should more appropriately be charged to his mother's account. Nor do I wish to put the parties to the expense of having to come back to Court to determine whether what has been charged to the account in the name of Philip Sun should properly have been charged to the account in the name of Ms. Wu.
- [246] In order that the reasonable expenses of their son at the Arbutus Club can be paid on a regular basis by Philip Sun, I order that Philip Sun provide the Arbutus Club with monthly post-dated cheques of \$650.00 each to pay for the activities of their son at the Club. I order

this sum to be paid as I am satisfied that it has been necessary for Ms. Wu to artificially reduce the expenditures at the Arbutus Club by virtue of the failure of Philip Sun to pay adequate spousal and child support and extraordinary expenses. The \$650.00 per month will cover the anticipated expenses of their son. This amount will not be available to Philip Sun to satisfy any charges that he incurs at the Arbutus Club with those charges to be paid directly by him. This amount will not cover any membership expenses associated with this account. Ms. Wu will not be in a position to use the account of Philip Sun to charge anything to the Arbutus Club. At the same, their son must refrain from charging to his father's account what his mother should be charged to her account.

- [247] At one point in the proceedings, Philip Sun offered to pay 100% of the account at the Arbutus Club. He later reneged on that offer. Despite the combined income that I have attributed to Philip Sun and Ms. Wu, I am satisfied that their son's expenses at the Arbutus Club should be treated as an extraordinary expense.
- [248] While Ms. Wu will be at liberty to apply to the Court for an order that other expenses should be treated as extraordinary expenses, I would not anticipate such an application. However, if extraordinary expenses are subsequently ordered, those extraordinary expenses other than the Arbutus Club will be shared on a 91% basis by Philip Sun and a 9% basis by Ms. Wu.
- [249] On the issue of whether there should be an order requiring Philip Sun to pay extraordinary expenses on a retroactive basis, it was clear that the August 6, 2003 Consent Order would require Philip Sun to pay the sum of \$6,000.00 per month to Ms. Wu for child support and spousal support but exclusive of extraordinary expenses, and that this sum was payable only for a period "not exceeding 4 months from the date of the August 6, 2003 Order." Inexplicably, no application was made on behalf of Ms. Wu after Philip Sun, unilaterally and at the insistence of his father, reduced the amount payable to \$2,000.00 per month.
- [250] I am satisfied that a retroactive order for extraordinary expenses should be made. However, I am satisfied that such an order should only be made back to November, 2007 which is the date when the Trial of this matter concluded. I order that extraordinary expenses of \$1,350.00 per month from December 1, 2007 be paid. I order that Philip Sun pay to Ms. Wu the sum of \$25,935.00 in payment of the \$1,350.00 monthly extraordinary expenses to and including June 30, 2009. Ms. Wu will also be entitled to interest at the rate established by the Registrar of the Court on each payment of \$1,350.00 from the date when such a payment should have been paid to and including June 30, 2009. Those sums are to be paid by Philip Sun by August 14, 2009. If the parties cannot agree regarding the amount to be paid, they will be at liberty to apply for directions. (L) SPOUSAL SUPPORT
- [251] Pursuant to the Consent Order, Philip Sun made payments of \$6,000.00 to February, 2004 and then subsequent payments of \$2,000.00. At Trial, Philip Sun stated that he paid \$6,000.00 initially but that: "subsequently I reviewed the expenses with my father, and after a discussion the since the - all the other expenses are covered at the moment, or mostly

covered at the moment, we come to the conclusion that \$2,000 is more - is - is paid". Under cross-examination, Philip Sun was asked whether the \$2,000.00 amount was a sum that was set without the agreement of Ms. Wu and he answered: "Without a court consent or whatever, yes." He also stated: "I believe \$2,000.00 was reasonable - after all the other charges that I've covered."

- [252] By the Consent Order, the Certificate of Pending Litigation was removed from the title to Drummond and the net sale proceeds were held in trust. Some of the net sale proceeds were used to purchase an apartment on 40th Avenue in Vancouver ("West 40th"), where Ms. Wu and their son continue to reside. On a "without prejudice basis", the Plaintiff agreed to vacate Drummond by August 14, 2003 and was "forthwith entitled to reside and have exclusive occupancy of the furnished Kerrisdale Apartment".
- [253] Philip Sun was also to pay the following expenses on a without prejudice basis relating to West 40th: (a) all utilities including heat, electricity, telephone, cable and internet; (b) property taxes; (c) home insurance; (d) home maintenance - necessary repairs; (e) strata fees; and (f) security system and monitoring fee. Philip Sun was also to pay the following on a without prejudice basis for the benefit of Ms. Wu: (a) Medicare and extended health premiums; (b) expenses related to routine visits to the dentist; (c) car insurance; (d) expenses related to routine maintenance of her vehicle; and (e) any other major repair work to her vehicle or dental treatments as may be agreed to by him on prior notice. Expenses relating to West 40th and the personal expenses of Ms. Wu were all to be paid for a period not exceeding four months: "... pending disposition of this matter in Court, by further agreement of the parties, or until further order of this Court".
- [254] The \$2,000.00 per month plus the payment of other expenses was woefully inadequate to support the lifestyle previously enjoyed by Philip Sun and Ms. Wu. Ms. Wu has sworn three Financial Statements in these proceedings. Regarding the monthly expenses claimed by her, those expenses have ranged from \$23,929.00 to \$51,115.69 per month. The expenses claimed can be summarized as follows: STATEMENT SWORN DEC. 16, 2003 STATEMENT SWORN OCT. 31, 2005 STATEMENT SWORN OCT. 22, 2006 Housing Rent or mortgage *.00 Property taxes *.00 660.00 Property insurance *.00 300.00 Water, sewer, garbage *.00 Strata fees *.00 House repairs and maintenance *.00 580.00 Other: security system/monitoring fee - gardener *.00 400.00 Sub-total 0.00 1,940.00 Utilities *.00 Heat and electricity *.00 450.00 Telephone - cellular *.00 250.00 250.00 Cable TV *.00 100.00 Internet *.00 Other (specify) *.00 Sub-total 250.00 800.00 Household expenses Food 2,600.00 400.00 400.00 Household supplies .00 435.00 435.00 Meals outside the home 4,000.00 960.00 960.00 Furnishings and equipment .00 Other (specify) Cleaner 1,000.00 215.00 215.00 Sub-total 7,600.00 2,010.00 2,010.00 Transportation Public transit, taxis .00 26.00 26.00 Gas and oil 500.00 420.00 690.00 Car insurance and license *210.00 210.00 210.00 Parking 150.00 99.00 99.00 Repairs and maintenance rental *1,000.00 927.00 200.00 Lease payments *1,122.00 107.00 107.00 Other Car wash, detailing BCAA 388.00 187.00 187.00 Sub-total 3,370.00 1,976.00 1,519.00 Other Charitable donations .00 Vacation 7,500.00 1,170.00 1,170.00 Pet care .00 Newspapers,

publications *.00 61.00 61.00 Other (specify) .00 17.00 17.00 Sub-total 7,500.00 1,248.00
 1,248.00 Health MSP premiums *100.00 100.00 100.00 Extended health premiums *.00
 224.00 224.00 Dental plan premiums *.00 Health care (net of coverage) 833.00 389.00 389.00
 Drugs (net of coverage) .00 Dental care (net of coverage) *333.00 833.00 833.00 Other glasses
 & contacts 208.00 208.00 208.00 Physio, personal trainer 286.00 143.00 143.00 Sub-total
 1,760.00 1,897.00 1,897.00 Personal Clothing 2,000.00 1,997.00 1,997.00 Hair care 790.00
 790.00 790.00 Toiletries cosmetics, beauty salon 1,500.00 1,409.00 1,409.00 Education
 (specify) .00 Life insurance .00 Dry cleaning/ laundry 416.67 183.00 183.00 Entertainment/
 recreation 1,500.00 699.00 699.00 Gifts 1,000.00 200.00 200.00 Alcohol, tobacco .00 Other
 Cell phone Petty cash 250.00 300.00 300.00 Sub-total 7,456.67 5,578.00 5,578.00 Children:
 Weekday nanny *1,800.00 Child care Weekend nanny *1,400.00 Clothing (activities
 equipment) *2,066.67 539.00 539.00 Hair care 90.00 90.00 90.00 School fees* and supplies
 *916.00 916.00 916.00 Entertainment/ Recreation 1,000.00 1,257.00 1,257.00 Activities and
 lessons *4,050.00 5,123.00 5,123.00 Gifts-teachers, self 783.00 259.00 259.00 Arbutus Club
 and Quilchena *1,000.00 1,400.00 1,400.00 Other: Church donations Toiletries Dry cleaning
 433.34 129.00 69.00 129.00 69.00 Nanny agency fee *100.00 Sub-total 23,429.02 9,782.00
 9,782.00 Savings RRSP .00 RESP .00 Other (specify) .00 Sub-total .00 Support payments to
 others Specify .00 Sub-total .00 Debt payments Specify VISA and PLC .00 1,188.00 1,188.00
 *Payments to be made by Husband [Philip Sun] Sub-total .00 1,188.00 1,188.00 TOTAL
 MONTHLY EXPENSES 51,115.69 23,929.00 25,692.00 TOTAL ANNUAL EXPENSES 613,388.28
 287,148.00 311,544.00

- [255] Many of the monthly expenses estimated by Ms. Wu are not only totally unrealistic but also greatly exaggerated. For instance, it is inconceivable that she would be spending \$790.00 on her own "Hair care" or \$1,409.00 on her "Toiletries, cosmetics, beauty salon" each month or on average each month. It is also not believable that the monthly expenses for their son would include \$539.00 for "Clothing (activities equipment)", \$90.00 for "Hair care", \$5,123.00 for "Activities and lessons", or \$129.00 for "Toiletries". These are not anticipated monthly expenses for a very young boy. During cross-examination, Ms. Wu confirmed that she was not actually incurring expenses of \$40,000.00 per month, but that: "I just estimate based on previous experience".
- [256] Ms. Wu submits that a lump sum award of between \$9,000,000.00 and \$10,000,000.00 for child and spousal support should be made so that monthly payments for spousal support will not be required. As well, Ms. Wu submits that a new Mercedes vehicle, all proceeds from the sale of Drummond, West 40th where she and her son are now living, and \$1,500,000.00 for a new home should also be available instead of monthly payments for spousal support.

- [257] In the alternative, Ms. Wu submits that any spousal support awarded should be retroactive to July or August, 2003 and that it should be set at \$63,000 per month (\$756,000.00 per year). Ms. Wu seeks the base amount of support as being the average between her first and third sworn Financial Statements. As to the duration of spousal support, Ms. Wu submits that it should be "as long as possible".
- [258] While the Court in *Moge v. Moge*, [1992] 3 S.C.R. 813 stated that spouses should be placed in a position as close as possible to that enjoyed before the marriage breakdown, I am satisfied that this goal cannot be reached here. First, it is clear that the lavish lifestyle was not funded only by income. Second, I cannot conclude that the "need" of Ms. Wu includes a continuation of a lavish lifestyle previously experienced by her prior to separation. Third, I cannot conclude that compensatory support should be available. Fourth, I cannot conclude that the entire actual expenses for the household approached the \$63,000.00 per month that Ms. Wu is claiming. Rather, I find that the average monthly expenditures were in the neighbourhood of \$25,000.00. Fifth, at Trial and at her November 17, 2005 Examination for Discovery, Ms. Wu stated that she was not aware that she could be receiving child tax benefits or GST rebates. As she has not been filing income tax returns, it is also a case that she has not sought the return of monies that would have been withheld when her personal RRSP was collapsed in 2005. Unless Ms. Wu is being less than truthful with the Court in these regards, it is apparent to me that she is making no efforts to obtain funds that are available to her.
- [259] Taking into account all the factors relating to the question of the quantum of spousal support, I set spousal support in the amount of \$6,000.00 per month. I order that Philip Sun provide a series of post-dated cheques for that amount, payable to Ms. Wu, with the first twelve cheques to be payable on the first day of each and every month and the first cheque payable on July 1, 2009. On or before March 1 each year, Philip Sun will provide a series of twelve post-dated cheques for that amount payable to Ms. Wu.
- [260] Although a review of the Spousal Guidelines allows me to conclude that this amount is not within the recommended range: \$6,502.00 (Lower), \$7,315.00 (Middle) and \$8,133.00 (Upper), I remain satisfied that this is an appropriate amount to be paid.
- [261] As to the duration of that support, I take into account the fact that Ms. Wu is well educated, that the requirement that she drive their son to school every day has now been eliminated, that she has significant skills but has not attempted to find employment, and that she has significant assets. The monthly amount payable will be reviewable on application by either party after July 1, 2011. I will not be seized of any such application.
- [262] On the question of whether spousal support should be retroactive, I am satisfied that there should be retroactive spousal support to December 1, 2007 when the Trial of this matter concluded. If no support had been paid by Philip Sun to Ms. Wu, I would order that Philip Sun pay to Ms. Wu the sum of \$114,000.00 in payment of the \$6,000.00 monthly spousal support payments that should have been made from December 1, 2007 to and including

June 30, 2009. However, Philip Sun has paid \$2,000.00 most months, as well as the payment of other expenses.

[263] Rather than put the parties to the expense of attempting to ascertain what was paid in total so that this amount could then be subtracted from the amounts payable for child support, extraordinary expenses, and spousal support, I order that \$3,000.00 per month or \$57,000.00 in total be paid by Philip Sun to Ms. Wu by August 1, 2009. The payment of this amount takes into account the payments made for child and spousal support, the extraordinary expenses paid, and my attempt to ascertain what was being paid on a monthly basis, albeit constrained by the failure of Philip Sun to provide his bank statements and other financial records to show what was being paid since November, 2003. The sum of \$57,000.00 will be payable without interest at the rate established by the Registrar. (M) COSTS

[264] As I am advised that the provisions of Rule 37B of the Rules of Court apply no order is made as to costs. The parties will be at liberty to apply. — "Burnyeat J" — The Honourable Mr. Justice Burnyeat

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Prepared on 29 October 2026 · Esheria