IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Phaneuf v. 0896459 B.C. Ltd.,*
2025 BCSC 1509

Date: 20250807
Docket: S215588
Registry: Vancouver

Between:

Norman Phaneuf and Bradley Phaneuf

Plaintiffs

And

0896459 B.C. Ltd., Fremont Developments Ltd. and Vern Phaneuf

Defendants

And

BPYA 1286 Holdings Ltd., WCIL Investments Ltd., Irene Phaneuf, and Terry Phaneuf

Defendants by Counterclaim

Before: The Honourable Justice Basran

Reasons for Judgment

Counsel for Norman Phaneuf, Bradley Phaneuf, and WCIL Investments Ltd.:	T.M. Cohen, K.C. C.R. Phillips T. Murphy, Articled Student
Counsel for Vern Phaneuf:	R.W. Cooper, K.C. S. Ibrahim
No other appearances	
Place and Dates of Trial:	Vancouver, B.C. January 27–31 February 3–7, 10–12, 2025
Place and Date of Judgment:	Vancouver, B.C. August 7, 2025

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Introduction

[1] In this dispute among siblings, the evidence at trial reveals that Vern Phaneuf, the principal defendant, is dishonest, entitled, ungrateful, and jealous. He also maintains a puzzling and entirely unsubstantiated superiority complex that drove him to pointlessly prolong this largely unnecessary litigation. In sharp contrast, Norman Phaneuf and Bradley Phaneuf, the plaintiffs, and their sister, Elaine Spencer, provided forthright, coherent, and logical testimony regarding the matters in issue.

[2] For clarity, and intending no disrespect, throughout these reasons for judgment, I will refer to the members of the Phaneuf family by their first names.

[3] Norman and Bradley brought this action to rectify an obvious, corporate, and mutual mistake in the articles of incorporation of two companies, 0896459 B.C. Ltd. (“089“) and Fremont Developments Ltd. (“Fremont Developments”) (together, “the Companies”). Vern resists this rectification.

[4] Each of the Companies respectively owns and operates an A&W franchise. These franchises were established and are run by Norman and Bradley. At the establishment of the Companies, Norman and Bradley decided that each of them would retain a 40% interest in the Companies in the form of Class A shares, and would provide each of their two brothers, Vern and Terry, with a 10% interest in the form of Class B shares.

[5] The articles, which were drafted by Vern, mistakenly refer to the Companies’ Class A shares as “non-participating”, meaning that Norman and Bradley, as holders of these shares, are not entitled to the payment of dividends or to share in the proceeds of the distribution of assets if the Companies were liquidated, dissolved, or wound up. The Companies’ Class B shares are identified as “participating”.

[6] The consequence of this error, if allowed to stand, is that Vern and Terry would be entitled to receive 100% of the profit which was created by Norman’s and Bradley’s successful entrepreneurial efforts.

[7] This matter should have been resolved long ago via a straightforward rectification by consent. Instead, Vern has tried to leverage a simple and obvious mistake in the articles of the Companies both to obtain an entirely unearned and undeserved share of the hard-earned successes of Norman and Bradley, and to litigate longstanding grievances against Norman, Bradley, their mother, Irene, and other family members.

[8] Based on both statutory and equitable grounds, I am entirely satisfied that the Companies' articles of incorporation ought to be rectified to recognize that the Class A shares are participating and, consequently, that Norman, Bradley, Vern, and Terry, respectively hold a 40%, 40%, 10%, and 10% interest in the participating share equity of the Companies.

[9] This finding is largely based on my acceptance of the evidence provided by Norman, Bradley, and their sister, Elaine, coupled with my outright rejection of Vern's evidence. As described in detail below, my findings are also consistent with both documentary records and commercial common sense.

Factual Background

The Phaneuf Siblings' Move to BC

[10] The Phaneuf family consists of six siblings, Norman, Bradley, Vern, Terry, Elaine, and Vivian, born to parents Irene and Edmour Phaneuf in Saskatchewan. Unfortunately, Terry passed away on November 15, 2024, while the litigation was ongoing. Vivian is not involved in this matter.

[11] Norman moved to BC from Saskatchewan in about 1986 or 1987 to open his first franchise restaurant with A&W Food Services of Canada Inc. ("A&W"). He opened his first A&W restaurant in 1987 in East Maple Ridge, BC (the "East Maple Ridge A&W") with his mother, Irene. Terry assisted with opening the franchise including by providing loans. At that time, the East Maple Ridge A&W was owned by 316839 B.C. Ltd. ("316"), a company in which Norman and Irene each held 50% of the issued and outstanding shares.

[12] In 1992, Norman and Irene opened a second franchise located in Maple Ridge at the Haney Place Mall (the “Haney Place Mall A&W”). The Haney Place Mall A&W was also initially held by 316.

[13] Bradley graduated from high school in 1993 and moved to BC from Saskatchewan in 1994. He began managing the day-to-day operations of both the East Maple Ridge A&W and the Haney Place Mall A&W. He was not a shareholder of 316 and, at that time, was not entitled to profits in relation to the first two franchises.

[14] Norman and Bradley finished high school but did not obtain any post-secondary education. Vern holds a Bachelor of Commerce degree, and he became a certified public accountant (“CPA”) in 1992. He moved to BC in 1996, after beginning an accounting career in Saskatchewan.

[15] Shortly after Vern arrived in BC, the parties opened a third A&W franchise located in West Maple Ridge (the “West Maple Ridge A&W”). The West Maple Ridge A&W was operated by BPYA 1286 Holdings Ltd. (“BPYA”). Vern was a 50% owner of BPYA, the other shareholders included Norman and their father, Edmour. The West Maple Ridge A&W location closed when its lease expired.

[16] Between May 1997 to September 1999, Vern spent most of his time working on a development project in Prince Albert, Saskatchewan.

[17] In 1999, Vern began working as an investment advisor at Merrill Lynch, later acquired by CIBC Wood Gundy, where he continues to work today.

[18] In 2005, Bradley acquired 20% of the shares of West Coast Investments Ltd., a Saskatchewan company, which later became the parent company of 316. At that time, Norman and Irene held the remaining 80% of shares in West Coast Investments Ltd., equally.

The A&W Franchise Expansion Opportunity

[19] In 2010, A&W offered Norman and Bradley an opportunity to enter into a multi-site development agreement ("MSDA"), pursuant to which up to three restaurants could be opened in a specific geographical area. Norman and Bradley offered both Vern and Terry a 10% interest in the MSDA, with the understanding that Norman and Bradley would each retain a 40% interest in this franchise expansion opportunity.

[20] Norman and Bradley essentially made the offers of 10% as gifts and in recognition of past services as Vern had provided accounting and other business services to the A&W franchises and Terry initially loaned Norman some of the funds to open the East Maple Ridge A&W in 1987.

[21] On November 28, 2010, Vern incorporated 089 online, while at Norman's house. The intention was for 089 to be the company which held the MSDA. Norman and Bradley were both present when Vern incorporated 089. The initial directors of 089 were Norman, Bradley, and Vern. There were five share classes established under 089's Authorized Share Structure. The initial intention was for Norman, Bradley, and Vern to each hold Class A shares, and for Terry to hold Class B shares.

[22] On or about December 17, 2010, A&W sent Norman and Bradley a draft of the MSDA that would govern the prospective franchises. The draft MSDA reflected the share structure set out above. It also stipulated that since Norman, Bradley, and Vern were the principals of 089, they were required, among other things, to personally guarantee the performance of all present and future obligations of 089, and its principals, by signing a standard Guarantee, Indemnity, and Personal Assurances Agreement ("PAA").

[23] After receiving the draft MSDA, Vern advised Norman and Bradley that he would not provide a personal guarantee. He also engaged Boughton Law Corporation ("Boughton").

[24] In March 2011, Vern requested that the draft MSDA be amended to remove him as a principal, and to remove the need for him to provide a personal guarantee. He also requested that his shareholdings in 089 be changed from 100 Class A shares to 100 Class B shares. He also advised that he would resign as a director of 089 to avoid liability.

[25] On or about March 11, 2011, A&W circulated a revised MSDA which implemented these changes and removed Vern as a principal.

[26] 089 entered into the MSDA on March 14, 2011. Norman and Bradley signed on behalf of 089 and personally guaranteed any obligations arising under the MSDA.

[27] On April 1, 2011, Bradley signed a number of corporate documents at Boughton's office.

[28] Around this time, 089's articles were amended, and Vern's shares changed from Class A shares to Class B shares. The 089 articles describe the Class A shares as being "non-participating", this means, as noted, that these shares are not entitled to any payment of dividends or to share in proceeds of a distribution of the assets and property in the event of a liquidation, dissolution, or winding up of the Companies. Conversely, the Class B shares were described as being "participating".

[29] Vern prepared the 089 articles.

[30] At trial, Vern initially resisted the assertion that he incorporated 089 and set up its share structure. In the course of the litigation, he produced a copy of the index to the 089 articles as an unsigned, single-page document. When asked about the document by way of outstanding requests, Vern said he did not recall where it came from. Metadata for the document shows that it was created on March 29, 2011, at 1:20 p.m., approximately 45 minutes after a paralegal at Boughton requested it. The metadata further reveals that Vern's assistant worked on this document.

[31] The Boughton paralegal also asked for a signed copy of 089's Incorporation Agreement. The Incorporation Agreement, which was ultimately provided to

Boughton, had handwriting on it indicating the company name, date, name of incorporator, and number of shares. On cross-examination, Vern admitted that this appeared to be his handwriting. I have no difficulty concluding that Vern created the 089 articles and the associated share structure.

[32] I accept Norman's evidence that he did not understand or know what the terms "participating" or "non-participating" meant. At this time, he relied on Vern to deal with the formalities of incorporating and filing for 089.

[33] In November 2011, A&W requested that Norman and Bradley provide it with the details of which company would hold the first franchise restaurant under the MSDA, which was to open in Fremont Village in Port Coquitlam (the "Fremont Village A&W").

[34] Vern told Norman that he should reply to A&W that the Fremont Village A&W would be owned by 089, the same company that held the MSDA. A&W initially advised that 089 could not hold both the MSDA and a franchise, but it eventually granted an exception to this policy.

[35] In June 2012, Franchise and Escrow Agreements were signed between 089 and A&W for the Fremont Village A&W. Only Norman and Bradley signed personal guarantees for the franchise restaurant. The restaurant officially opened in March 2013, with 089 serving as the franchisee.

[36] On April 17, 2012, Vern instructed Boughton to incorporate a new company that would "mirror" 089. Accordingly, on May 15, 2012, Boughton incorporated Fremont Developments with the same share structure and nearly identical articles as 089.

[37] In 2014, a Franchise Agreement and Escrow Agreements were signed between Fremont Developments and A&W, for the second restaurant opened under the MSDA, which eventually opened in 2017, on Broadway Street in Port Coquitlam (the "Broadway A&W").

[38] Recall that, prior to the MSDA, Norman and Bradley owned and operated the East Maple Ridge A&W and the Haney Place Mall A&W. Both of these restaurants operated under its own company, with its own share structure. While these franchises are not the subject of this litigation, I note that, contrary to Vern's assertion that there was an agreement that all "family businesses" would be evenly divided, none of the A&W restaurants were owned on a 25%-each basis by Norman, Bradley, Vern, and Terry.

The Phaneuf Family Conflict

[39] The parties' relationship began to deteriorate around 2014 or 2015. Their initial disputes arose around the same time that Irene decided to sell her shares in West Coast Investments Ltd. to Norman, Bradley, and Terry. At this time, West Coast Investments Ltd. owned the East Maple Ridge A&W and the Haney Place Mall A&W.

[40] In 2016, pursuant to an amalgamation and share sale, 316 and the BC continuation of West Coast Investments Ltd. combined to form a new company, WCIL Investments Ltd. ("WCIL"). At and after this time, Norman held 50% of the shares, Bradley held 30%, and Terry held the remaining 20%.

[41] While Vern was initially content to receive a 10% interest in the Companies, 089 and Fremont Developments, by 2018, after he was excluded from Irene's sale of her shares to Norman, Bradley and Terry, he became jealous and bitter. He repeatedly sought a larger proportion of what he perceived to be the "family's business". Tellingly, Vern did not consider his own venture as an investment advisor to be part of the "family businesses".

[42] During a dispute between the brothers in 2018, Vern pleaded that after 37 years, he was left with only "two 10 percents" of the family businesses. This refers to his 10% equity interest in 089 and Fremont Developments.

[43] In September 2017, 089 and Fremont Developments issued a profit distribution to the brothers in the form of management fees. Norman and Bradley

were each paid out $31,500, while Vern and Terry each received $7,875. This reflects the brothers' 40%, 40%, 10%, and 10% ownership and equity interest in the Companies.

[44] Vern's $7,875 management fee was paid to his holding company, Pacific Ocean Investments Ltd. ("Pacific Ocean").

[45] In 2020, Elaine, who by then was acting as the Companies' sole accountant, recommended that the brothers begin issuing profits as dividends rather than as management fees. Accordingly, she prepared Shareholder Memorandums which listed the proposed profit distribution to the brothers, based on their 40%, 40%, 10%, and 10% share split.

[46] Vern objected to the percentages at the time because he wanted a higher percentage. For this reason, he signed the Shareholder Memorandums "under protest". However, at no time did he indicate, advise, or suggest that Norman and Bradley were not entitled to the receipt of profits because of the "non-participating" status of the Class A shares. Vern was paid his dividends in July 2020; the dividends were paid to Pacific Ocean.

The Discovery of Class A's Non-Participating Status

[47] In or around August 2020, Elaine, while taking steps to implement the profit distribution to Norman, Bradley, and Terry, discovered that the Class A shares were described as "non-participating" in the articles. She was on holiday in Saskatchewan at the time and therefore contacted Norman to advise him of her discovery and to tell him that she would need to look into it further once she returned from Saskatchewan and had access to additional documents. At the time of the phone call, Elaine thought that perhaps another share class had been inadvertently issued.

[48] In October and December 2020, Norman contacted Boughton to further inquire regarding this issue.

[49] At some point between December 12 and 18, 2020, Elaine spoke with Vern about this issue. She testified that when she told Vern that the Class A shares were non-participating, he was “surprised”. In his direct evidence, Vern initially denied that there had been any phone call between him and Elaine. He then said that there had been a phone call and that he had made a sarcastic statement in response to this information.

[50] In December 2020, having determined that the Class A shares were not entitled to the receipt of dividends, and that no further share class had been issued to Norman or Bradley, Norman wrote to his brothers to advise that dividends could not be paid to Class A shareholders, because their shares were non-participating.

[51] On December 18, 2020, for the first time, Vern took the position that only he and Terry held participating shares. On that day, Vern’s lawyer sent a letter demanding wide-ranging disclosure of the Companies’ documents and requesting a buyout. This was the first time Vern had sent a letter from his lawyer to his brothers.

[52] Elaine was shocked by Vern taking the position that he and Terry held all of the participating shares in the Companies. In her testimony, she confirmed that, to her knowledge, Norman and Bradley did not know what participating versus non-participating shares meant.

[53] Elaine also recounted that, prior to his death, Terry had told her that Vern was initially very happy about receiving 10% in the Companies, but that he later sought a larger share of his brothers’ businesses. Terry died in November 2024. I found Elaine’s hearsay evidence on this issue to be admissible for the truth of its contents.

[54] On June 10, 2021, Norman and Bradley filed a petition against 089 and Fremont Developments. Norman and Bradley requested that the court rectify the share rights and restrictions in the Companies’ articles of incorporation to reflect that Class A shares were participating. While Vern was not named in the original petition, he was served with this petition and, eventually, objected to the relief sought.

[55] On September 29, 2022, the petition was converted into an action by a court order pursuant to the reasons for judgment indexed as *Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706. Vern was added as a defendant to the action.

[56] On September 22, 2023, Vern filed a late response to civil claim and counterclaim, adding Irene and Terry as defendants.

[57] On July 25, 2024, this court struck the counterclaim: *Phaneuf v. 0896459 B.C. Ltd.*, 2024 BCSC 1343.

Issues

[58] Norman and Bradley assert that the rights and restrictions assigned to Class A shares in the Companies' articles of incorporation were a drafting error that did not accurately reflect the parties' agreement. Consequently, they request that this Court rectify the articles of incorporation so that Class A shares are listed as participating shares which are entitled to both vote and participate in the equity of the Companies.

[59] Vern asserts that the articles of incorporation accurately reflect the agreement between the parties at the time of incorporation and, therefore, opposes any changes or rectification to the rights and restrictions of the Class A shares.

[60] This Court must, therefore, determine whether the articles of incorporation accurately reflect the intention of the parties, and, if they do not, whether this Court should modify the articles of incorporation to reflect Class A's participatory status. In deciding this issue, the Court must also consider whether Norman's and Bradley's claim is barred by the statute of limitations.

[61] Lastly, Norman and Bradley assert that Vern acted negligently in failing to diligently oversee the incorporation of the Companies and by failing to disclose the alleged drafting error in the articles of incorporation. This Court must therefore consider whether Vern owed his brothers a duty of care, whether he breached this duty of care, and, if so, whether Norman and Bradley are entitled to damages for the breach.

Credibility

Legal Principles

[62] The credibility of the evidence provided by Norman, Bradley, Elaine, and Vern is determinative in this trial. It is therefore useful to set out the principles governing credibility determinations. In assessing the truthfulness of the witnesses' testimony, I am guided by the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357:

> […] In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[63] In assessing credibility, I will apply the factors described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); [*Faryna*] *v. Chorny*, [1952] 2 D.L.R. [354] (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

Positions of the Parties

[64] Norman and Bradley contend that Vern's testimony is wholly unreliable and lacks credibility. They submit that Vern's evidence ought to be rejected unless corroborated by documentary or other independent evidence. Specifically, they assert that Vern's evidence is both internally and externally inconsistent, that it lacks candour and plausibility, and that it is motivated by malice and bitterness.

[65] Vern contends that Norman and Bradley's evidence lacks credibility and that Elaine's evidence does not assist on the key events in dispute. Specifically, he challenges his brothers' claims that they lack an understanding of corporate structures, records, and activities. Instead, he asserts that their alleged lack of sophistication is a ruse motivated by their animus towards him and argues that his evidence should be preferred to that of his siblings.

Credibility Assessment

Norman and Bradley

[66] The evidence provided by Norman and Bradley was logical, forthright, straightforward, consistent, and coherent both internally and externally. Notably, their evidence aligned with the evidence of the witnesses who testified on their behalf, including their sister, Elaine. Their evidence was also consistent with rational business practices and relevant documentary evidence. It remained unshaken on cross-examination.

[67] Both Norman and Bradley also made reasonable concessions by acknowledging the assistance Vern provided to them on issues involving leasing and accounting. Bradley was particularly measured, calm, thoughtful, and cooperative throughout both direct and cross-examination.

[68] I accept the evidence provided by Norman and Bradley without reservation.

Elaine

[69] Elaine is a certified public accountant. She is not a party in this litigation, and while she has done some accounting for the Companies, she has no financial stake in any of the businesses in issue.

[70] Elaine became involved in the issue before the Court because her mother, Irene, asked her to try to resolve the dispute among the brothers. She tried to do so with various proposals, all of which were unsuccessful, primarily because Vern unreasonably, and persistently, refused to agree to rectify the obvious error in the Companies' articles of incorporation.

[71] Elaine's evidence was clear, responsive to the questions asked, and in harmony with the documentary evidence before this Court. Her evidence also aligns with Norman's and Bradley's testimony. Her recollection of events, including the telephone conversation she had with Vern in December 2020 when she advised him of the problem with the articles of incorporation and he expressed surprise, was clear and detailed.

[72] I accept Elaine's evidence unreservedly. She is understandably saddened by the dispute involving her brothers but, nevertheless, she testified in a rational and logical manner and assisted the Court by providing details and context about some of the notable events which are at issue.

Vern

[73] Vern lied repeatedly and unrelentingly during his testimony.

[74] The underlying premise of Vern's evidence is that the parties intended for the Class A shares to be non-participating. He asserts that this intention began during a 1994 fishing trip in Ucluelet, BC, where Norman, Bradley, and Terry enticed him to leave his accounting practice in Saskatoon, SK on the basis that they would each own a 25% interest in the businesses that they would operate together in BC.

[75] From the beginning, Vern's evidence about leaving Saskatoon shifted and was inconsistent. Originally, he provided evidence that he was induced to leave an "accounting partnership" in Saskatoon. Later, he clarified that he was not an accounting partner at the time, but that he left an anticipated offer of partnership in an accounting firm in Saskatoon, SK.

[76] Nevertheless, the first BC business that Vern was a part of was the West Maple Ridge A&W. He moved to BC on January 1, 1996, and this location opened in March 1996. Vern received a 50% interest in this business. This runs counter to Vern's assertion that he was enticed to come to BC on the basis that the family businesses would be shared equally between the four brothers, 25% each.

[77] Without any proof, Vern also argues that the parties intended for the Phaneuf brothers to own the Companies, equally. Vern asserts that the parties intentionally set up the Companies' share structure, which gave Norman and Bradley no equity in their own business, in order to establish some sort of a "*de facto* shareholders' agreement" whereby Norman and Bradley each had 40% of voting, non-participating shares and he and Terry each had 10% of non-voting, participating shares. Vern asserts that this share structure was some sort of mechanism to eventually enforce a 25% ownership interest for all four brothers in all of their respective businesses.

[78] There is simply no documentary evidence to support the contention that the brothers agreed to share their businesses equally with Vern. None of the wide range of businesses operated by the brothers function on the basis that each brother owns a 25% interest. Instead, each business has its own share structure based on who invested, worked, and provided personal guarantees for the respective business.

[79] Additionally, the brothers' conduct does not support an assertion of equal ownership. In or about 2005, Bradley opened an Extreme Pita franchise. Vern assisted Bradley with this venture but had no ownership interest in it. Additionally, Norman, Bradley, and Vern had no ownership interest in Terry's businesses, and Vern works solely for his own benefit at CIBC Wood Gundy. Vern does not share his salary with his brothers.

[80] Vern is, himself, unable to reconcile this equal ownership argument with the facts before the Court. Vern accepts that he received 10% of the shares of the Companies, which he asserts constitutes a 50% equity interest. He concurrently asserts that the Companies' underlying share structures were designed to ensure that the brothers would all own 25% of any family business. This evidence cannot be reconciled because it is a fiction unsupported by any documents or logic.

[81] I completely reject Vern's submission that he intentionally designed the share structure of 089 so that it would function as a *de facto* shareholders' agreement that would spur the brothers to negotiate a different arrangement for the yet-to-be incorporated companies that would operate the restaurants opened under the

MSDA. There is no evidence that Vern, or any party, ever attempted to initiate these discussions in relation to the restaurants opened under the MSDA before they opened. On the contrary, Vern told Norman to advise A&W that the first restaurant would operate under 089.

[82] I find that while it may have been Vern's hope, expectation, or aspiration to share these "family businesses" equally, this expectation was not grounded in fact or reality. I find that Vern fabricated this entire "*de facto* shareholders' agreement" narrative to try to take advantage of the mistake in the articles of the Companies that describes the Class A shares as "non-participating", in an attempt to benefit himself.

[83] Finally, I entirely reject Vern's assertion that he knew the Class A shares of the Companies were non-participating. His relationship with his brothers began deteriorating in 2015, when he began agitating for a larger share of the successful businesses owned by his brothers and of the shares they acquired from their mother.

[84] Elaine tried to mediate and resolve this dispute by speaking individually to each of her brothers. Not once during this tumultuous period did Vern suggest to Elaine, or to his other brothers, that he held 50% of the equity in the Companies and, consequently, that Norman and Bradley were not entitled to dividends from them. It is inconceivable that Vern would have remained silent on this issue.

[85] To the contrary, I find that, if he had this information, he would have used this information to leverage and squeeze his brothers in the precise manner that he attempted once he actually became aware of the mistake in the articles of incorporation of the Companies in December 2020.

[86] Lastly, I note that Vern's evidence related to the incorporation of the Companies is inconsistent. While he claims to have known about the share structure from the Companies' inception, he originally denied creating or modifying 089's articles of incorporation. Concurrently, however, he agreed that the metadata of this document reveals that his assistant at CIBC Wood Gundy modified this document on

March 29, 2011. He provided no rational explanation for this inconsistency, presumably because none exists.

[87] These are but a few of the lies and inconsistencies advanced by Vern. Virtually every element of his evidence lacked truth, clarity, and logic. I reject his evidence completely and instead prefer the evidence of Norman, Bradley, and Elaine on all factual matters in dispute.

[88] I reject Vern's evidence that he opted for a role in the Companies that involved less risk and responsibility, by choosing not to be a director and deciding not to provide personal guarantees, but he nevertheless believed that he held a 50% equity interest in them. This evidence strains credulity because it suggests that Norman and Bradley agreed that Vern could switch from a 10% voting and non-participating interest, that required him to be a director and guarantor (Class A shares), to non-voting Class B shares that effectively provide him with a 50% interest in the Companies and deprive them of any equity interest in them. This is an absurd and commercially unreasonable proposition.

Did the Phaneuf Brothers Intend that the Class A Shares of the Companies be Non-Participating?

Legal Principles of Rectification

[89] In accordance with s. 230(2) and (3) of the BC *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCBCA*], a court may correct the records of a company. Sections 230(2) and (3) provides:

> (2) If information, other than information in respect of which a court application may be made under section 129, is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, a company's basic records, the company, a shareholder of the company or any aggrieved person may apply to the court for an order that the basic records be corrected.
>
> (3) In connection with an application under this section, the court may make any order it considers appropriate, including
>
> > (a) an order requiring the company to correct one or more of its basic records,

> (b) an order restraining the company from calling or holding a meeting of shareholders or paying a dividend before the correction is made,
>
> (c) an order determining the right of a party to the application to have the party's name entered or retained in, or deleted or omitted from, basic records of the company, whether or not the issue arises between 2 or more shareholders or alleged shareholders, or between the company and any shareholders or alleged shareholders, and
>
> (d) an order compensating a party who has incurred a loss as a result of a matter referred to in subsection (2).

[90] A company's articles are considered to be a "basic record" for the purposes of the above sections: s. 230(1) of the *BCBCA.*

[91] Sections 229 and 230 of the *BCBCA* provide this court with broad powers to implement a wide range of remedies to facilitate the rectification of a "corporate mistake" or to correct corporate records of a company: *Gitga'at Development corp. et al v. Hill et al*, 2006 BCSC 686 at para. 55, rev'd in part on other grounds 2007 BCCA 158.

[92] The purpose of these provisions is to provide the court with "a broad discretion to expediently resolve disputes in connection with a company's records": *Rogers v. Rogers Communications Inc.*, 2021 BCSC 2184 at para. 242.

[93] The party seeking to rectify an error must simply prove, on a balance of probabilities, that there is an error or omission in a document that does not align with the earlier intention: *Lau v. Canada (Attorney General)*, 2014 BCSC 2384 at para. 95, citing *F.H. v. McDougall*, 2008 SCC 53.

[94] As stated by the Supreme Court of Canada in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55:

> [44] As these reasons and those of my colleague Brown J. in [*Canada (Attorney General) v. Fairmont Hotels Inc.,* 2016 SCC 56] reveal, rectification under Quebec civil law, as the parties and the courts below referred to it, and the equitable remedy of rectification stem from different legal sources but lead to similar results. Both ultimately have the same purpose: to ascertain that the true agreement between the contracting parties is accurately expressed in the written instruments reflecting either the terms of the agreement or the execution of the obligations themselves. The [statutory remedy] accomplishes this goal through contractual interpretation and

> retroactive amendment of documents, while equity accomplishes it through the correction of written instruments to reflect the true agreement of the parties.

[95] I find that the same applies to the *BCBCA*; this is to say, statutory remedies under the *BCBCA* and equitable rectification "stem from different legal sources but lead to similar results."

Factual Findings

[96] The preponderance of the evidence clearly demonstrates that the Phaneuf brothers intended all the shares of the Companies, both Class A and Class B, to be equity and fully participating shares. The only distinction between Class A and Class B shares contemplated by the brothers was that the Class A shares were to be voting shares, while the Class B shares were to be non-voting. Notwithstanding Vern's late in the day protestations to the contrary, this was the clear intention of all of the brothers from the outset.

[97] The brothers agreed and, for many years, all referred to their share interests and profit distributions in the Companies as being "*pro rata*" at 40%, 40%, 10%, and 10% for Norman, Bradley, Vern and Terry, respectively.

[98] I reject Vern's assertion that he only agreed to this profit distribution in respect of the Fremont Village A&W franchise. None of the evidence, including Vern's actions, support such a conclusion. Notably, in 2017, Vern accepted that management fees from the Companies should be divided on a 40%, 40%, 10%, and 10% basis between Norman, Bradley, Vern, and Terry.

[99] This clear acceptance is not diminished by Vern's bizarre assertion that he believed that Norman and Bradley were each entitled to 40% of the Companies' profits, if they were distributed as management fees, but that they were not entitled to 40% of the profits if they were distributed as dividends. Vern also argued that Norman and Bradley would not have, each, been entitled to 40% of the assets if the Companies were wound up or dissolved

[100] Additionally, if, as contended by Vern, 089 was supposed to only hold the MSDA, it would not make sense for its shares to be split 40%, 40%, 10%, and 10%. I also reject Vern's assertion that this share structure was some sort of "*de facto* shareholders' agreement". Such an argument is nonsensical and none of the other brothers share this understanding.

[101] On April 14, 2012, a paralegal at Boughton authored an email to Norman in which she asked him to confirm the details for the incorporation of what became Fremont Developments. That email described the shareholders as follows:

> **Shareholders**
> Bradley Phaneuf - 400 Class "A" Common (voting, non-participating)
> Vern Phaneuf - 100 Class "B" Common (non-voting, participating)
> Norman Phaneuf - 400 Class "A" Common (voting, non-participating)
> Terry Phaneuf - 100 Class "B" Common (non-voting, participating)

[102] This is the only document in evidence, besides the articles, that shows Norman and Bradley's shares as non-participating.

[103] I accept Norman's evidence that he did not understand or know what the term "participating" or "non-participating" meant, and instead, relied on Vern to deal with the formalities of incorporation and filings for the Companies. Consequently, I accept that the brothers did not discuss the concept of "participating" and "non-participating" shares at incorporation, or at anytime prior to Vern's attempt to claim 50% of the Companies' equity, because Norman and Bradley did not know what these terms meant.

[104] I also accept that Norman and Bradley clearly understood that they would each have a 40% profit and equity interest in the MSDA, as well as a 40% profit and equity interest in any franchises that they opened pursuant to the MSDA.

[105] After Vern's relationship with his brothers deteriorated, Norman and Bradley relied on Elaine for accounting and business services, advice, and expertise. Elaine testified that at different points, she had conversations with all four brothers,

including Vern, who confirmed that the shares of the Companies were to be participating at a ratio of 40%, 40%, 10%, and 10% for Norman, Bradley, Vern and Terry, respectively.

[106] Specifically, Elaine testified that she has a clear recollection of a detailed conversation she had with Vern regarding the share structure of 089. This conversation occurred in around 2013. Elaine had just started doing the tax returns for the Companies and she remembers herself and Vern discussing the 40%, 40%, 10%, and 10% share allocation.

[107] During this conversation, Vern said nothing about the shares being participating or non-participating. The only difference Vern noted between the Class A and Class B shares was that the former were voting and the latter were non-voting. She recalls Vern stating that his and Terry's shares were non-voting because they did not want to provide personal guarantees.

[108] Importantly, both Vern and Elaine are CPAs. In her testimony, Elaine explained that a CPA would not describe the structure as 40%, 40%, 10%, and 10% if only 20% of the shares were participating, while the remaining 80% were voting, but non-participating. She explained that if only the Class B shares were participating, then Terry and Vern would each have owned 50% of the equity of the Companies, so describing the structure as 40%, 40%, 10%, and 10% would have made no sense.

[109] I accept Elaine's evidence and find that since this discussion occurred between two CPAs, both of whom understood share structures, Vern would not have left the important detail about share equity out of the conversation with Elaine if he knew about it.

[110] Catherine Anderson, A&W's General Counsel, also confirmed that, prior to the commencement of this litigation, A&W did not know that Norman and Bradley did not have at least 35% equity in the Companies.

[111] Importantly, the MSDA contained a cross-default provision such that Norman and Bradley could potentially lose their other successful and longstanding A&W franchises if they did not comply with the terms of the MSDA and its related franchise agreements. One such term required that Norman and Bradley have a minimum 35% equity interest in the anticipated franchises and a controlling interest in the voting shares of the Companies.

[112] Mrs. Anderson confirmed that A&W does not generally negotiate the terms of its franchise agreements, and the provision of a personal guarantee is non-negotiable. A&W seeks operators who are financially committed to the success of the franchise and, consequently, A&W would not have agreed with Vern and Terry having 100% of the equity in the Companies unless it had approved them as franchisees, and they undertook A&W's training program, had financial risk at stake, and signed personal guarantees, PAAs, and indemnities—none of which they did.

[113] Indeed, Vern declined to be a director of the Companies, declined to provide personal guarantees, PAAs, or indemnities to A&W, and did not invest or work in the underlying franchises.

[114] The relationship between Vern and the rest of his family started deteriorating in 2015 when his mother, Irene, sold her shares in West Coast Investments Ltd. to Norman, Bradley, and Terry but excluded Vern. For reasons that are entirely unclear, Vern appears to have felt entitled to some of his mother's assets.

[115] Shortly thereafter, Vern sent emails to his brothers in which he sought a 20% or 25% interest in the first two franchises opened under the MSDA, namely, the Fremont Village A&W and the Broadway A&W. He requested that this additional interest be gifted to him and seemed to believe that he was entitled to this interest by virtue of being a Phaneuf sibling.

[116] It is noteworthy that in these exchanges, Vern said nothing which suggested that the share structure of the Companies was a "*de facto* shareholders' agreement" or that the Class A shares were non-participating.

[117] In 2017, Vern agreed to a profit distribution from the Companies in the form of management fees. The distribution was allocated 40%, 40%, 10%, and 10% to Norman, Bradley, Vern and Terry, respectively.

[118] In 2020, Vern received a 10% share of profit distribution from the Companies "under protest". Again, he did not raise any issue regarding the participating versus non-participating shares of the Companies, he merely wanted a bigger share of the profit.

[119] Elaine informed Vern of the Companies' share structure in December 2020. There is no document, email, phone call, or any other evidence of any discussion prior to December 2020 in which Vern contended that the Class A shares owned by Norman and Bradley were "non-participating" such that Norman and Bradley had no right to profits and he and Terry each owned 50% of the equity in the Companies.

[120] Similarly, and contrary to Vern's bald assertions, there is no credible evidence that the brothers discussed the possibility that on wind up or dissolution, Norman and Bradley would be disentitled to any of the Companies' assets.

[121] I find that it defies all logic and credulity to believe that Norman and Bradley would invest heavily and work tirelessly in businesses they had no ownership interest in. Vern's assertions that this was the agreement between the brothers is irrational, self-interested, and a seeming product of his imagination. Neither the evidence nor commercial common sense supports such an assertion.

Discussion

[122] As stated above, I reject Vern's contention that the Companies' share structure was deliberately established as some sort of "*de facto* shareholders' agreement". His assertion that the share structure was a mechanism to eventually enforce a 25% ownership interest between the four brothers in all of their respective businesses is nothing more than some combination of wishful thinking and/or an after-the-fact concoction upon finding out in December 2020 that Norman and Bradley's shares were mischaracterized as "non-participating".

[123] I accept Norman and Bradley's evidence that Vern incorporated 089 online using a computer in Norman's residence. Vern listed Bradley as the incorporator and used Norman's credit card to pay the filing fee. Given that Norman and Bradley had no experience incorporating companies, it is not credible to believe that they incorporated 089 themselves. I find that it is understandable that they relied on their professional siblings, Vern and, later, Elaine, to do these sorts of tasks, given that they also relied on their siblings to do the Companies' accounting and tax planning.

[124] Norman and Bradley are, and were, successful A&W franchise operators. This is why A&W approached them with the MSDA expansion opportunity. I reject Vern's assertion that this opportunity was presented generally to "the family".

[125] Norman and Bradley may not have business degrees or professional credentials, but these are quite obviously not essential elements for success in business. Norman and Bradley built profitable and sustained businesses with hard work, perseverance, integrity, and determination.

[126] Conversely, Vern seemingly confuses his commerce degree and professional accreditation with business acumen and success. Vern is asking the Court to accept the absurd proposition that he and Terry each owned 50% of the Companies without investing or working in any of the associated franchises, and without providing personal guarantees, indemnities, or PAAs.

[127] Correspondingly, Vern asks this Court to find that Norman and Bradley invested heavily, and worked diligently, in businesses in which they had no equity interest; notwithstanding the fact that they were directors of, and had sole voting authority over, the underlying Companies.

[128] Vern's position is irrational and nonsensical. I therefore reject it.

[129] Norman and Bradley would not have provided personal guarantees if they had known that the Class A shares of the Companies disentitled them to the profits and assets of the Companies. Nor would they have risked their other successful A&W franchises to implement such a share structure.

[130] Vern's assertion also runs counter to his own testimony that after 37 years, he was left with "two 10 percents". In my view, this evidence is a clear admission that Vern knew perfectly well that his only interest in his brother's businesses was 10% of the equity in 089 and Fremont Development.

[131] I find that an ill-conceived combination of entitlement and jealousy, which were on full display during Vern's testimony at trial, drove him to seek an entirely unearned and unwarranted piece of Norman's and Bradley's successes. This Court will not entertain such a ludicrous misadventure.

[132] I am satisfied, based on the evidence before me, that at the time 089 was incorporated, in November 2010, and when its articles were signed in April 2011, the brothers orally agreed that Norman and Bradley were to have a 40% equity and voting interest in the company. The same oral agreement applied when Fremont Developments was incorporated with matching articles of incorporation.

[133] The articles of 089 and Fremont Developments do not reflect this agreement. Pursuant to s. 230 of the *BCBCA*, the basic records of the Companies ought to be corrected to reflect that Norman and Bradley each have a 40% participating, equity, and voting interest in the Companies.

[134] The broad remedial powers of s. 230 of the *BCBCA* should be invoked to correct the obvious corporate mistake in the Companies corporate records such that Norman's and Bradley's Class A shares are listed as participating, equity, and voting shares. The corporate mistake to be corrected is the description that inaccurately describes the Companies' Class A shares as being "non-participating".

[135] In my view, the statutory remedies set out in s. 230 are sufficient to correct the clear mistake of describing the Companies' Class A shares, held by Norman and Bradley, as non-participating. If this statutory provision is insufficient to correct this error, I am also satisfied that equitable rectification should be granted on the basis of a mutual mistake.

[136] Rectification based on mutual mistake is appropriate in situations, such as this, where the terms of the agreement reached by the parties are definitive and ascertainable, where the agreement was effective when the instrument was executed, and where the instrument failed to accurately record the prior agreement: *Canada (Attorney General) v. Fairmont Hotels Inc.,* 2016 SCC 56 at para. 14 [*Fairmont Hotels*].

[137] In this case, having accepted the evidence of Norman, Bradley, and Elaine, and rejected the evidence of Vern, I have no difficulty in concluding that the brothers had a definite and ascertainable prior agreement to share the equity of the Companies on a 40%, 40%, 10%, and 10% as between Norman, Bradley, Vern and Terry, respectively. This agreement was in effect at the time the Companies were incorporated, and at the time their articles were created. The articles incorrectly refer to Class A shares as “non-participating”. Accordingly, the articles can easily be amended to reflect the brothers’ prior agreement.

[138] Correcting the error will give effect to the true intentions of the brothers, while a failure to correct this mistake will cause an unintended windfall in favour of Vern, and Terry’s estate. Such windfalls ought to be avoided, as such an outcome would be inherently unfair: *Fairmont Hotels* at paras. 44, 63.

[139] I make this assessment objectively, having regard to all of the facts, the relevant documents, the parties’ post-agreement conduct, and the oral evidence of Elaine, Ms. Anderson, and the parties. It is appropriate to consider these factors in these circumstances: *McLean v. McLean*, 2013 ONCA 788 at para. 59

[140] Additionally, to find otherwise would ignore commercial context and good business sense: *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at para 21. It would result in the commercial absurdity of Vern acquiring a 50% interest in businesses in which he took no financial risk and made virtually no contribution.

[141] Accordingly, I find that the Phaneuf brothers intended the Companies' Class A shares to be participating, and I order that the Companies' documents be amended to reflect this intention.

Is this Action Statute-Barred?

Legal Principles

[142] A proceeding in respect of a claim may not be brought more than two years after the day on which the claim was discovered: s. 6 of the BC *Limitation Act*, S.B.C. 2012, c. 13.

[143] In accordance with s. 8 of the *Limitation Act*, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

a) that injury, loss, or damage occurred;

b) that the injury, loss, or damage was caused by or contributed to by an act or omission;

c) that the act or omission was that of the person against whom the claim is or may be made; and

d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[144] In accordance with *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, the following principles apply to discoverability:

a) a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn [at para. 3];

b) the degree of knowledge required to discover the existence of a potential claim is more than mere suspicion or speculation, but it is not so high as to require certainty of liability or perfect knowledge [at para. 46]; and

c) a plaintiff will have that requisite knowledge when the evidence shows that the plaintiff discovered, or ought to have discovered, through the exercise of reasonable diligence, the material facts on which the claim is based [at

> para. 40]. Accordingly, plaintiffs are expected to exercise reasonable diligence and cannot sleep on their rights.

Positions of the Parties

[145] Vern asserts that the claims brought by Norman and Bradley are statute-barred because the claim was discoverable as early as 2010. Norman and Bradley assert that they discovered the claim in 2020, when they sought to issue dividends.

Discussion

[146] Norman and Bradley brought their claim in 2021. I am satisfied that Norman and Bradley had no reason to believe that the shares they owned in the Companies were non-participating.

[147] Norman and Bradley entrusted the details of incorporation, corporate filings, and accounting to Vern and then later to Elaine after their relationship with Vern deteriorated. Vern incorporated 089 and then instructed Boughton to incorporate Fremont Developments as a mirror image of 089. Neither Norman nor Bradley had any reason to suspect that the Companies were not incorporated in accordance with their oral agreements.

[148] I recognize that the minute books for the Companies were held in Norman's residence but neither he nor Bradley had any reason to review them in detail until 2020 when Elaine discovered that the Companies' Class A shares did not entitle Norman or Bradley to receive dividends. Up until this point, Norman and Bradley had each been paid 40% of the profits as management fees and had no reason to suspect any inconsistency in the articles.

[149] In my view, Norman and Bradley exercised reasonable diligence by relying on their professionally accredited siblings, Vern and Elaine, to take care of the corporate details of their businesses. Accordingly, I find that the mistake in the Companies' articles which described Class A shares as non-participating was not practically discoverable until Elaine discovered it in August 2020.

[150] Norman and Bradley filed their claim within two years of this date. Therefore, I find that the action brought by Norman and Bradley is not statute-barred.

Are Norman and Bradley Entitled to Damages for Negligence?

[151] I am satisfied that Vern owed a duty of care to Norman and Bradley to incorporate 089 and by extension, Fremont Developments, on the basis of a 40%, 40%, 10%, 10% division of participating and equity interest. Vern undertook to do this task and did so, despite his protestations to the contrary. He breached this duty of care by mischaracterizing the Class A shares as “non-participating”.

[152] Norman and Bradley assert that they are entitled to damages in the amount of $68,609. This amount accounts for the loss of interest that would have been earned by Guaranteed Investment Certificates if the funds allocated by the Companies as dividends were paid to Norman and Bradley in a timely fashion.

[153] I appreciate that Norman and Bradley could have generated this amount, in their own hands, had the dividends been paid out in 2020. However, the underlying funds, and any further amounts earned on them, remain available in the Companies and may be paid to them whenever they wish. Norman and Bradley control the voting shares of the Companies and can issue amounts to themselves, if they see fit, as either management fees or dividends.

[154] I am not convinced that Norman and Bradley have established that they suffered a loss as a result of Vern’s negligence and, correspondingly, I am not convinced that they have demonstrated an entitlement to damages.

Conclusion

[155] This matter should have been resolved via a straightforward rectification application by consent. Instead, Vern used the mistake in the Companies’ articles as leverage to try to extract money from his brothers, to which he was not entitled. He created a web of incoherent lies to advance this goal.

[156] Norman and Bradley are entitled to the relief they seek. I order that, in accordance with both the *BCBCA* and the law of equity, 0896459 B.C. Ltd. and Fremont Developments Ltd. correct their articles of incorporations, and any other relevant documents, to reflect that both Class A and Class B shares are fully participating, equity shares, which are entitled to all participating rights, including dividends and a distribution of assets on wind up or dissolution.

Costs

[157] If the parties wish to make submissions on costs, they may make the necessary arrangements with Supreme Court Scheduling within 30 days of the date of this judgment. If no submissions are received, Norman and Bradley will have their costs at Scale B.

"Basran J."