

CANADA / JUDGMENT

Short v. Ewachniuk

2021 BCSC 994

COURT

Supreme Court of British Columbia

DECIDED

25 May 2021

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2021 BCSC 994 Short v. Ewachniuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Short v. Ewachniuk,

2021 BCSC 994

Date: 20210525

Docket: S187814

Registry: Vancouver

Between:

John Norman Short

Petitioner

And

Alexander Theodore Ewachniuk,

Regent Holdings Ltd.,

Richmond Boat & Yacht Sales Limited and

Vancouver Marina (1971) Ltd.

Respondents

- and -

Docket: S1711002

Registry: Vancouver

Between:

Alexander Theodore Ewachniuk

Petitioner

And

The Partnership of Alexander Theodore Ewachniuk and

John Norman Short, named and doing business as

Richmond Boat & Yacht Sales Limited, John Norman Short

and Richmond Boat & Yacht Sales Limited

Respondents

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Petitioner, John Norman Short:

W. McMillan

K. Meyer

Counsel for the Respondent Alexander Theodore Ewachniuk:

D. Lunny

C. M. Tribe

Counsel for the Respondent Regent Holdings Ltd.:

R. B. Fraser

S. Batkin

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 8-9, September 28-30, October 1-2, November 26-27, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 25, 2021

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Introduction

- [1] In 1965, two friends, Mr. Short and Mr. Ewachniuk, went into the marina business on property near the Moray Bridge on the Fraser River in Richmond. Mr. Ewachniuk provided the financial backing and access to the necessary property. Mr. Short operated the day-to-day business.
- [2] Over the next five decades, their marina business grew and flourished. The relationship was, at times, fraught, but the business endured, and both men profited. Unfortunately, the business relationship between the two men spiralled downward in 2017. This litigation is the result of the breakdown of that relationship. Each side filed a petition seeking relief. Sadly, Mr. Ewachniuk passed away on September 16, 2019. For ease of reference, in these reasons, I refer to the executor of Mr. Ewachniuk's estate, as "Mr. Ewachniuk's Estate" or the "Estate".
- [3] Both sides agree that the business relationship is at an end and should be wound-up. However, they differ on the proper remedy.

- [4] Mr. Ewachniuk's Estate submits that the two men operated under a partnership agreement and its wind-up should be resolved under partnership law. In the alternative, the Estate submits that the company in which the two men were shareholders should be dissolved and its assets liquidated. That remedy would leave each party with shares in a third company that ran the marina. The Estate denies any misconduct on Mr. Ewachniuk's part and levels criticism at Mr. Short's conduct.
- [5] For reasons discussed below, Regent Holdings Ltd. ("Regent"), the landlord of the marina property, takes the same position as Mr. Ewachniuk's Estate.
- [6] In response, Mr. Short says that a dissolution and liquidation of the business would work an injustice upon him and provide a windfall to Regent and Mr. Ewachniuk's Estate. He seeks a declaration that the affairs of the subject companies were conducted in such a manner that he is entitled to be bought out of his share in the business by Mr. Ewachniuk's Estate or by Regent
- [7] The issues to be addressed in this petition are:
- a) Were the parties operating as a partnership?
 - b) What is the proper application of s. 324 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]?
 - c) Was Mr. Ewachniuk's conduct improper or oppressive?
 - d) Was Mr. Short's conduct improper or oppressive?
 - e) If so, what is the appropriate remedy?
 - f) If Mr. Short is entitled to a remedy other than liquidation, what is the appropriate valuation of his interest in the business?
- [8] I have structured these reasons in the following sequence:
- a) Background facts
 - b) Discussion of the applicable principles of partnership law
 - c) Discussion of the applicable principles of corporate law relating to winding-up and the "oppression remedy"
 - d) Discussion of the specific allegations of improper conduct
 - e) Appropriate remedy
 - f) Valuation
- [9] For the reasons that follow, I dismiss Mr. Ewachniuk's petition and grant Mr. Short the relief he seeks in his petition.

Background Facts

- [10] Mr. Ewachniuk and Mr. Short became friends while attending high school together in the 1950s. They bonded over a love of fast cars.
- [11] In 1965, Mr. Ewachniuk had an idea for the use of some land that his family owned (via Regent) on the Fraser River at 8211 River Rd., Richmond (the "Property"). The Property is bisected by the Moray Bridge where Sea Island Way crosses the Fraser River from Sea Island to Richmond.
- [12] Mr. Ewachniuk envisioned a marina with related automobile, boat, and trailer sales. He also envisioned a retail and restaurant business on the property. At the time, Mr. Ewachniuk was in law school. Mr. Short's education ended in high school.
- [13] Mr. Ewachniuk approached Mr. Short to see whether he wanted to be involved in the business. Mr. Short agreed to the proposal, and the two men incorporated Richmond Boat & Yacht Sales Limited ("RBYS") on June 29, 1965.
- [14] The Property is, and was, owned by Regent. In 1965 that company was controlled by Mr. Ewachniuk's parents. I discuss below the well-documented litany of litigation regarding the ownership and management of that company. Ultimately, as of approximately 2011, Mr. Ewachniuk was the sole shareholder in Regent.
- [15] A partnership indenture was signed by the two men on August 18, 1970. There is a dispute between the parties as to whether, in subsequent years, their relationship continued to be run as a partnership or whether their relationship was governed by their status as shareholders in RBYS.
- [16] Initially, RBYS was in the business of buying and selling boats and automobiles. To operate as a marina, the business needed floats and wharves. It also needed a water lease from the provincial government. RBYS purchased the floats and wharves in the first instance. There is a dispute over the current ownership of the hard assets of the marina. That dispute goes to both the allegations of oppressive conduct and the valuation of RBYS, and is discussed under those headings.
- [17] There is no dispute regarding Mr. Ewachniuk's and Mr. Short's roles in the business. At the start, Mr. Ewachniuk was in law school, and later he had a busy legal practice. He did not plan to be involved, nor was he involved, in the day-to-day operations of the marina. It is common ground that Mr. Short was responsible for the operation, improvement, and development of the marina business. Mr. Ewachniuk looked after the business' legal and corporate matters. He was also close by. He ran his law practice from a building on the Property. The marina operated for more than 50 years on this basis.
- [18] The trust relationship between the parties is evident from the manner in which they handled marina expenses. Mr. Ewachniuk regularly signed batches of blank cheques and left them with Mr. Short. When funds were required, Mr. Short would co-sign a cheque and pay the invoice.

- [19] With respect to the corporate structure, constating documents, agreements, and leases, Mr. Short says that he always signed whatever documents Mr. Ewachniuk put in front of him. It is clear that Mr. Ewachniuk designed, drafted, and implemented the plan for the corporate structure. At the hearing, Mr. Short used his lack of education about commercial matters as a shield against the legal effect of certain documents. Mr. Ewachniuk's Estate argues, and I accept, that Mr. Short cannot argue a non est factum (i.e., the documents signed were fundamentally different than what he thought they were and thus void) position in respect of documents that have governed his commercial relationship for decades. However, it is equally evident that Mr. Ewachniuk designed the structure of the business in a manner such that, if there should be a falling-out between the two men, the collapse of the relationship would benefit him, and not Mr. Short.
- [20] Initially, the marina operated under the banner of RBYS.
- [21] In 1971, the two men incorporated Vancouver Marina (1971) Ltd. ("Vancouver Marina"). The initial shares issued in Vancouver Marina were held in the following allotments:
- a) Mr. Short, 50 voting shares;
 - b) Mr. Ewachniuk, 50 voting shares; and
 - c) Regent, 100 non-voting shares.
- [22] The share registry was later amended to show that Regent had voting shares. I discuss below the dispute over the status of Regent's shares (voting v. non-voting).
- [23] In 1976, Vancouver Marina was reorganized such that the two men transferred their personal shareholdings in Vancouver Marina to RBYS. Their shares in Vancouver Marina were recalled and re-issued to RBYS. At the same time, Regent's 100 non-voting shares in Vancouver Marina were recalled and reissued. Thus after 1976, Vancouver Marina was owned (50% each) by Regent and RBYS. In turn, Mr. Short and Mr. Ewachniuk each owned 50% of RBYS.
- [24] In 1976, Mr. Ewachniuk's parents held a majority interest in Regent. Mr. Ewachniuk and his two sisters held minority positions. The father later passed away, leaving Mr. Ewachniuk's mother as the majority shareholder. She passed away in 2006. As discussed below, prior decisions of this Court have found that Mr. Ewachniuk exercised almost complete control over Regent after (and to some extent before) his mother's passing. As such, to the extent he controlled Regent, after 2006 Mr. Ewachniuk effectively controlled 75% of the marina business. The remaining 25% was controlled by Mr. Short through his holding in RBYS.
- [25] After 2011, with the conclusion of the litigation involving his family, Mr. Ewachniuk did own 100% of the shares in Regent. The diagram below describes the relationship of the corporate entities and shareholdings.

- [26] The financial arrangement between Vancouver Marina and its shareholders, which carried on for approximately five decades, was as follows:
- a) Vancouver Marina would operate for the year, collect moorage and other revenue, and pay its expenses. One of the expenses was Mr. Short's salary as manager which, for most years, was \$60,000.
 - b) At the end of the fiscal year, Mr. Ewachniuk and Mr. Short would sit down with Vancouver Marina's accountant. They would determine the company's net profit for the year.
 - c) Vancouver Marina's profit would be divided as follows:
 - i. According to the terms of the lease (as amended over time), Regent would receive half of Vancouver Marina's annual profit as "rent". (In practice, the "rent" amount was calculated and paid following the year-end meeting and calculations.)
 - ii. RBYS would receive the other half of Vancouver Marina's profit which was described as a "management fee". RBYS had few expenses. Mr. Ewachniuk and Mr. Short, as shareholders, would then divide RBYS's profit equally.
- [27] On the issue of the valuation of the marina business, there is a dispute between the parties as to whether Regent (as both shareholder and lessor) should be entitled to "profit" as well as "rent". However, as I discuss below, it was Regent, as lessor, that set the terms of the marina's tenancy. It stands to reason that, after his mother's passing in 2006, Mr. Ewachniuk controlled the lessor and dictated the terms of the lease. He did not seek to negotiate (or impose) different lease provisions.
- [28] The lease agreements (over time) between Vancouver Marina and Regent included a provision that if Regent sold the Property during the period of the lease, then RBYS would be entitled to half of the sale proceeds that were attributable to the sale of the marina (the "Sales Proceeds Clause"). The Sales Proceeds Clause was included in the lease renewals in 1980, 2000, and 2010. I discuss this clause in more detail under the heading "Valuation".
- [29] In the early 2000s, Mr. Short's son, Michael Short, commenced working at the marina. His initial role was to assist his father in management. Over time, Michael Short became the manager of the day-to-day operations. Both Mr. Short and his son received salary from Vancouver Marina. Their salaries were expenses of Vancouver Marina.
- [30] Mr. Ewachniuk was involved in prior litigation relating to Regent. The first case related to his mother's will. The second case arose from the first and related to a loan Mr. Ewachniuk had taken from his parents and not repaid. The third case involved his sisters who claimed, successfully, that he was operating the company in an oppressive manner.
- [31] In the first case, *Hix v. Ewachniuk*, 2008 BCSC 811, aff'd 2010 BCCA 317, Justice Hinkson (as he then was) found that Mr. Ewachniuk had unduly influenced his mother to make a new will (which he drafted) removing his sisters as beneficiaries and leaving the bulk of his mother's estate, including full ownership of Regent, to Mr. Ewachniuk. Justice Hinkson

found that Mr. Ewachniuk had "an aggressive and domineering personality both in general, and in particular, in his desire for the absolute ownership of the shares in Regent Holdings" (at para. 103). Justice Hinkson voided the will Mr. Ewachniuk drafted and reverted to a prior will. The prior will divided Ms. Ewachniuk's estate, including her shares in Regent, between Mr. Ewachniuk and his two sisters.

[32] In the second case, *Ewachniuk Estate v. Ewachniuk*, 2011 BCSC 395, Justice Russell dealt with the following facts:

[1] On December 23, 1980, the defendant, Alexander Theodore Ewachniuk ("Ted"), and his parents, Roman Ewachniuk and Sophia Ewachniuk ("Mrs. Ewachniuk"), entered into a purchase and sale agreement (the "Agreement") concerning shares held by the defendant's parents in the family company, Regent Holdings Ltd. ("Regent Holdings").

[2] The purchase of his parents' shares in Regent Holdings increased the defendant's holdings from 13,000 shares to 28,000 shares as compared to the 8,500 shares held by each of his sisters, Neeva Gayle Hix and Mary Ann Runnalls.

[3] Payment for the Regent Holdings shares was secured by a promissory note dated the same day in favour of Roman Ewachniuk and Mrs. Ewachniuk in the amount of \$750,000 (the "Promissory Note") and signed by the defendant.

[33] Mr. Ewachniuk never paid for the shares. Justice Russell ruled that Mr. Ewachniuk owed his mother's estate \$750,000, plus interest. Mr. Ewachniuk's appeal of that decision was dismissed (indexed at 2011 BCCA 510).

[34] In the third action Mr. Ewachniuk's sisters, who were minority shareholders in Regent, alleged that Mr. Ewachniuk was operating the company in a manner that was oppressive toward them.

[35] In two decisions released by Justice N. Smith in 2008 and 2010 (*Runnalls v. Regent Holdings Ltd.*, 2008 BCSC 1073, 2010 BCSC 1106, collectively the "Runnalls litigation"), Mr. Ewachniuk was declared to have conducted the affairs of Regent in a manner that was oppressive and unfairly prejudicial to his sisters. In the latter decision, Mr. Ewachniuk was ordered to purchase his sisters out of their interest in Regent. The value of their interest was set at \$1.6 million each.

[36] As a result of the remedy provided in the Runnalls litigation, Mr. Ewachniuk bought out his sisters and, as of 2011 or 2012, Regent was 100% controlled by Mr. Ewachniuk. Today, it is controlled by the executor of his estate, his widow, Patricia Ewachniuk.

The End of the Relationship

[37] Through all of the litigation involving Mr. Ewachniuk's family, the marina continued to operate and generate profits.

- [38] The relationship between Mr. Ewachniuk and Mr. Short took a sharp downturn in the first half of 2017. Each man alleges that the actions of the other constituted conduct that was either oppressive or unfairly prejudicial. I have set out the initial events here, but I address the specific allegations of misconduct in detail below.
- [39] In March 2017 Michael Short discovered that \$200,000 had been withdrawn from Vancouver Marina's Bank of Montreal account. When he inquired about the withdrawal at the bank, he determined that Mr. Ewachniuk had transferred the funds to Regent without notice to, or authorization of, Mr. Short or Michael Short.
- [40] At Mr. Short's request, the bank demanded that Mr. Ewachniuk return the \$200,000. Mr. Ewachniuk returned the funds on April 11, 2017. The only explanation that Mr. Ewachniuk has ever provided for the withdrawal of those funds came through a letter from his lawyer. The letter stated that Mr. Ewachniuk "temporarily borrowed \$200,000 from the Company for personal purposes" and that he felt "legally and morally entitled" to the funds.
- [41] On May 3, 2017, Mr. Short suffered a catastrophic spinal injury. He was hospitalized and unable to get around by himself for many months.
- [42] On May 5, 2017, Mr. Ewachniuk again attended at the bank and attempted to withdraw \$100,000 from Vancouver Marina's account. In later communications, Mr. Ewachniuk explained that his reason for attempting to withdraw the funds was to provide money to Mr. Short's wife to assist them in their time of need. (Mrs. Short neither requested nor needed the funds.)
- [43] For a reason set out in the next paragraph, the bank would not allow Mr. Ewachniuk to withdraw the funds. Mr. Ewachniuk sought approval for the withdrawal by phoning Mr. Short in hospital. Mr. Short refused, and the bank did not release the funds.
- [44] In the course of his attempt to withdraw the funds, Mr. Ewachniuk learned that he had been removed from the signing authority for Vancouver Marina's bank account. The bank had a directors' banking resolution on file providing that Mr. Short and his son were the sole signatories on the account.
- [45] When Mr. Ewachniuk learned of the banking situation in 2017, he was shocked and upset to learn that he did not have signing authority. It is fair to say that he assumed the worst.
- [46] I pause to note that, later in the chronology, following an investigation initiated by Mr. Ewachniuk, Mr. Ewachniuk satisfied himself that neither Mr. Short nor his son had abused the signing authority. No funds had gone missing or been improperly diverted.
- [47] The events of May 2017 led to a precipitous deterioration in the relationship between Mr. Ewachniuk and Mr. Short. Mr. Ewachniuk's actions after learning of the banking resolutions set off a fight over control of the corporate entities. Each party alleges that the acts of the opposing party represent conduct that was oppressive or unfairly prejudicial or taken in bad faith. Each side says that the actions of the other provide important context for the

appropriate remedy in this case. I set out those specific allegations, and my assessment of them, below.

Legal and Evidentiary Issues

- [48] The evidence forming the basis of the hearing of these petitions comprised 44 affidavits and nine transcripts of cross-examinations on affidavits.
- [49] Credibility issues are, of course, difficult to assess in hearing lacking viva voce testimony. Mr. Ewachniuk passed away on September 16, 2019, before he was cross-examined and before certain facts were uncovered in the process of third-party document disclosure. As discussed below, certain late-disclosed documents cast an unfortunate light on Mr. Ewachniuk's credibility in this litigation.
- [50] Out of necessity, I make credibility findings below. Where I have done so, I have explained my reasoning. I make no negative credibility findings against Mr. Short.
- [51] Mr. Ewachniuk commenced his petition on November 27, 2017. Mr. Short filed his petition on July 13, 2018.
- [52] Both parties agree that the relationship is at an end and RBYS should be wound-up. That end-point will either unfold pursuant to the Partnership Act, R.S.B.C. 1996, c. 348, or under BCA, s. 324. The cross-firing allegations of misconduct in both petitions form the basis of the arguments relating to the relief sought.
- [53] I now turn to discuss the issues to be addressed.
- Were the parties operating as a partnership?
- [54] The first issue to be decided is whether the parties' remedies should be governed under the Partnership Act or under the BCA.
- [55] As noted above, the parties signed a partnership indenture on August 18, 1970. That document was signed after the incorporation of RBYS, but before the incorporation of Vancouver Marina. The Estate submits that RBYS was the external manifestation of the partnership between Mr. Ewachniuk and Mr. Short and that the partnership indenture is binding on them.
- [56] On that basis, the Estate, in Mr. Ewachniuk's petition, seeks:
- a) an order that the partnership of Ted Ewachniuk and John Short, doing business as RBYS, be dissolved under s. 38 of the Partnership Act;
 - b) a declaration that the shares that RBYS holds of Vancouver Marina and any other RBYS assets are partnership property; and
 - c) an order for an accounting under R. 18-1 of the Supreme Court Civil Rules.

- [57] As noted, at some point after the filing of his petition, Mr. Ewachniuk satisfied himself that Mr. Short had not misappropriated any funds. Hence, the Estate is no longer pursuing the accounting in paragraph c).
- [58] If successful on points a) and b), the partnership would be dissolved, and each man would be left with shares in RBYS. In respect of RBYS, Mr. Ewachniuk's petition then seeks liquidation pursuant to s. 324 of the BCA.
- [59] Mr. Ewachniuk's Estate submits that the only remedies available are those under the Partnership Act. In particular, s. 38 of the Partnership Act empowers the court to decree dissolution in certain cases. Notably, there is no "oppression remedy" in the Partnership Act. The only remedy available pursuant to the Partnership Act is the dissolution of the partnership.
- [60] In response, Mr. Short does not deny that he signed the partnership indenture. He says that he signed all documents that Mr. Ewachniuk put in front of him and he did not pay attention to corporate structures.
- [61] Mr. Short submits that when parties are involved in a corporate relationship, they cease to be in a partnership. He submits that "shareholders of a company are not in a partnership". Rather, shareholders, directors, and the company itself are all separate entities. Mr. Short relies on several cases as support for that position in law: *San Bao Investment Inc. v Sun*, 2018 BCSC 1128 at para. 64; *Pine Valley Mining Corporation (Re)*, 2007 BCSC 926 at para. 39, citing *Salamon v. A. Salamon and Company, Ltd.*, [1897] A.C. 22 (U.K.H.L).
- [62] Mr. Short acknowledges that the courts often apply a "partnership analogy" to determine whether it would be "just and equitable" to order the winding-up of a company under s. 324 of the BCA. That is especially so in circumstances where a company is analogous to a partnership or was formerly conducted as a partnership prior to incorporation. However, the overlay of a "partnership analogy" does not change the fact that a company is not a partnership. Mr. Short refers to *Vivian v. Firth*, 2012 BCSC 517:
- [72] Where the relationship between the parties resembles a partnership more than arm's length shareholders such that it can be said that the entity is, in substance, a partnership in the guise of a private company, courts have been prepared in some circumstances to liquidate a corporation on the same grounds that would justify the winding-up of a partnership: *M. Koehnen, Oppression and Related Remedies* (Thompson Carswell: Toronto, 2004), cited in *Golden Pheasant Holding Corp. v. Synergy Corporate Management*.
- [73] References to "quasi-partnerships" or "in substance partnerships", while a convenient shorthand way of describing the circumstances in which it may be appropriate to apply the kind of equitable considerations that govern the dissolution of partnerships to applications to wind-up the business of a company, may be misleading. The Court is not engaged in a labelling exercise in determining whether a partnership analogy is appropriate, but in an assessment of a constellation of factors that may, as between one person and another, make

it unjust to insist on a strict application of legal rights.

- [63] I accept Mr. Short's submission that the relationship between the two men must be governed on the basis that they were shareholders in RBYS and not on the basis of a partnership.
- [64] It is evident that the two men were not operating as equal "partners" in the marina business. Instead, their relationship was governed by Mr. Ewachniuk's dominant shareholding position in Vancouver Marina. I note the multiple hats worn by Mr. Ewachniuk over time: 50% shareholder in RBYS, controlling mind of Regent in its capacity as landlord, and controlling mind of Regent in its capacity as the other 50% shareholder in Vancouver Marina.
- [65] In these circumstances, the relationship cannot be viewed as an "equal partnership". The corporate structure was integral to their relationship.
- [66] Further, it is evident that, particularly after May 2017, the parties dealt with their relationship, inter se, on the basis of their corporate positions. Although Mr. Ewachniuk referred to the partnership in his correspondence, he attempted to achieve the results he wanted through shareholder meetings and corporate resolutions.
- [67] I discuss below Mr. Ewachniuk's actions following the breakdown of the relationship. Those actions were, in my opinion, taken in his capacity as a shareholder and Director. They were not the actions of an equal partner in RBYS attempting to deal with his co-partner.
- [68] Further, Mr. Lunny, counsel for the Estate, concedes that the partnership would have terminated upon Mr. Ewachniuk's death in 2019 (see s. 36(1) of the Partnership Act). It is possible that the relationship could be unwound as of that date, but in unwinding it, the parties' relationship would, it seems to me, revert to their interests as shareholders in RBYS and the other relationships.
- [69] On that basis, despite the existence of the 1970 partnership indenture, I find that the relationship between Mr. Short and Mr. Ewachniuk was a relationship of shareholders governed by the BCA. For those reasons, I find that the breakdown of the relationship is not governed by the Partnership Act, but instead by the BCA.
- [70] Having decided that issue, I now move on to discuss the structure of, and remedies available under, the BCA.

What is the proper application of s. 324 of the BCA?

- [71] As noted, the parties agree that the business relationship should be terminated.
- [72] Mr. Ewachniuk's Estate says that the usual remedy under s. 324 of the BCA would be fair to both parties: dissolution and liquidation. In other words, the Estate submits that the hard assets of RBYS should be liquidated and its shares in Vancouver Marina should be transferred to the individuals.

[73] In response, Mr. Short says that liquidation would provide him with virtually nothing, and afford great benefit to Mr. Ewachniuk's Estate. Further, he says that:

- a) Mr. Ewachniuk's conduct led to the deterioration of the relationship;
- b) Mr. Ewachniuk's Estate should not benefit from his misconduct;
- c) Mr. Short should not be prejudiced by the remedy awarded;
- d) if the individuals receive direct ownership of the shares in Vancouver Marina, Mr. Short will continue to be subject to the whims of its landlord, Regent, which is controlled by the Estate, and Regent could then manoeuvre Vancouver Marina out of business resulting in him receiving nothing; and
- e) as such, Mr. Ewachniuk's Estate (or, alternatively, Regent) should be forced to purchase his shares.

[74] The powers and duties of the court to order the winding-up of a company are found in s. 324 of the BCA:

Court may order company be liquidated and dissolved

324 (1) On an application made in respect of a company that is a financial institution by the Authority, or made in respect of a company, including a company that is a financial institution, by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if

- (a) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or
- (b) the court otherwise considers it just and equitable to do so.

[75] Mr. Short submits that the facts of this case fall under s. 324(1)(b) and, further, that s. 324(3) (b) applies to these facts:

324 (3) If the court considers that an applicant for an order referred to in subsection (1)(b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:

- (a) make an order that the company be liquidated and dissolved;
- (b) make any order under section 227 (3) it considers appropriate.

[Emphasis added.]

[76] Although Mr. Short is not a shareholder of Vancouver Marina, Mr. Ewachniuk's Estate and Regent do not strenuously argue that it would be improper to find him to be a person who is "any other person whom the court considers to be an appropriate person to make the application" under s. 324. I find that he is an appropriate person to apply for the relief he seeks in his petition in respect of both RBYS and Vancouver Marina.

[77] Section 227 of the BCA makes provision for relief in circumstances where the affairs of a company are conducted in an oppressive or unfairly prejudicial fashion:

Complaints by shareholder

227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A shareholder may apply to the court for an order under this section on the ground

- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
- (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[78] Section 227(3) provides a number of remedies available to the court where oppression is established.

[79] Mr. Short submits that it is appropriate in this case to apply the relief provided in two provisions of s. 227(3):

227 (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

- (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
- (m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

[80] Mr. Short submits that the test for relief under s. 324 does not require a finding that Mr. Ewachniuk's conduct was oppressive, only that it would be "just and equitable" under s. 324(3) for the relief to be granted. In support of that proposition, he cites *Baker v. Hanlon*, 2019 BCSC 1185:

- [9] Whether or not the court finds oppression or unfair prejudice under s. 227, the court may nevertheless, if it is "just and equitable", make an order pursuant to s. 324 that a company be liquidated and dissolved, or make any order under s. 227(3) it considers appropriate: *Boffo Family Holdings Ltd. v. Garden Construction Ltd.*, 2011 BCSC 1246 at para. 119.
- [10] The words "just and equitable" in s. 324 of the BCA confer a broad discretion on the court: *Boffo Family Holdings Ltd.* at para. 120; *Rogers v. Agincourt Holdings Ltd.* (1976), 74 D.L.R. (3d) 152 at 156 (Ont. C.A.).
- [11] The just and equitable test represents a lower threshold than that under the oppression remedy in s. 227 of the BCA. Section 324 gives the court the power to fashion a remedy that is just and equitable even where the conduct falls short of oppressive or unfairly prejudicial: *Boffo Family Holdings* at para. 121; *Samra v. Bel-Air Taxi Ltd.*, 2009 BCSC 548 at para. 92; *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173 at para. 56.
- [12] Circumstances in which the court has exercised its jurisdiction under the just and equitable ground include situations where there is a justifiable lack of confidence among the members, the parties are in deadlock, or where a partnership analogy applies: *Boffo Family Holdings* at para. 122; *Palmieri v. A.C. Paving Co.* (1999), 48 B.L.R. (2d) 130 at paras. 26-30 (S.C.).
- [81] Mr. Short submits the cases under s. 324 indicate that the court has been innovative in its approach to this type of application on a winding-up. These cases confirm that the court has exercised its discretion under the "just and equitable" wording using a lower threshold. Aggrieved shareholders need not demonstrate conduct that rises to the level of "oppressive or unfairly prejudicial" in order to avail themselves of the remedies under s. 227, when the company is being wound-up under s. 324. Instead, Mr. Short submits that the court need only find that there has been some level of misconduct such that it would be just and equitable to fashion a remedy provided under s. 227.
- [82] In response, Mr. Ewachniuk's Estate argues that:
- a) Mr. Ewachniuk did nothing oppressive or unfairly prejudicial;
 - b) Mr. Short's interests were not affected in his capacity as a shareholder;
 - c) the majority of Mr. Short's complaints are either statute barred or not timely; and
 - d) in fact, it was Mr. Short who conducted himself in an inappropriate fashion.
- [83] On that basis, Mr. Ewachniuk's Estate submits that Mr. Short's petition should be dismissed and RBYS should be wound-up and its assets liquidated.

- [84] As noted, the order sought by Mr. Ewachniuk's Estate would result in the Estate and Mr. Short directly owning shares in Vancouver Marina. As discussed below, it is my opinion that such a remedy would not end the relationship between the parties. It would simply lead to another stage in the litigation process. I also find that such a liquidation would be unfair to Mr. Short.
- [85] To this point in these reasons, I have not addressed the position taken by Regent. Regent's position becomes more important when discussing potential remedies.
- [86] Regent is a shareholder of Vancouver Marina, but not RBYS. However, it is a respondent in Mr. Short's petition. Counsel for Regent made submissions in respect of Mr. Short's arguments on the proper application of the BCA in relation to the winding-up of business relationships. Not surprisingly (given that Mr. Ewachniuk's Estate owns 100% of Regent), Regent submits that Mr. Ewachniuk's actions were not oppressive or unfairly prejudicial to Mr. Short.
- [87] Regent's submission on the law relating to s. 227 echoes the submissions made by counsel for Mr. Ewachniuk's Estate.
- [88] Regent cites *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 68, and submits that, in assessing whether conduct was oppressive, the court should:
- a) first determine whether the evidence supports the reasonable expectation asserted by the claimant; and
 - b) if so, determine whether the evidence establishes that the reasonable expectation was violated by conduct that falls within the terms "oppression" or "unfair prejudice".
- [89] In order to be a "reasonable expectation", the claimant must establish that the expectations were "reasonably held". That assessment includes consideration of: general commercial practice; the nature of the company; the relationships between the parties; past practice; any agreements or representations; the fair resolution of conflicting interests; and whether the claimants could have taken steps to protect themselves (*BCE Inc.* at paras. 70-72).
- [90] Regent concedes that the test for "unfairly prejudicial" conduct is lower than the test for "oppressive" conduct, but says that Mr. Ewachniuk's conduct does not meet either test.
- [91] Regent also argues (in support of Mr. Ewachniuk's Estate) that Mr. Short did not suffer in his capacity as shareholder. Regent cites *Khela v. Phoenix Homes Limited*, 2015 BCCA 202, as authority for the proposition that the oppression remedy is only available where injuries are suffered by claimants in their capacity as shareholders.
- [92] Finally, Regent submits that Mr. Short's complaints, as set out in his petition, are not "timely". Section 227(4) requires that oppression proceedings be brought in a "timely manner".

- [93] As set out above, the submissions of Mr. Ewachniuk's Estate and Regent focus on Mr. Short's petition and the fact that it seeks relief under s. 227 of the BCA. They argue that Mr. Ewachniuk's actions were not oppressive or unfairly prejudicial. Hence, they argue, Mr. Short has not established the basis for his relief. In other words, until that threshold is met, like a light switch, no remedy is available to Mr. Short.
- [94] I do not accept this submission. I find that Mr. Short's characterization of s. 324 is the proper one.
- [95] I also note that, although counsel for Mr. Ewachniuk's Estate submits (at hearing) that Mr. Short's allegations fell short of establishing oppressive conduct, Mr. Ewachniuk's petition contains the following paragraph in its "Legal Basis" section:
14. The just and equitable test mandated by section 324 of the BCA represents a lower threshold than that under the oppression remedy found in section 227 of the BCA. An applicant such as Mr. Ewachniuk does not need to establish oppression, or unfairly prejudicial conduct or other wrongdoing to engage section 324 of the BCA.
- [96] I accept the characterization as set out in Mr. Ewachniuk's petition, which mirrors Mr. Short's position. I reject the "light switch" approach to relief as characterized by Mr. Ewachniuk's Estate and Regent. In my opinion, the cases confirm that the court is empowered to do what is "just and equitable" as long as the lower threshold has been met.
- [97] At this point, I think it is also helpful to take a step back from the arguments and note the procedural steps taken in this litigation.
- [98] On November 27, 2017, Mr. Ewachniuk commenced his petition seeking "partnership" remedies (which I have dismissed), and an order dissolving and liquidating RBYS under s. 324 and relief under s. 227.
- [99] In January 2018, Mr. Short filed a response to petition alleging that Mr. Ewachniuk manufactured the conflict between the parties (i.e., improper conduct). Further, the response to petition noted that the relief sought by Mr. Ewachniuk would prejudice Mr. Short and provide a windfall to Regent and Mr. Ewachniuk. Mr. Short's response claimed relief under s. 227 of the BCA and sought an order that Mr. Ewachniuk purchase his shares in RBYS.
- [100] However, there is no provision in the Rules allowing a counterclaim in a petition.
- [101] As a result, on July 13, 2018, Mr. Short filed his own petition against Mr. Ewachniuk, Regent, Vancouver Marina, and RBYS. That petition first sought conversion of the petition to an action. Alternatively, it sought consolidation with Mr. Ewachniuk's petition. In addition, it sought a declaration that Mr. Ewachniuk had acted in an oppressive manner and an order that Mr. Ewachniuk (or, in the alternative, Regent) purchase his shares. He also sought other relief.

- [102] The submissions of Mr. Ewachniuk's Estate and Regent (arguing that Mr. Short's onus is to establish "oppressive" conduct) are applicable to "an oppression claim". However, they do not address the law in respect of the overlay of an allegation of oppressive conduct in an application under s. 324 of the BCA. While Mr. Short's petition alleges "oppression", that pleading was, in fact, a response to Mr. Ewachniuk's petition.
- [103] The law is clear that under s. 324, the court has broad discretion in terms of remedy to do what is "just and equitable": see Baker at para. 10. The range of remedies available is set out in s. 227(3), which falls under the "oppression remedy" provisions.
- [104] Thus, the issue is really an assessment of the equities between the parties, based on their past conduct, their positions within the company, and the financial consequences of a dissolution and liquidation. Assuming that the business relationship has broken down, it makes common sense that all conduct leading to that point is subject to consideration.
- [105] As a result, my analysis below proceeds on the footing that (as in Baker) I have broad discretion to arrive at a just and equitable remedy. Below, I assess the allegations of both Mr. Short and Mr. Ewachniuk regarding the conduct of the opposing party. My goal in making that assessment is to determine the context of the conduct and whether either side has taken steps that require me to fashion a remedy that is "just and equitable".
- [106] Mr. Short submits (as does Regent) that I should fashion a remedy that accords with Mr. Short's "reasonable expectations". As noted by the Supreme Court of Canada in BCE Inc., factors that are useful in determining whether a "reasonable expectation" exists include:
- a) general commercial practice,
 - b) the nature of the company,
 - c) the relationships between the parties,
 - d) past practice,
 - e) any agreements or representations,
 - f) the fair resolution of conflicting interests, and
 - g) whether the claimants could have taken steps to protect themselves.
- [107] Mr. Short submits that those factors lead to a finding that his interest in RBYS should be purchased by Mr. Ewachniuk's Estate, or by Regent.
- [108] On the other side, Mr. Ewachniuk's petition does not allege oppression. Regardless, he submits that the context of the relationship, and hence, the remedy that I determine, should take into consideration Mr. Short's actions. Mr. Ewachniuk submits that Mr. Short took several steps in bad faith.

[109] On the basis of that overview of the parties' positions, I now turn to examine the allegations (by each side) of conduct that was alleged to be oppressive, unfairly prejudicial, or simply taken in bad faith. The overarching goal of this assessment is to determine a remedy that is just and equitable.

Mr. Short's Allegations Against Mr. Ewachniuk's Conduct

[110] Not surprisingly, Mr. Short's allegations of Mr. Ewachniuk's oppressive and improper conduct evolved over time. Mr. Short filed his petition on July 13, 2018. That petition described Mr. Ewachniuk's "oppressive conduct" over the course of 21 paragraphs. In addition to the recent (i.e., since 2017) allegations of misconduct, the petition makes allegations that purport to revisit Mr. Ewachniuk's actions in the 1960s and 1970s. Those acts include the transfer of assets from RBYS to Regent, and Regent's shareholdings shifting status from non-voting to voting.

[111] At the hearing of the petition, Mr. Short did not argue that all of the acts of alleged misconduct should be considered. He did, however, make submissions on some of the decades-old acts by Mr. Ewachniuk. Mr. Short submits that they are relevant to the nature of the relationship and Mr. Ewachniuk's shifting position on issues.

[112] I discuss those allegations below. However, in assessing the allegations, I have in mind the submissions of Mr. Ewachniuk's Estate that if Mr. Short felt that Mr. Ewachniuk had breached obligations to him in earlier decades, then he should have sought to correct those wrongs in those earlier decades. In other words, the Estate argues that Mr. Short cannot acquiesce to a set of facts, and then, at the termination of the business relationship, complain that those facts were oppressive.

[113] Mr. Short made numerous allegations of misconduct against Mr. Ewachniuk. I deal with his primary allegations in the following sections. Mr. Short also made submissions regarding other, less consequential, acts by Mr. Ewachniuk. I address those allegations after the discussion of the larger issues under the heading "Other Conduct".

Mr. Ewachniuk's Attempted Withdrawals in March and May 2017

[114] In the recitation of the background facts above, I described Mr. Ewachniuk's withdrawal of \$200,000 in March 2017 and his attempted withdrawal of \$100,000 in May 2017. Mr. Short alleges those acts constitute improper conduct by Mr. Ewachniuk. Mr. Short says that the attempted withdrawals were oppressive to him.

[115] For the reasons set out below, I do not find either of the (attempted) withdrawals constitute oppressive conduct. However, they do set the tone for the subsequent deterioration of the trust relationship.

- [116] First, I accept Mr. Ewachniuk's submission that, upon return of the funds, no further remedy was required in relation to those acts. I do not accept Mr. Short's submission that the withdrawals themselves were "oppressive". The withdrawals harmed or would have harmed Vancouver Marina, and not Mr. Short in his capacity as a shareholder of RBYS.
- [117] Mr. Ewachniuk's Estate further argues that, since Mr. Ewachniuk was essentially a 75% shareholder in Vancouver Marina, he was entitled to withdraw those funds. I do not accept that submission. Mr. Ewachniuk's actions did not accord with usual business practice, nor with the long established practice of these companies. Put another way, Mr. Short had a reasonable expectation that Mr. Ewachniuk would not whisk large sums of money from the company coffers.
- [118] While not "oppressive conduct", the attempted withdrawals do provide context for the subsequent downturn in the relationship between the parties. Any reasonable businessperson would become concerned when another member of a closely held corporation attempted to withdraw \$200,000 from the company account without prior discussion or authorization. That act cannot simply be swept under the rug.
- [119] Mr. Ewachniuk's two separate attempted large withdrawals were not undertaken in the manner that business was usually conducted between these two men and within the companies. They provide evidence of Mr. Ewachniuk's attitude toward the business and toward his business partner. Further, Mr. Ewachniuk's attempted withdrawals opened the floodgates that led to the cascade of distrust between the parties. There is no doubt that Mr. Ewachniuk precipitated the decline in the relationship between the parties. Hence, the attempted withdrawals, while not oppressive, are relevant in considering the "lower threshold" that must be met under s. 324 of the BCA.

Mr. Ewachniuk's Demand that the Shorts Give up Banking Authority and the Subsequent Correspondence Purporting to Terminate the Relationship and the Lease

- [120] Following his second attempt to withdraw funds, in May 2017, Mr. Ewachniuk made inquiries at the bank as to why his withdrawal had been declined. He learned that he did not have any banking authority for Vancouver Marina.
- [121] Upon learning that fact, Mr. Ewachniuk demanded that Mr. Short and his son execute new banking resolutions naming Mr. Ewachniuk and his wife as the sole representatives authorized to conduct banking matters on behalf of Vancouver Marina. Mr. Short and his son refused.
- [122] To foreshadow later events, the bank had correctly advised Mr. Ewachniuk that he did not have signing authority on Vancouver Marina's account. Although the Shorts refused to hand over full signing authority to Mr. Ewachniuk and his wife, the parties convened a directors meeting on June 13, 2017, wherein they passed a resolution requiring that at least one Short and at least one Ewachniuk sign all Vancouver Marina cheques.

[123] The exact reason for Mr. Ewachniuk's removal from signing authority is unclear. The best evidence, from Mr. Short, is that, in earlier negotiations relating to a line of credit (around the time of the Runnalls litigation), the bank told Mr. Short that a condition of further financing was that Mr. Ewachniuk would not have signing authority. I find that the reason for his removal is not relevant to these petitions. However, the bank asking for Mr. Ewachniuk's removal has a "ring of truth".

[124] Upon receiving the Shorts' refusal to give over full signing authority, Mr. Ewachniuk penned an email dated May 23, 2017, in which he took several positions. He wrote, in part:

I prefer to communicate via email so that there is an accurate record.

The bank account for Vancouver marina (sic) is and will continue to be frozen. However, Mike Short can still make deposits.

The partnership between John Short and my-self (sic) is over, so is our subordinate relationship through Richmond Boat & Yacht Sales Ltd. RB&YS Ltd. was the operating arm of our partnership. John has no more than 50% of the shares, or of the directorship or daily operations. Accordingly, he needs my consent to carry on. He does not have that. His name as marina manager is terminated and [the reason his name] was there rather than both our names was that I did not want to be involved day to day nor answer the phone calls. He needs my consent to do anything. Once the house of cards falls so do all relationships. Mr. John Short was the author of this and in writing.

It is only the result of coincidence that whilst I was trying to act as a 'Good Samaritan' in trying to afford Mrs. Short comfort and financial relief by send (sic) a bank draft for \$100,000 to John's wife. I discovered that I was not able to do any banking as I had been eliminated or precluded from doing anything financially by both John and Mike on August 29, 2007.

The lease between Regent Holdings Ltd. and Vancouver Marina Ltd. is also terminated for non-compliance of an essential term. [Mr. Ewachniuk cited a term of the 2010 lease providing that the Vancouver Marina would make advance payments to Regent within 30 days of receipt of moorage.]

[Emphasis in original.]

[125] The email continues and makes a number of threats. It is clear in this email that Mr. Ewachniuk is purporting to end all of the business relationships. As he notes, "Once the house of cards falls so do all relationships". Below, I return to discuss Mr. Ewachniuk's comment about the effect of the "house of cards" falling.

[126] I note the importance of the date mentioned in bold and italic section of the email: August 29, 2007. I will return to this date below when discussing Mr. Ewachniuk's allegations against Mr. Short.

[127] The May 23, 2017, email also purports to terminate the marina lease. Mr. Ewachniuk appears to rely on a provision in the lease requiring Vancouver Marina to "make advance payments within (30) days of receipt of moorage". I note two things about Mr. Ewachniuk's position in this email:

- 1) It did not accord with Vancouver Marina's practice for the prior 50 years.
- 2) His email purported to terminate the lease on the basis of a breach by Vancouver Marina, when he controlled the landlord and also held majority control (75%) of the tenant.
- 3) Mr. Short, at best, held a 25% interest in the lessee.
- 4) If the lease were terminated, Regent would take over the operation of the marina.

[128] When analyzed on that basis, it is clear that the only entity or individual who would be harmed by the termination of the lease was Mr. Short.

[129] In a subsequent email dated May 25, 2015, Mr. Ewachniuk wrote, "This is fraud - intentional breach of fiduciary relationship and continuing daily deceit since August 2007 by my partner and his son". Although the "fraud" allegation was made in the email, Mr. Ewachniuk's petition did not include that allegation. Mr. Short raises Mr. Ewachniuk's fraud allegation as a further act of oppressive conduct. As discussed below, at the hearing of the petitions, Mr. Ewachniuk's Estate adduced no evidence, nor any allegation, that the Shorts had mishandled the financial affairs of the companies. To the contrary, every dollar was accounted for.

[130] Further, the normal business practice involved Mr. Ewachniuk signing batches of blank cheques. The Shorts continued to have Mr. Ewachniuk sign batches of cheques until 2017 as they had done in prior decades. Hence, although Mr. Ewachniuk had no signing authority, his signature still appeared on all cheques. I discuss Mr. Ewachniuk's Estate's submissions regarding the alleged impropriety of the banking resolutions below. The Estate says that the Shorts took these steps to wrest financial control of the companies away from Mr. Ewachniuk.

[131] Mr. Ewachniuk later learned that a similar banking resolution had been filed on RBYS's bank account. That revelation was less troublesome to him because RBYS had less banking activity. It simply received and distributed the profits annually. However, Mr. Ewachniuk's reaction to that revelation was similar to his prior response.

[132] On May 29, 2017, Mr. Ewachniuk sent a list of demands to Michael Short to be completed within three days. The demands related to the purported termination of the lease and asked for certain information and items that would allow Mr. Ewachniuk to commence management of the marina. Further emails were exchanged between the men. Mr. Ewachniuk's position in this correspondence was that the business relationship and the lease for the marina had been terminated.

- [133] Thus, as of the end of May 2017, Mr. Ewachniuk's position was that the partnership was dissolved, the marina was no longer managed by the Shorts, and the lease was terminated. As he described it in his May 23, 2017, email, the "house of cards" had fallen and all of the relationships had ended.
- [134] In a later letter, dated July 5, 2017, Regent's counsel withdrew the purported termination of the lease.
- [135] Despite the withdrawal of the purported lease termination, Mr. Short says that all of the actions outlined above constituted oppressive conduct by Mr. Ewachniuk.
- [136] Mr. Ewachniuk's Estate submits that Mr. Ewachniuk's reaction was reasonable in the circumstances and was not oppressive. Further, the Estate argues that, once he resiled from the "termination" position, any prejudicial effect was erased.
- [137] I do not accept the position of Mr. Ewachniuk's Estate in relation to the events of late May 2017. I find that, in the context of this relationship, Mr. Ewachniuk's conduct in purporting to end the business relationship and the lease was the quintessence of oppressive conduct.
- [138] In particular, Mr. Ewachniuk's email(s) of May 23, 2017, cannot be considered anything but oppressive conduct. While the two men were equal shareholders within RBYS, it was very clear who (had always) held the stronger hand with respect to the relationship overall.
- [139] Despite the fact that Mr. Short had devoted more than 50 years to the marina, Mr. Ewachniuk purported to terminate Mr. Short's involvement with an angry email. In his first May 23 email, Mr. Ewachniuk leapt to the conclusion that he had been defrauded. He then latched onto the most draconian of self-help remedies and terminated all relationships. Further, the emails make it abundantly clear that he was well aware of the corporate structure and how it would unravel. It is clear from his email that Mr. Ewachniuk sought to terminate the partnership (if it existed) and Mr. Short's relationship through RBYS and its daily operations.
- [140] As noted, Mr. Ewachniuk wrote, "John has no more than 50% of the shares, or of the directorship or daily operations. Accordingly, he needs my consent to carry on. He does not have that". Hence, Mr. Ewachniuk knew that he was affecting Mr. Short in his capacity as a shareholder. He was unwinding the whole "house of cards".
- [141] Mr. Ewachniuk's Estate cannot resile from his actions or his words. As Mr. Ewachniuk stated in his email, "I prefer to communicate via email so that there is an accurate record". I find that he achieved that goal.

- [142] The May 23, 2017, email purported to terminate Mr. Short as marina manager and terminate the lease. Mr. Ewachniuk was attempting to cut Mr. Short out completely. Again, because Mr. Ewachniuk had designed the corporate structure, he was well aware of the power he held over Mr. Short. That power was the basis of his comment that "[o]nce the house of cards falls so do all relationships". Again, Mr. Ewachniuk's actions affected all of the inter-relationships: employment, lease, and shareholder.
- [143] In addition, the May 25, 2017, email, wherein Mr. Ewachniuk alleged fraud on the part of his 50-year business partner, constituted piling-on to his prior acts.
- [144] I noted above the finding in the Hix case that Mr. Ewachniuk had an "aggressive and domineering personality". I consider that these emails display those personality traits. The only reasonable explanation is that Mr. Ewachniuk was attempting to force Mr. Short out of the business by using his (Mr. Ewachniuk's) more dominant position. If the lease were terminated, Vancouver Marina would have little value. Mr. Ewachniuk would be left with Regent and full ownership of the marina. Mr. Short's interest in RBYS would be worth almost nothing.
- [145] As noted above, Mr. Ewachniuk, through his counsel, later resiled from the termination of the lease. However, by that point in time, the damage was done. In my opinion, it was clear that Mr. Short would always be hard-pressed to rebuild or continue a business relationship with Mr. Ewachniuk. The emails demonstrated Mr. Ewachniuk's pre-disposition to resort to the most draconian remedy. Any attempt to return to a "normal" relationship would have been difficult, if not impossible.
- [146] On that basis, I find that Mr. Ewachniuk's conduct in May 2017 constituted oppressive conduct as that term used in BCA, s. 227. Mr. Short held a reasonable expectation that the business operations would continue and that his interest in the business would continue to hold value. Further, Mr. Ewachniuk's conduct set the tone for the remainder of the (spiralling) relationship between the parties.

Mr. Ewachniuk's Subsequent Actions in June 2017

- [147] On June 9, 2017, Mr. Ewachniuk attended at the Bank of Montreal. It is unclear what he did, but in response to his actions, the bank froze the accounts of Vancouver Marina.
- [148] At a meeting held on June 13, 2017, the directors of Vancouver Marina unanimously passed a new banking resolution requiring the signature of both camps on every cheque (i.e., one of Michael or John Short plus one of Mr. or Mrs. Ewachniuk). Mr. Short was agreeable to the new banking resolutions, and the evidence establishes that he was attempting to rebuild the relationship.
- [149] In early July 2017, Patricia Ewachniuk attended at Vancouver Marinas' bank and inquired about the account. Shortly after that visit, the bank terminated Vancouver Marina's line of credit. The account and line of credit were subsequently reopened by the bank.

- [150] Mr. Short alleges that the acts of the Ewachniuks in June and July 2017, which caused Vancouver Marina's bank to be frozen and line of credit to be terminated, constituted unfairly prejudicial conduct. I do not find those acts to have been oppressive or prejudicial to Mr. Short. They had little effect and were soon remedied.
- [151] However, as discussed below, when addressing the allegations of misconduct made by Mr. Ewachniuk's Estate against Mr. Short, I find that it is important to have in mind the context that there was an ongoing fight over control of the companies and their bank accounts.

Mr. Ewachniuk's February 2018 Bank Manoeuvres

- [152] In February 2018, Mr. Ewachniuk demanded that Vancouver Marina's bank reverse certain funds transferred by Vancouver Marina to RBYS. He advised the bank that the transfer was not authorized. However, the transfer of funds had been authorized at a February 2018 meeting of the directors of Vancouver Marina. Further, after the funds had been transferred to RBYS, RBYS prepared cheques to Mr. Short and Mr. Ewachniuk for RBYS's annual profit. Mr. Ewachniuk had already deposited the cheque that he received from RBYS. As a result, when the bank reversed the Vancouver Marina transfer to RBYS, RBYS could not cover the cheque to Mr. Ewachniuk because it did not have the necessary funds. Mr. Ewachniuk's motive for this step is opaque.
- [153] After further communications in February 2018, Mr. Ewachniuk demanded that Vancouver Marina pay the amount of \$448,190.50 to Regent. That amount constituted 50% of Vancouver Marina's cash on hand as of that date.
- [154] After some back-and-forth between the parties, Mr. Short agreed to make advance payments to Regent from Vancouver Marina.
- [155] Although these actions by Mr. Ewachniuk were unexplained, I do not find them to constitute oppressive conduct on their own. They are, however, emblematic of the deterioration of the relationship between the parties and Mr. Ewachniuk's propensity to impose his will, however capricious, on Mr. Short.

Regent's Failure to Renew Vancouver Marina's Lease

- [156] As noted, Mr. Ewachniuk's purported termination of Vancouver Marina's lease (in his May 23, 2017, email) was later revoked. However, the lease was due for renewal as of February 1, 2020. The prior lease provided that Vancouver Marina had an automatic right of renewal, providing that it paid the rent, performed the covenants therein, and provided the required notice. The failure to renew the lease occurred after Mr. Short's petition was filed. Hence, it is not listed as part of Mr. Ewachniuk's improper conduct.

- [157] In an affidavit prepared for this hearing and filed August 15, 2018, Mr. Ewachniuk, on behalf of Regent, stated that the lease was not terminated and Regent had no present plans to sell the property. He noted that, as a 50% shareholder in Vancouver Marina, Regent "has every intent to preserve Vancouver Marina's business and value".
- [158] It is evident that Mr. Short was concerned about the status of the lease and renewal. Mr. Short, on behalf of Vancouver Marina, gave notice to renew the lease in April 2019. Mr. Ewachniuk did not respond to that notice prior to his passing on September 16, 2019.
- [159] The lease expired on February 1, 2020, as Regent did not respond to Vancouver Marina's notice.
- [160] Regent finally responded to Vancouver Marina's notice in March 2020, after the expiry of the prior lease term. In a letter Regent took the position that it would not renew the lease because:
- a) Vancouver Marina was in default of its obligation to advance portions of its yearly rent within 30 days of receipt of moorage payments;
 - b) there had been substantial changes in circumstances, specifically:
 - i. Mr. Short and RBYS were unable to provide management services, and
 - ii. Vancouver Marina and Regent had not secured extensions of the long-term water lot leases from the Province.
- [161] Mr. Short, in his submissions, notes that:
- a) in Regent's letter, it purported to rely upon the same lease term that Mr. Ewachniuk cited in his May 23, 2017, email (discussed above). Mr. Ewachniuk (the principal of Regent) had previously cited that "breach" as a basis for termination of the lease. He then withdrew that allegation. Hence, he had acquiesced to the state of affairs;
 - b) again, Mr. Ewachniuk controlled 75% of Vancouver Marina and 100% of Regent. His 100% interest was alleging that his 75% interest was not abiding by the terms of the lease. However, it is clear that he controlled both entities;
 - c) it was disingenuous for Regent to purport to rely on that provision as a basis for not renewing the lease, when Regent had never taken the position that Vancouver Marina was in breach during the term of the lease. Further, as noted, Mr. Ewachniuk could have cured any purported breach by simply asking that the terms of the lease be followed;
 - d) Mr. Short's provision of management services is not a term or condition of the lease;
 - e) Mr. Short is not seeking to be paid his salary as manager;
 - f) Vancouver Marina is close to securing its long-term (30-year) water lease renewals.

- [162] The status of the renewal of the lease remains in limbo. Mr. Short describes the failure to renew the lease as evidence of oppressive conduct.
- [163] On the other side, Mr. Ewachniuk's Estate and Regent argue that the lease was not terminated. Its term expired. Further, the lease was a contractual arrangement with Vancouver Marina. They say that the expiration of the lease is a reflection of the new reality of the parties. The original business model does not make sense give the fact that Mr. Short cannot be the manager and the passing of Mr. Ewachniuk.
- [164] I note that the Estate and Regent take the position (on the issue of valuation) that the absence of a lease (or the uncertainty about any renewal) decreases the value of Mr. Short's interest in RBYS and the relief available to him.
- [165] When I consider all of the surrounding facts, I ask: Who benefits and who is harmed by Regent's failure to renew the lease? Clearly, neither Regent nor the Estate is harmed. In fact, Regent now operates a marina on the premises and takes 100% of the profits. Similarly, the Estate, as the owner of Regent, also benefits. It is clear that the only person harmed by the failure to renew is Mr. Short. Further, given the terms of the lease, he had a reasonable expectation that if Vancouver Marina opted to renew, there would be a further ten-year term.
- [166] On that basis, I find that the failure to renew the lease was unfairly prejudicial to Mr. Short.
- [167] However, as I discuss below, I find that the appropriate date for the valuation remedy is July 18, 2018, which is prior to the expiration of the lease term. As of that date, all parties would have had the reasonable expectation that the lease would be renewed.
- [168] Based on this evidence, in my assessment of a just and equitable remedy under ss. 324, 227 of the BCA, the failure of Regent to renew the lease provides strong evidence that an order liquidating RBYS and leaving Mr. Short with shares in Vancouver Marina would lead to an unfair result for Mr. Short. The subsequent actions of Mr. Ewachniuk's Estate and Regent support this finding.

Mr. Ewachniuk Voted on Vancouver Marina Directors' Resolutions When he was in a Conflict Position

- [169] Mr. Short submits that, in directors' meetings after May 2017, Mr. Ewachniuk took positions and voted on resolutions that benefited Regent, to the detriment of Vancouver Marina and RBYS.
- [170] Mr. Short says that Mr. Ewachniuk owed a fiduciary duty to Vancouver Marina and RBYS, and he should have recused himself from voting on resolutions that involved Regent.

[171] Mr. Ewachniuk's Estate submits that Mr. Short's arguments overstate the obligations of directors in closely held corporations. The reality of the situation was that the business relationship was formed on the basis that Mr. Ewachniuk's family owned property that would be a good base for a marina. Hence, there was always going to be a contractual relationship between the companies, and the interests of Regent and Vancouver Marina would always be in tension.

[172] I find that Mr. Ewachniuk voting on resolutions that involved Regent was not a matter that constituted oppressive or unfairly prejudicial conduct. In the context of the case, I find it to be a neutral act.

Mr. Ewachniuk Relied on Unauthorized Changes in Regent's Shares from Non-Voting to Voting

[173] Mr. Short also alleges that certain actions by Mr. Ewachniuk in prior decades are relevant to his complaint in his petition.

[174] First, Mr. Short says that Mr. Ewachniuk improperly takes the position that Regent has, and had, voting shares in Vancouver Marina. He says that Regent actually holds non-voting shares. That distinction is important in respect of the power balance within Vancouver Marina at shareholder meetings.

[175] Mr. Short submits that it would be an abuse of process for Mr. Ewachniuk to take different positions in alternate cases, each to his own benefit. He notes that, in the Runnalls litigation, Mr. Ewachniuk swore an affidavit indicating that Regent was supposed to hold non-voting shares in Vancouver Marina. However, he swore that the shares had been incorrectly registered as "voting" shares, and he had instructed his solicitors to correct the share registry. Mr. Short submits that Mr. Ewachniuk specifically swore that affidavit to decrease the value of Regent during the course of litigation in which his sisters claimed an interest.

[176] Further, Mr. Ewachniuk requested an affidavit from Mr. Short in the Runnalls litigation that was to the same effect. Mr. Short swore, in 2008, that he had recently learned that in 1976, Mr. Ewachniuk had changed Regent's shareholding from non-voting to voting without Mr. Short's knowledge or consent.

[177] In response, the Estate notes that the documentary evidence shows that Mr. Short signed off on numerous sets of financial statements and directors' resolutions while he was President of Vancouver Marina. From 2007 forward, those documents indicate that Regent was a voting shareholder in Vancouver Marina.

[178] Mr. Short's evidence from the Runnalls litigation is consistent with his position in these proceedings and with his description of the standard operating procedures for RBYS and Vancouver Marina. As noted above, Mr. Ewachniuk was responsible for all corporate documents. Mr. Short's position is that if Mr. Ewachniuk drafted a document and put it in front of him, he (Mr. Short) would sign it.

- [179] While Mr. Short's description of the usual practice for the execution of corporate documents may be accurate, he cannot claim that he does not have any responsibility for the legal effect of those documents. Mr. Ewachniuk's Estate correctly submits that Mr. Short cannot claim "non est factum" with respect to the corporate documents that do not assist his claims.
- [180] Mr. Ewachniuk turns this allegation back on Mr. Short. He notes that at Vancouver Marina's August 21, 2018, annual general meeting, Mr. Short, in his capacity as Chair of the meeting, recognized the voting status of Regent on preliminary motions. However, on the vote to elect the slate of directors for the next year, Mr. Short took the position that Regent did not have voting shares. Hence, he refused to accept Regent's vote in favour of Mr. Ewachniuk's slate of directors.
- [181] Mr. Ewachniuk's Estate says that this was an act wherein Mr. Short attempted to wrest control of Vancouver Marina. I discuss this allegation below when dealing with Mr. Ewachniuk's Estate's allegations of improper conduct against Mr. Short.
- [182] At this point, I am assessing Mr. Ewachniuk's actions in relation to the relationship with Mr. Short. The evidence is clear that the share registry denotes that Regent has voting shares. Prior financial statements and meeting minutes recorded the same information. While Mr. Short has a legal argument that Regent was meant to hold non-voting shares, I am unable to find that Mr. Ewachniuk's reliance on the share registry was an oppressive or unfairly prejudicial act. That holds true whether or not he was telling the truth in his evidence in the Runnalls litigation.
- [183] As a result, I do not consider Mr. Ewachniuk's actions in relation to the voting status of Regent to be a factor that favours Mr. Short's application for relief.

Mr. Ewachniuk Improperly Transferred the Ownership of Hard Assets from Vancouver Marina and RBYS to Regent

- [184] The same reasoning as above holds true for Mr. Short's allegation that Mr. Ewachniuk improperly transferred the ownership of the hard assets from Vancouver Marina and RBYS to Regent.
- [185] The evidence is not disputed that when the two men started out in business together, they operated under the RBYS banner. RBYS financed the purchase of many of the floats and other hard assets that were used in the marina business.
- [186] However, Mr. Ewachniuk's Estate notes the following:
- a) The 1969 lease between Regent and RBYS (and subsequent leases) provides that all alterations and improvements of the marina would become the property of Regent at the end of the lease term.

- b) In 1973, RBYS assigned all rights, title, and interest to the piles, floats, docks, sheds, ramps, retaining walls and dredging to Regent. Mr. Short signed that document as the president of RBYS.

[187] While Mr. Short does not deny signing those documents, he says that Mr. Ewachniuk prepared the paperwork and he (Mr. Short) simply signed the documents that were placed in front of him. Regardless, Mr. Short cannot complain, in 2020, that Mr. Ewachniuk's treatment of the hard assets of the marina was "oppressive conduct" when he signed the documents that transferred those assets to Regent some five decades earlier.

[188] On these issues, the documentary evidence supports Mr. Ewachniuk's version of the facts. Mr. Short's position on these issues was incorrect. Mr. Ewachniuk's conduct in this regard was not oppressive.

Other Conduct

[189] As noted, Mr. Short made other allegations of oppressive or unfairly prejudicial conduct against Mr. Ewachniuk which he submits should be considered in assessing the business relationship. Those allegations include, Mr. Ewachniuk:

- a) refused to authorize the use of modern business practices, such as automatic bank transfers and the use of credit cards;
- b) impeded Vancouver Marina from obtaining independent counsel (after the events of May 2017); and
- c) threatened to terminate the employment of John Short and Michael Short.

[190] I have described above the acts that led to the precipitous downturn in the business relationship between Mr. Short and Mr. Ewachniuk. I have found that some of the steps taken by Mr. Ewachniuk were clearly oppressive. After the relationship was fractured, it is fair to say that each side was attempting to protect his (or its) position. Mr. Short was attempting to continue the business relationship; Mr. Ewachniuk was attempting to end it.

[191] In that context, I do not consider the acts described above to be oppressive or unfairly prejudicial. Banking practices were a business decision. They did not impact Mr. Short as a shareholder. Although Mr. Ewachniuk slowed the appointment of counsel for Vancouver Marina, he did not block it. Finally, I have dealt with the May 2017 emails that threatened to tumble the whole "house of cards" and all relationships (including employment). Mr. Ewachniuk's later threats do not add to, or worsen, his initial oppressive acts.

Summary of Findings Regarding Mr. Ewachniuk's Oppressive Conduct

[192] On the basis of the discussion above, I find that:

- a) Mr. Ewachniuk's conduct, as demonstrated in his emails in late May 2017, constituted oppressive conduct toward Mr. Short;

- b) while not all of Mr. Ewachniuk's conduct was oppressive, the relationship between the parties was coloured by Mr. Ewachniuk's threats and actions commencing in May 2017, and his attempts to take control of the companies thereafter;
- c) Regent's refusal to renew the lease in 2020, among other facts, was unfairly prejudicial toward Mr. Short and establishes that the dissolution and liquidation of RBYS would result in an unfairness to Mr. Short.

[193] On that basis, I find that Mr. Short has satisfied the elements required to trigger relief under ss. 324(3) and 227(3).

[194] Having addressed Mr. Ewachniuk's conduct, I now turn to the allegations of misconduct against Mr. Short in order to determine whether his conduct should be considered in fashioning a just and equitable remedy.

Mr. Ewachniuk's Allegations of Improper Conduct by Mr. Short

[195] As noted, Mr. Ewachniuk's Estate does not seek any relief apart from the dissolution of RBYS and the liquidation of its assets. Those assets are comprised of its shares in Vancouver Marina, cash in the bank, and some other chattels. As a result, the Estate does not style its allegations against Mr. Short as acts of oppressive or unfairly prejudicial conduct as described in s. 227 of the BCA. However, the Estate argues that Mr. Short's conduct provides context that should be taken into consideration by the court in deciding the proper resolution of this case. In other words, the Estate argues that, if there was improper conduct, it was a two-way street.

[196] Mr. Ewachniuk's main allegation of improper conduct against Mr. Short, as noted above, relates to the fact that Mr. Ewachniuk had been removed from banking authority. His petition alleges that there were two improper resolutions: August 29, 2007, relating to Vancouver Marina and October 12, 2010, relating to RBYS. I discuss those allegations in more detail below.

[197] Mr. Ewachniuk's petition cites further examples of Mr. Short's alleged misconduct. However, they were not seriously argued at the hearing. I discuss the lesser allegations first.

Mr. Short Used Electronic Banking Procedures

[198] Mr. Ewachniuk's petition alleges that Mr. Short's improper conduct included using electronic banking procedures, credit card, and other procedures to deal with Vancouver Marina's and RBYS's funds and expenditures, including the continued and improper payment of salaries to Mr. Short and his son.

- [199] The Estate submits, "It is not an exaggeration to say that Mr. Short electronically raided the treasury of Vancouver Marina to pay monies to [RBYS] and then had [RBYS] pay monies to John Short and Ted Ewachniuk without the approval or consent of the Ewachniuks. They did the very thing that they had accused Mr. Ewachniuk of so forcefully".
- [200] This submission has no merit. Mr. Short, in his position as manager, stopped relying (solely) on physical cheques for the operation of the business and authorized electronic banking, credit card, and other procedures to deal with payments to and from the marina. That was simply a decision to modernize the business and add efficiencies. As noted, there is no allegation that Mr. Short misappropriated any funds.
- [201] It is incorrect to say that Mr. Ewachniuk did not approve or consent to those payments. He was well aware of them because he met with Mr. Short and the accountant every year-end to go over the financial statements. Following those meetings, he received a cheque for half of the amount of RBYS's profits. To the extent that funds were paid out to the shareholders of Vancouver Marina, those payments were made after a review by the parties at a meeting with their accountant.
- [202] I find no merit in this allegation.

Michael Short Took a Partnership or Corporate Opportunity

- [203] Mr. Ewachniuk's petition alleges that Mr. Short's son, Michael, improperly misappropriated a business opportunity from Vancouver Marina by becoming an investor in False Creek Fuels Ltd. The facts that form the basis of this allegation are:
- a) Michael Short started working at Vancouver Marina in the early 2000s and became a director in 2007;
 - b) at some point after 2007, Michael Short invested in, and became involved in the operation of, a marine fuel dock in Vancouver under the name False Creek Fuels Ltd.
- [204] Mr. Ewachniuk alleges that:
- a) the corporate opportunity should have been provided to Vancouver Marina to participate; and
 - b) Michael Short was supposed to be working full time at Vancouver Marina.
- [205] In response, Mr. Short notes that Michael Short is not a shareholder in either Vancouver Marina or RBYS. He is not a party to either petition. Hence, his conduct cannot have a bearing on these petitions.
- [206] Further, to the extent that Mr. Ewachniuk might have had a complaint about the corporate opportunity claim, he could have pursued it when the issue arose. Any claim is clearly time-barred.

- [207] Still further, False Creek Fuels Ltd. operates a fuel barge that is more than 15 kilometres from the Property at Moray Bridge. There is no prospect of any competition for business. I am confident that no boater would have trouble deciding whether to fuel-up in the Fraser River or travel 15 km to False Creek or vice versa.
- [208] In my opinion, Michael Short's business entanglements with another gas dock do not have any effect on the business relationship between Mr. Ewachniuk and Mr. Short, nor on the remedy available in the wind-up of that relationship.

Mr. Short Refused to Provide Financial Disclosure

- [209] The petition alleges that Mr. Short refused to provide Mr. Ewachniuk with disclosure or access to financial information relating to the companies.
- [210] Although included in the petition, this was not argued at the hearing.
- [211] I note that, at all times, Mr. Ewachniuk was a shareholder and director in RBYS and Vancouver Marina. He had his own accountant in respect of the businesses. The evidence is clear that the parties had a practice of meeting at the year-end to go over the financials.
- [212] Mr. Ewachniuk's petition was filed at a time when he suspected that Mr. Short had misappropriated funds and sought an accounting for all income and expenses. However, he always had access to that information. He simply had not exercised his access until he discovered that he did not have any banking authority.
- [213] As noted, following a review of the marina's finances, all funds were accounted for.
- [214] There is no factual basis for this allegation.

Mr. Short Used His Personal Credit Card

- [215] Mr. Ewachniuk's petition also raises the allegation that Mr. Short used a personal credit card for business purposes in order to improperly obtain "points" as a personal benefit. Mr. Ewachniuk's petition calls upon Mr. Short to account for those amounts.
- [216] This point was not argued at the hearing.
- [217] To be frank, I am at a loss to conceive of a more picayune allegation of improper conduct. In my opinion, the inclusion of this allegation in the petition is exemplary of Mr. Ewachniuk's anger at everything that Mr. Short had done up to the date of filing. He was looking for any reason to terminate the relationship.
- [218] In submissions, counsel did not press any of the above allegations as being particularly egregious. That was a reasonable position to take because none of them were egregious. None of these allegations constitute improper conduct, and I will not take them into consideration in determining the issues in these petitions.

Banking Resolutions

- [219] The primary focus of Mr. Ewachniuk's assertion of improper conduct against Mr. Short (prior to the filing of the petition) relates to the banking resolutions that removed Mr. Ewachniuk's signing authority. As noted above, upon learning, in May 2017, that he did not have any banking authority, Mr. Ewachniuk took the steps that commenced the steep downturn in the relationship between the parties.
- [220] Mr. Ewachniuk's counsel argues the banking resolution issue at the hearing. However, that submission was hampered by a significant evidentiary issue.
- [221] In support of his petition, Mr. Ewachniuk swore and filed an affidavit on November 27, 2018, appending numerous documents that formed the basis of his claim. In the affidavit, Mr. Ewachniuk also swore that the information alleged in his petition was true.
- [222] Exhibit "T" to Mr. Ewachniuk's affidavit #1 was the Vancouver Marina's banking resolution dated August 29, 2007. The banking resolution at Exhibit "T" states that John and Michael Short had full signing authority for the company. There is no mention of Mr. Ewachniuk.
- [223] Mr. Ewachniuk's petition says that the 2007 banking resolutions were designed by Mr. Short to wrest financial control of the company away from Mr. Ewachniuk. The petition (filed November 27, 2017) alleges:
25. Unknown to Mr. Ewachniuk and without his consent, Mr. Short began at an unknown date to engineer the affairs of the Partnership Company and Vancouver Marina in order to injure, impair or diminish the role and interest of Mr. Ewachniuk in breach of Mr. Short's duties as a partner and fiduciary and thereby to take over control of the Partnership Company and Vancouver Marina business.
26. In particular, Mr. Short, by filing a Banking Resolution, dated August 29, 2007, falsely purporting to be a resolution passed by the directors of Vancouver Marina, surreptitiously removed Mr. Ewachniuk as an authorized signatory of the bank account of Vancouver Marina at the Bank of Montreal and substituted as the authorized signatories: "Either John Norman Short or Michael John Short." Thereafter, Mr. Short, by not disclosing this false resolution deceived Mr. Ewachniuk into believing that the status quo remained unchanged.
32. Mr. Ewachniuk viewed this misconduct and the failure to proffer any warrant or justification for it as acts of such gravity as to bring the partnership to an end and he quite properly sought to regain control of the bank account.
- [224] It is clear from this pleading that the banking resolution dated August 29, 2007, was central to Mr. Ewachniuk's allegation that Mr. Short had been the author of the breakdown in trust between the two men and the resulting in termination of the business relationship.
- [225] While banking authority had, in fact, been removed from Mr. Ewachniuk, the evidence that Mr. Ewachniuk tendered in an attempt to establish that point is significantly tarnished:

- a) As noted above, Mr. Ewachniuk's email of May 23, 2017 referenced the date, August 29, 2007 as the date he lost banking authority.
 - b) Exhibit "T" to Mr. Ewachniuk's affidavit #1, sworn November 27, 2017, was a bank "Certificate and Agreement" with Vancouver Marina dated August 29, 2007. It is a form of corporate resolution created by the bank indicating that the signing authority for Vancouver Marina was: "Either John Norman Short or Michael John Short". The exhibited document was signed by John Short in his capacity as president.
 - c) That document was in Mr. Ewachniuk's possession when he commenced his petition and, as noted, formed a significant part of his claim.
 - d) However, much later in the litigation, in 2020, the bank produced its documents.
 - e) The bank's copy of the same August 29, 2007, "Certificate and Agreement" (signed by Mr. Short) provided the signing authority was: "Either John Norman Short or Michael John Short and Ted Ewachniuk or Patricia Ewachniuk" (emphasis added).
- [226] Hence, the typed words indicating that Mr. Ewachniuk had signing authority for Vancouver Marina had been removed, or whited-out, from Mr. Ewachniuk's copy of the document.
- [227] The evidence is clear that there was no banking resolution removing Mr. Ewachniuk's signing authority in 2007. That removal was achieved by a banking resolution signed by Mr. Short and his son on October 12, 2010, in relation to Vancouver Marina.
- [228] Mr. Ewachniuk's petition also refers to a second RBYS banking resolution dated October 12, 2010. However, as discussed above, RBYS did not carry on any active business. It merely received its yearly profit distribution from Vancouver Marina and, in turn, paid it out to Mr. Short and Mr. Ewachniuk. Hence, there were really only two cheques per year.
- [229] The bank's copy of the Vancouver Marina 2007 "Certificate and Agreement", required the signature of at least one member of both groups: the Shorts and the Ewachniuks.
- [230] Mr. Ewachniuk passed away before the documents were disclosed by the bank. Hence, he was never asked about the obvious alteration of the document.
- [231] Mr. Lunny, on behalf of Mr. Ewachniuk's Estate, submits that there is no evidence as to how the 2007 Certificate and Agreement came to be altered and that it remains a "mystery".
- [232] I do not find it to be mysterious.
- [233] Regretfully, on a balance of probabilities, I find that:
- a) following Mr. Ewachniuk's attempt to withdraw \$100,000 in 2017, the bank informed him that he did not have signing authority; (That was an accurate description of the state of affairs.)
 - b) that event commenced the decline of the relationship between Mr. Short and Mr. Ewachniuk;

- c) correspondence was exchanged between the parties and counsel for the parties. Positions were taken. As noted above, Mr. Ewachniuk's email of May 23, 2017, states, in bold italic print, "I had been eliminated or precluded from doing anything financially by both John and Mike on August 29, 2007". The only conclusion I can draw is that Mr. Ewachniuk had the August 29, 2007, Vancouver Marina banking resolution. He either misread the document, or deliberately misstated its effect;
- d) then, in November 2017, Mr. Ewachniuk was preparing the documents for his affidavit in support of his petition;
- e) upon review of the August 29, 2007, Vancouver Marina banking resolution, Mr. Ewachniuk realized that, in fact, he and his wife continued to have signing authority for Vancouver Marina in that resolution. The August 29, 2007, resolution did not remove him from signing authority. In fact, it did the opposite. However, he had committed to a position, and he did not have any other documents;
- f) in order to make the evidence fit the allegation, Mr. Ewachniuk altered the document by whiting out his name and his wife's name.

[234] The only inference that I can draw from the two versions of the certificate and agreement is that Mr. Ewachniuk altered the copy of the August 29, 2007 banking resolution that was appended to his affidavit. He "whited-out" the words "and Ted Ewachniuk or Patricia Ewachniuk".

[235] Mr. Lunny notes that both parties proceeded through the litigation on the basis of Mr. Ewachniuk's version of the document. He submits that "it appears clear" that Mr. Ewachniuk was informed by the bank in May 2017 that he did not have signing authority due to the August 29, 2007, resolution. Part of that submission is correct. Mr. Ewachniuk had no signing authority, but it was not due to the 2007 resolution.

[236] Mr. Lunny also submits that "nothing turns upon" the fact that the August 29, 2007, resolution was altered, because the 2010 resolution (which did remove his signing authority) has been disclosed by the bank.

[237] The submission that "nothing turns" on the fact that a key document appears to have been altered by Mr. Ewachniuk is, to say the least, optimistic.

[238] I note that Mr. Ewachniuk was no longer a lawyer in 2017 (having been disbarred in 2000). Hence, any potential professional duties and obligations are not engaged. However, he had decades of litigation experience. He knew the importance of preservation of documents. There is no reasonable explanation for the alteration of a document in his possession apart from a deliberate act by him.

- [239] The alteration of a relevant document by any litigant is an extremely serious matter. However, taking a step back and viewing this act in the context of the business and personal relationships in this case: the alteration of a document and subsequent reliance upon it to destroy a business relationship of 52 years is, quite simply, unconscionable.
- [240] However, despite the alteration of the 2007 banking resolution, the fact remains that Mr. Ewachniuk had been removed from banking authority in 2010.
- [241] Mr. Ewachniuk's Estate submits that the timing of these acts (in 2010) suggests that Mr. Short was attempting to take over or acquire majority ownership in Vancouver Marina and RBYS during that period. Of note, in 2010, Mr. Ewachniuk had been ordered to buy out his sisters' holdings in Regent. The evidence suggests that he was attempting to arrange financing. He suggests that Mr. Short was taking advantage of that situation to wrest financial control away from Mr. Ewachniuk.
- [242] I note that this allegation is, by definition, pure speculation on the part of counsel. Until the disclosure of the documents by the bank (in 2020), all parties were working on the assumption that the August 29, 2007, banking resolution (produced by Mr. Ewachniuk) was a true copy. Mr. Ewachniuk died in 2019. The bank documents were disclosed in 2020. Hence, Mr. Ewachniuk could not have opined on the reason that a change in banking authority occurred in 2010. His position, while alive, was that the change occurred in 2007, before the Runnalls litigation had proceeded to trial.
- [243] Further, Mr. Lunny's submission regarding the state of Mr. Ewachniuk's finances in 2010, and the possibility that Mr. Short was attempting to buy out his partner, leads to nothing. Mr. Short did not attempt to buy out Mr. Ewachniuk. To use Mr. Lunny's phrase, "nothing turns on it".
- [244] In response to the allegation of misconduct with respect to signing authority, Mr. Short puts forward four propositions.
- [245] First, Mr. Short's evidence is that Mr. Ewachniuk had put him (Mr. Short) in charge of the attempts to obtain financing through the bank to buy out Mr. Ewachniuk's sisters. (Mr. Ewachniuk later obtained other financing.) Mr. Short also says that, to the best of his recollection, in negotiations with the bank, the bank's position was that it would only proceed on the basis that Mr. Ewachniuk would not have signing authority on the company's account. Given the prior litigation history, and the subsequent transactions, Mr. Short's narrative has a "ring of truth".
- [246] Second, even if Mr. Short thought about buying out Mr. Ewachniuk in 2010, nothing ever came of it. Even if he had taken some step in that direction, the two men were co-owners of RBYS. RBYS co-owned Vancouver Marina with Regent. Mr. Ewachniuk could not be forced to sell any interest unless his financial situation required that he sell a portion of the marina. Given Mr. Ewachniuk's shareholding position and the ownership of the land, Mr. Short could not carry out any form of hostile take-over.

- [247] Third, the parties had a long practice that Mr. Ewachniuk would sign blank cheques that were held by Mr. Short until they were required. Mr. Ewachniuk had full trust in Mr. Short until May 2017. When a supplier needed to be paid, Mr. Short would complete the (pre-signed) blank cheque and co-sign it. That practice continued throughout the business relationship until 2017.
- [248] After the relationship fell apart in 2017, Mr. Short was able to account for every dollar of the marina's income and expenses. Hence, to the extent the allegation is that Mr. Short improperly gained financial control, the only negative effect that Mr. Ewachniuk suffered was his own inability to improperly withdraw funds in 2017. Mr. Short's financial management of the marina, despite his complete financial control, was beyond criticism.
- [249] Fourth, the evidence is not disputed that the parties sat down with their accountant at the end of the year to review the financial statements. Hence, any significant anomaly would have been noted, at the latest, by the year-end review.
- [250] Having reviewed the evidence and the positions of the parties, I agree with Mr. Lunny's submission that Mr. Short should not have filed the 2010 banking resolutions without informing Mr. Ewachniuk. There was no company resolution regarding the signing authority. However, that authority was never abused. The business practices were not altered. Mr. Ewachniuk continued to sign blank cheques. Mr. Short and his son continued to manage the finances of the business prudently. As a result, Mr. Ewachniuk did not find out about the true state of affairs for seven years. It was only when he attempted to (improperly) withdraw funds for a non-business purpose that he learned of the state of affairs at the bank.
- [251] It follows that I do not accept the submission of Mr. Ewachniuk's Estate that the 2007 (or the 2010) banking resolutions cast a negative light on Mr. Short. If Mr. Short had changed the banking authority with the intent to "wrest the iron grip of control", the results would have been different. There would have been financial improprieties in the following years. There were none.
- [252] The discussion above leads to an assessment of the actual state of affairs. Mr. Lunny is correct that the bank advised Mr. Ewachniuk that he did not have signing authority. That had been the state of affairs since 2010. It is also accurate to say that Mr. Short and his son signed a bank document indicating that Vancouver Marina had passed a resolution providing that Mr. Short and his son had full banking authority.
- [253] Upon learning of that state of affairs, it is reasonable to expect that Mr. Ewachniuk would have been upset. Any person would have been suspicious. It would have been reasonable for Mr. Ewachniuk to ask some hard questions of the Shorts to determine how the business came to this state of affairs. He certainly could have asked for an accounting.

- [254] However, Mr. Ewachniuk's reaction to this revelation was to (purport to) terminate a 52-year business relationship through his May 23, 2017, email. That action was not reasonable. Further, to the extent that it was based on the August 29, 2007, banking resolution, his email was based on a fiction.
- [255] There is significant irony in the fact that the stated basis for Mr. Ewachniuk's distrust of Mr. Short was a document that Mr. Ewachniuk altered.
- [256] I do not find that the signing of the banking resolutions, in the context of these facts, constitutes improper conduct on the part of Mr. Short or his son. It does not play into my assessment of the equities of the wind-up of RBYS. Again, ironically, the documents have the opposite effect. Mr. Ewachniuk's conduct in altering documents to fit his allegations was improper conduct, both in the business relationship, and in the litigation.

Mr. Short's Actions Following May 2017

- [257] In addition to Mr. Short's actions before the filing of Mr. Ewachniuk's petition, counsel focusses on Mr. Short's actions after Mr. Ewachniuk's petition was filed.
- [258] Vancouver Marina held its annual general meeting ("AGM") on August 21, 2018, Mr. Short sat as chair. The two shareholders of Vancouver Marina are RBYS and Regent.
- [259] By the articles of the company, the president held an additional "casting" vote (in addition to the shareholder votes). Hence, if he and Mr. Ewachniuk were the only voting shareholders, Mr. Short's "casting" vote would turn the vote in his favour. However, if the directors of RBYS were deadlocked on a resolution, then RBYS would not be able to cast a vote.
- [260] Mr. Ewachniuk put forward a slate of four directors, with a majority that would favour his position (although Mr. Short would continue to be a director). By this time, all parties had retained counsel, and those counsel attended the meeting. Further, Mr. Ewachniuk sought to vote the 50% share interest held by Regent.
- [261] As discussed above, Mr. Short took the position that Regent did not have voting shares in Vancouver Marina. Following from that position, as chair, he purported to deny Regent the opportunity to vote on a slate of directors. Mr. Short took this position when he knew, or should have known, that the share registry recorded that Regent had voting shares in Vancouver Marina.
- [262] Mr. Ewachniuk's Estate argues that this act constituted bad faith on the part of Mr. Short in an attempt to maintain the "iron grip of control" over the company. In response, Mr. Short maintains that he had a reason for taking that position.
- [263] As noted above, all parties had counsel at this meeting. It is clear from the minutes of the meeting that Mr. Short's position was based on legal advice.

- [264] Further, the minutes of the meeting indicate that RBYS did not cast a vote (due to the deadlock) and, as a result, Regent's vote (for Mr. Ewachniuk's slate of directors) passed unanimously.
- [265] I do not consider Mr. Short's actions at that meeting, although based on an incorrect understanding of the facts, to be improper or to cast a negative pall over his conduct within the company. To the extent that he attempted to prevent Regent from voting, his attempt had absolutely no effect. At a directors' meeting immediately following the AGM, Mr. Ewachniuk's slate of directors appointed themselves as officers of the company (with Mr. Ewachniuk as president). Thereafter, Mr. Ewachniuk's slate has run the company.

Summary of Conclusions Regarding Mr. Short's Conduct

- [266] Having reviewed the evidence and the submissions of counsel for Mr. Ewachniuk's Estate and Regent, I am unable to find any conduct by Mr. Short that can be considered oppressive or unfairly prejudicial to Mr. Ewachniuk. I go further to say that, when I consider Mr. Short's actions in the context of the battle for control of RBYS and Vancouver Marina, it is clear that he was simply taking any steps that he could to maintain his position, and the relationships, within the business.
- [267] In other words, no action by Mr. Short will negatively influence my assessment of a just and equitable remedy on the facts of this case.

Appropriate Remedy

- [268] Having found that Mr. Ewachniuk's conduct was oppressive toward Mr. Short, the next issue relates to the appropriate remedy.
- [269] As noted, Mr. Short seeks an order that Mr. Ewachniuk's Estate, or, in the alternative, Regent, purchase his shares in RBYS. He seeks that order under s. 227(3)(h). Mr. Ewachniuk's Estate argues that liquidation of RBYS would be appropriate and fair to both parties.
- [270] I have described above the reasons why a liquidation of the assets of RBYS would be unfair to Mr. Short and would create a windfall for Mr. Ewachniuk's Estate. Simply put, the Estate would end up with the marina, and Mr. Short would end up with nothing apart from probable litigation against the Estate and Regent.
- [271] Having considered all of the evidence and submissions, I find that a just and equitable resolution will be reached by ordering Mr. Ewachniuk's Estate to purchase Mr. Short's shares in RBYS.
- [272] Having come to that conclusion, I now turn to address the proper valuation of Mr. Short's interest in RBYS.

Valuation

[273] The next issue relates to the proper valuation of Mr. Short's interest in RBYS. I address below the multiple issues raised by the parties and their experts. However, in the end, I return to an assessment that is just and equitable to the parties, given the events to date.

The Proper Approach to Valuation

[274] In addition to the specific "accounting-based" valuation issues discussed below, the parties have fundamental philosophical differences regarding the proper approach to the valuation of Mr. Short's interest:

- a) Mr. Short argues that the role of the court is to fashion a remedy that is just and equitable in all the circumstances. He argues that a "fair value" in these circumstances may exceed the "fair market value" because of the special circumstances of the relationship between the companies and the parties.
- b) Mr. Ewachniuk's Estate and Regent submit that the appropriate value is the "fair market value". They submit that any relief granted to Mr. Short cannot be punitive against Mr. Ewachniuk's Estate. In other words, the value ascribed to Mr. Short's interest cannot be greater than the amount that a willing purchaser would pay for that interest.

[275] To a large extent, the two positions represent opposing sides of the same coin. Mr. Short says that his interest in RBYS should not be valued on the basis that the marina will be sold separate and apart from the rest of Regent's assets to an arm's length third party. He says that no purchaser would agree to buy into a business wherein his or her interest would be subordinate to the interests of the Estate and Regent. He says there is no prospect, or market, for such a sale. Hence, using a "fair market value" would be unfair to Mr. Short. He seeks a "fair value" that represents, in part, the value that Mr. Ewachniuk's Estate will derive from full ownership of the marina. He seeks a valuation based upon half of the value of the marina as an ongoing concern.

[276] Conversely, Mr. Ewachniuk's Estate (and Regent) say that, if a share purchase is ordered, it would be unfair to the Estate (or Regent) to ascribe a price that is higher than a willing third party would pay.

[277] Mr. Ewachniuk's Estate and Regent also submit that, at this hearing, I am not able to determine a value for the shares in RBYS because such a determination would necessarily depend on findings related to disputed rights and obligations between Vancouver Marina, Regent, and RBYS which are not before me on this petition. I reject that submission in whole. As set out in the cases relating to s. 324 of the BCA, having arrived at my conclusions regarding the conduct of the parties, my role is to determine a just and equitable remedy for Mr. Short.

[278] Mr. Short points to prior cases where the determination of what is "just and equitable" diverted from the "fair market value" of the petitioner's interest. He cites

1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd., 2015 BCSC 1160, where Justice Sigurdson wrote:

[14] In determining the price to be paid for the shares in circumstances where oppression or unfairly prejudicial conduct has been found, the question is not necessarily what is the market value of the shares but rather what is a fair price or value in the circumstances: *Diligenti v. RWMD Operations Kelowna Ltd.* (No. 2), [1977] B.C.J. No. 1331 (S.C.) [*Diligenti*], paras. 83-89.

[18] With regard to whether a minority discount should be applied to the valuation, the authorities I was referred to tend not to take a minority discount into account in oppression proceedings. That seems to accord with the fact that the majority shareholder or the company is acquiring the shares, and as such the question is not what the shares would have fetched in the marketplace on a sale to a third party who would receive only a minority stake in the company.

[279] I note that in 1043325 Ontario Ltd., the petition was brought under s. 227 of the BCA, and the allegation was that there had been oppressive conduct. Justice Sigurdson found in favour of the petitioner. Hence, there was an allegation, and a finding, of oppression. That is a slightly different scenario than here, where a petition is brought under s. 324 seeking a winding-up and one party seeks an alternate remedy on the basis that there has been some improper conduct and liquidation would lead to an unfair result. As set out above, I have found oppressive conduct by Mr. Ewachniuk.

[280] Mr. Short also cites *Kidner Investments Ltd. v. Totem Mercury Holdings Ltd.*, 2017 BCSC 205, wherein Justice G.C. Weatherill reasoned:

[83] Moreover, I find it is unlikely that any prospective purchaser of Kidner's shares in Totem, if one were to be found, would be willing to pay the equivalent of 50% of the value of the Land. Sales of a block of shares in a privately held corporations to third parties comprising less than a majority interest typically command a discount, particularly where, as is the case here, there is a history of shareholder discord: 1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd., 2015 BCSC 1160 at paras. 18-19; *Marko v. Marko*, [1989] B.C.W.L.D. 1482 (C.A.).

[281] Justice G.C. Weatherill found that the parties' directors were deadlocked, although ascribed no blame to either party for the deadlock. He ordered a "shot-gun" sale of the business. For reasons that should be self-evident, a "shot-gun" order in the circumstances of the present case is not feasible.

[282] In determining this issue I return to the reasoning of Justice Burke in *Baker* which I find to be of assistance. In that case, brought under s. 324 of the BCA for a winding-up, the two petitioners owned 50% of a tire retail business in Surrey. The respondent owned the other 50%. The relationship had broken down. The complicating factor in *Baker* was that the tire

store leased premises that were owned by a company controlled by the respondent. Hence, it was unlikely a third party would purchase the petitioners' shares. Nobody would be interested in buying into a minority position in the business. Further, there was no chance of a "shot-gun" scenario. Similar to the present facts, if the petitioners bought out the respondent, the respondent would still be the lessor. At the next renewal, he could refuse to renew the lease (at paras. 43-45).

[283] In those circumstances, Burke J. ordered that a business valuator create an updated value of the tire business, as an ongoing enterprise. She ordered that the respondent purchase the petitioners' interest at 50% of the total value of the business. Hence, she arrived at a just and equitable result that was not based on the fair market value of the petitioners' (minority) interest in the business. It was based on half of the value of the business.

[284] In my analysis below, I have followed the same reasoning. I find that determining a just and equitable purchase price for Mr. Short's shares in RBYS starts from the proposition that the value of RBYS is determined by valuing Vancouver Marina and dividing it in half to determine the value of RBYS and then apportioning half of that value to Mr. Short's interest in RBYS. I find that this is the only fair result given the decades of work that Mr. Short put into the marina.

The Parties' Positions on Valuation

[285] The parties' positions on the value of the marina, and the interest of Mr. Short, are based on the opinions of several experts.

[286] Mr. Short says that RBYS's ownership interest in Vancouver Marina is somewhere in the range of \$3,361,811 to \$7,523,524. He claims half of that amount. In addition, he claims \$334,000, which represents half of the \$668,000 that Vancouver Marina owed to RBYS as of July 2018.

[287] Mr. Ewachniuk's Estate and Regent say that:

- a) as of the date of this hearing, Vancouver Marina has no lease, no management contract, and no assets;
- b) as a result, the interest that RBYS owns in Vancouver Marina is half of almost nothing;
- c) if a valuation is warranted, RBYS's ownership interest is in the range of \$889,999-\$1,300,000.

[288] Several questions emerge relating to valuation:

- a) What is the appropriate date from which to value Mr. Short's interest in RBYS?
- b) What is the status of the lease between Regent and Vancouver Marina?
- c) Is the "Sales Proceeds Clause" triggered?

- d) What is the status of the water lot leases?
- e) Is the value of RBYS based upon Vancouver Marina making lease payments or simply dividing the profits between Regent and RBYS?
- f) Is RBYS entitled to receive a management fee?
- g) Does Vancouver Marina own the hard assets of the marina?
- h) Are there capital expenditures that should be taken into account?
- i) Should RBYS be valued on the basis that Regent had voting or non-voting shares in Vancouver Marina?
- j) Should there be a "minority discount" based on Mr. Short's position within RBYS and Vancouver Marina?

[289] I discuss each of these issues below, followed by an assessment of the valuation reports.

What is the appropriate date to value Mr. Short's interest in RBYS?

[290] As set out above, I have found that Mr. Ewachniuk's improper conduct led to the dissolution of the relationship between the parties. That conduct was oppressive.

[291] It is well-settled that, absent unfairness, the appropriate date for the valuation should be the date the petition seeking the remedy was filed. In *M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd.*, 2020 BCCA 371, the Court of Appeal wrote:

[128] The judge did not address the appellant's submission that under the BCA, the presumptive date to value a court-ordered sale of shares is the date of the petition seeking the remedy, unless in the particular circumstances of the case it would be fair and just to select a different date.

[292] In this case, there are two petitions. Mr. Ewachniuk commenced his petition in November 2017. Mr. Short's petition, which seeks the remedy under s. 227, was filed July 13, 2018.

[293] Hence, I find that the appropriate date for valuation is July 13, 2018, and, to the extent possible, I use that date in the assessment below.

What is the status of the lease between Regent and Vancouver Marina?

[294] The answer to the first question provides the answer to the second question.

[295] As of July 2018, there was an existing ten-year lease in place. It was dated February 1, 2010. The lease provided that if Vancouver Marina met its obligations under the lease, and gave at least six months' notice, then Regent would renew the lease for a further term of ten years on "similar" terms. Rent would be negotiated, and there would be no further right to renew.

[296] The existing lease was set to expire in 2020. The evidence discloses that Mr. Short wrote to Regent on behalf of Vancouver Marina on April 16, 2019, providing the formal written request required by the lease.

[297] As of July 2018, Vancouver Marina had the option to renew the lease. It later took the necessary step for renewal. Hence, the lease would have been renewed if Mr. Ewachniuk had not taken the improper steps that he did.

[298] I find that, for valuation purposes, as of July 2018, there was an existing lease and it was capable of being renewed for a further ten years at the option of Vancouver Marina.

Is the "Sales Proceeds Clause" triggered?

[299] The 2010 lease contained a provision known as the "Sales Proceeds Clause", which provides:

The Lessor covenants with the Lessee that the Premises may be sold by the Lessor during the term of this lease only upon payment by the Lessor to Richmond Boat and Yacht Sales Ltd. of one-half (1/2) of the sale proceeds reasonably applicable to the sale of the premises, less and Lease Amount remaining unpaid.

[300] That provision, or one similar, had been included in Vancouver Marina's leases since the 1970s. Mr. Short indicated that he believed that the Sales Proceeds Clause would protect him in the event that Mr. Ewachniuk decided to sell Regent, or the Property. Further, he felt that the clause protected him in the event of a breakdown in his relationship with Mr. Ewachniuk.

[301] Although that may have been Mr. Short's understanding, there was, in fact, no part of the Sales Proceeds Clause that provided protection to Mr. Short in the event of a breakdown of the relationship.

[302] There is no evidence that Mr. Ewachniuk intended to sell the marina or the Property in 2017 or 2018. There is nothing in Mr. Ewachniuk's conduct, or the conduct of his Estate, indicating an intention to sell the Property.

[303] As such, I am unable to find that the Sales Proceeds Clause is engaged. However, the existence of the clause is relevant. I find that the fact that the Sales Proceeds Clause existed provides some protection of Mr. Short's interest in the marina. In other words, although the Property is not being sold, the valuation of Mr. Short's interest must recognize that the Property could not be sold out from underneath him without compensation under that clause.

What is the status of the water lot leases?

- [304] Vancouver Marina, being a marina, carries on business on the water. The water in this case is the Fraser River. Hence, Vancouver Marina requires a licence or lease to operate a business on the Fraser River. That is achieved by entering into water lot leases with the Province of British Columbia (the "Province"). The Province usually grants those leases for a period of 30 years.
- [305] For a reason that is unrelated to this litigation, the Province has been slow in renewing the water lot leases relating to Vancouver Marina. The prior lease expired in 2019. However, that lease existed as of July 2018, and there was no reason to believe, at that point in time, that it would not be renewed.
- [306] On that basis, I have not taken the possible expiration of the water lot leases into account in assessing the value of the marina or RBYS.

Is the value of RBYS based upon Vancouver Marina making lease payments or simply dividing the profits between Regent and RBYS?

- [307] I described above the structure of Vancouver Marina. RBYS owns 50% and Regent owns 50%.
- [308] By agreement between the owners, and structured by Mr. Ewachniuk, Vancouver Marina's profit at the end of each year would be divided equally between the two owners. Vancouver Marina claimed the management salaries paid to Mr. Short and his son as expenses, and those amounts were not included in the profits.
- [309] RBYS received its share of the profit as a "management fee".
- [310] Regent received its share of the profit as "rent".
- [311] In the Runnalls litigation, N. Smith J. ruled that this setup was unfair to the minority shareholders in Regent. He found that, by creating this structure, Mr. Ewachniuk was carving income away from Regent. On that basis, N. Smith J. ruled that RBYS was only entitled to a management fee after paying rent (as an expense) to Regent. In other words, Regent, was entitled to receive rent payments as lessor, and its share of profits as shareholder. In his 2010 decision (2010 BCSC 1106), N. Smith J. wrote:
- [67] Mr. Ewachniuk argues that the effect of that arrangement is that Vancouver Marina pays the marina operating expenses, including a direct salary of \$60,000 to Mr. Short, after which [RBYS] and Regent, as equal owners of Vancouver Marina, split its profits. [RBYS] receives its half as management fees while Regent receives its half as rent.
- [68] I do not think that is an accurate analysis. Mr. Ewachniuk established the corporate structure under which the marina is operated by a corporate entity other than Regent. Under that structure, Regent's relationship to the operating company is that of both landlord and shareholder. Having been given that dual role, Regent is, in my view, entitled to receive income in both capacities.

- [69] Vancouver Marina's true profit as a separate company is the amount remaining after payment of all expenses, including the rent it must pay to Regent. That profit is a benefit properly belonging to both its shareholders. The diversion of all of that profit to Richmond Boat, of which Mr. Ewachniuk is a 50 per cent shareholder, deprives the petitioners of the right to share in or benefit from that income and I find that to be unfairly prejudicial within the meaning of the Business Corporations Act.
- [70] From 2001 to 2009, the total management fees paid to Richmond Boat were \$2,022,568. That includes the \$60,000 a year management fee to Richmond Boat (Mr. Short's salary) that is specifically provided for in the lease. Deducting that amount, the total that should have been available to be shared by Richmond Boat and Regent was \$1,482,568. Regent was entitled to half that amount, or \$741,284, and the value of Regent must be increased by that amount.
- [312] On that basis, N. Smith J. increased the amount payable by Vancouver Marina to Regent by approximately \$82,500 per year.
- [313] Regent and Mr. Ewachniuk's Estate argue that I should apply the same calculation to the current proceeding. In other words, the value of RBYS should be calculated on the basis that Vancouver Marina is required to pay rent to Regent before calculating the profit to be divided between Regent and RBYS.
- [314] I do not accept that submission.
- [315] As set out in the reasons of N. Smith J, above (at para. 68), Mr. Ewachniuk established the corporate structure. While that structure may have been unfairly prejudicial to minority shareholders of Regent, it was not unfair to Mr. Ewachniuk. It was only unfair to Mr. Ewachniuk's sisters because the other half of the profits were being paid to a corporation of which he owned 50%.
- [316] Mr. Short submits that the fairest way to treat the parties is to grant a remedy that recognizes the realities of their business relationship. I accept that premise.
- [317] I find that Mr. Ewachniuk's Estate (and Regent) cannot complain that Regent's lease to Vancouver Marina was unfair to Regent and argue that an adjustment should be made for rent. Mr. Ewachniuk set up that structure and established the rent to be paid and the division of profits. The reasons of N. Smith J. apply to the case where Mr. Ewachniuk's sisters were minority shareholders in Regent. The structure was unfair to them. It was not unfair to Mr. Ewachniuk.
- [318] Hence, RBYS will be valued on the basis of the actual agreement and longstanding practice between the parties. The agreement was that Vancouver Marina's profits would be divided in two and Regent would receive its half of the profits as rent.

Is RBYS entitled to receive a management fee?

- [319] On the other issue related to the profit sharing, Mr. Ewachniuk's Estate argues that RBYS is not entitled to receive any payment from Vancouver Marina the fall of 2018 because RBYS has not been performing any management functions since that time.
- [320] As noted above, Mr. Short suffered a serious orthopedic injury in May 2017. He has not been capable of any work in a management capacity.
- [321] Mr. Short's son Michael managed the marina until late 2018. Mr. Ewachniuk sought to terminate Michael's employment by means of a directors' resolution at a meeting on July 7, 2018. That move led the Shorts to apply to court, leading to reasons for judgment of Justice Matthews (August 20, 2018) enjoining Vancouver Marina from terminating Michael's employment (indexed at 2018 BCSC 1686). However, Michael resigned from that role a few months later.
- [322] Mr. Ewachniuk's Estate also submits that the directors of Vancouver Marina did not authorize RBYS's continued management nor the continued payment of management fees to RBYS after 2017. Hence, the Estate submits that no management services have been performed and no resolution for the payment of fees has been approved.
- [323] The Estate and Regent submit that it would be doubly unfair to value RBYS on the basis that it is entitled to receive a management fee for which it performed no service, simply on the basis that it was the "decades old practice". They submit that, after RBYS stopped providing management services, the 50% of net earnings that were previously paid out as a "management fee" to RBYS, thereafter stayed in Vancouver Marina as the "profits". Those profits were subject to the decisions of the company's board of directors. The directors could decide to pay it out as dividends or re-invest it in the business.
- [324] In answer to all of the submissions of the Estate and Regent, I have concluded that the appropriate valuation date is July 2018. As of that date, the management services were still being provided.
- [325] Further, as I have found above, Mr. Ewachniuk collapsing the "house of cards" was an act that was oppressive toward Mr. Short. The equal division of the profits between the owners of Vancouver Marina was, as noted by Mr. Ewachniuk's Estate, the "decades' old practice". Hence, to value RBYS on the basis that Mr. Ewachniuk had terminated the management agreement would be the opposite of "just and equitable".
- [326] Finally, RBYS, as a 50% shareholder in Vancouver Marina, was entitled to receive a percentage of Vancouver Marina's profits. The Estate's submission is based on the nomenclature created by Mr. Ewachniuk. He named the profit sharing arrangements as "rent payments" and "management fees". However, the reality of the situation was that Vancouver Marina was dividing its profits between its shareholders on a basis that Mr. Ewachniuk determined to be fair, not on the basis of rent or management fees owed. He put the structure in place. He cannot rely on the naming of the payments to deny the benefit of ownership to his former partner.

[327] On that basis, I conclude that RBYS should be valued on the basis that it was entitled to half of the profits of Vancouver Marina. That is in line with the contractual arrangements and the longstanding practice.

Does Vancouver Marina own the hard assets of the marina?

[328] The marina consists of 161 boat slips. The access to those slips is provided by decking, wharves, and ramps from the foreshore. There are also hard assets in the office.

[329] Mr. Short argues that the initial investment in the hard assets of the marina were made by RBYS. When Vancouver Marina was incorporated, the ownership of those assets was transferred to Vancouver Marina.

[330] He also submits that in the Runnalls litigation, Mr. Ewachniuk swore an affidavit stating that Regent did not pay for the hard assets when the business commenced. Mr. Ewachniuk's affidavit #5 from the Runnalls litigation, sworn December 11, 2009, states that the hard assets of the marina were transferred into Regent's name, solely for the purpose of protecting them against (hypothetical) litigation. He also swore that he had instructed his counsel to correct the records and put the hard assets back in Vancouver Marina's name. Mr. Short submits that, by adducing this evidence, Mr. Ewachniuk decreased the value of Regent in the Runnalls litigation. Mr. Short says that Mr. Ewachniuk should be bound in this litigation by the position he took in prior litigation. He says that a change of position amounts to an abuse of process.

[331] Hence, Mr. Short argues that the valuation of Vancouver Marina should include the hard assets.

[332] In response, Mr. Ewachniuk points to two documents: the 1969 lease and the 1973 transfer of assets. He says these agreements document the transfer of the hard assets to Regent. (See the discussion above under the heading: "Mr. Ewachniuk Improperly Transferred the Ownership of Hard Assets from Vancouver Marina and RBYS to Regent".)

[333] While Mr. Ewachniuk's affidavits in the Runnalls litigation are at odds with the position that his Estate takes in this litigation, I am unable to find that the hard assets of the marina should be included in the value of either Vancouver Marina or RBYS. The documentation is clear that the hard assets were transferred either in 1979 or at the end of the term of the 1969 lease. Mr. Short signed those agreements. He cannot complain about a state of affairs when he signed the document transferring the assets.

[334] Further, even if those agreements were not sufficient to transfer the hard assets, the Property lease, since 1969, has provided that, at the end of the term, the hard assets would become the property of the lessor, i.e., Regent. That term is not unusual in commercial leases. Regent, like any lessor, would not want its tenant to be able to remove the marina at the end of the lease.

[335] Hence, the hard assets of the marina do not belong to RBYS. I discuss below the treatment of those assets in the expert valuation reports.

Are there capital expenditures that should be taken into account?

[336] Regent and Mr. Ewachniuk's Estate commissioned expert reports relating to the capital expenditures that are required for the marina. They included payments for dredging and stabilization of the banks and foreshore.

[337] Mr. Short concedes that certain amounts need to be set aside for these projects, but disputes the amounts claimed. I discuss these issues below when assessing the expert reports.

Should RBYS be valued on the basis that Regent had voting or non-voting shares in Vancouver Marina?

[338] Mr. Short argues that Regent was meant to have non-voting shares in Vancouver Marina. That issue is important because if Regent does not have voting shares, then control of Vancouver Marina was essentially divided equally between Mr. Ewachniuk and Mr. Short.

[339] However, as noted above, the share registry shows Regent as owning 100 voting shares in Vancouver Marina.

[340] Again, Mr. Short points to Mr. Ewachniuk's evidence in the Runnalls litigation. In the same affidavit #5, Mr. Ewachniuk swore that Regent was supposed to have non-voting shares in Vancouver Marina. He (again) swore that he had instructed his counsel to correct the share register to provide that Regent's shares are non-voting. The obvious inference is that Mr. Ewachniuk provided that evidence in the Runnalls litigation to decrease the value of Regent. If Regent only had non-voting shares, then it had less control over the operation of Vancouver Marina.

[341] Mr. Short argues that it would be an abuse of process to allow Mr. Ewachniuk to take opposing positions in different litigation in order to achieve a better result in each proceeding.

[342] In response, Mr. Ewachniuk's Estate submits that he is not seeking to re-litigate anything. The Estate submits that it is Regent, not the Estate, that is defending a claim that is "without factual or legal foundation". The Estate further submits that any claim in relation to the voting shares is statute barred. If Mr. Short wanted to correct the share register, he should have done so immediately following the conclusion of the Runnalls litigation.

[343] I have reviewed the decisions in Runnalls. I am unable to find that there was any consideration by N. Smith J. of the voting vs non-voting issue.

[344] On that basis, I find that I am unable to look behind the share registry. I value RBYS on the basis that Regent had voting shares.

Should there be a "minority discount" based on Mr. Short's position within RBYS and Vancouver Marina?

[345] Mr. Short submits that there should be no minority discount.

[346] Mr. Ewachniuk submits the opposite.

[347] I have set out above the numerous ways in which Mr. Ewachniuk exercised his influence over Mr. Short. I have also set out my reliance on Burke J.'s reasons in Baker.

[348] On the circumstances of this case, in the assessment of a just and equitable result, I find that it is not appropriate to apply a "minority discount" to the value of Mr. Short's interest.

Expert Reports

[349] Having discussed the basis upon which I will determine the valuation, I now turn to the expert reports.

[350] Mr. Short retained two experts:

- a) Mr. Balderston is a professional appraiser who valued the entire Property (owned by Regent) at \$14,300,000 and, working backward, valued the marina at \$7,100,000.
- b) Mr. Blair is a chartered business valuator who calculated the following values as of July 13, 2018:
 - i. The fair market value of RBYS's 50% interest in Vancouver Marina was \$3,361,811.
 - ii. The fair value of Mr. Short's interest, without a "minority shareholder discount", would be \$1,680,000, on the assumption that RBYS owns 50% of the hard assets of the marina (floats and wharves etc.). However, he ascribes a negative value to those assets (\$107,000) due to accumulated depreciation (i.e., without those assets, Mr. Short's interest would be \$107,000 more).
 - iii. Applying further considerations, Mr. Short's 50% interest in RBYS, as of July 13, 2018, is between \$1,500,000 and \$1,600,000.

[351] Hence, on the basis of the reports that Mr. Short commissioned, a just and equitable price at which the Estate or Regent should buy him out would be in the range of \$1,500,000 and \$1,600,000.

[352] At the hearing of the petition, counsel for Mr. Short provided submissions on valuation that used certain figures taken from his opponent's expert reports as a starting point. Working with those figures and applying calculations based on adjusted capitalization rates and normalized operating income, Mr. Short's counsel submits that his 50% interest in the marina should be valued in the range of \$3,761,000.

[353] I have reviewed counsel's submissions on those figures, and I reject his suggested approach. In my opinion, accepting counsel's calculations as applied to an opposing party's expert report is fraught with problems and potential errors. If the true value of Mr. Short's interest was in the range of \$3,700,000, then I expect that Mr. Short's experts would have come to that conclusion.

[354] In response, Mr. Ewachniuk's Estate retained three experts:

- a) Mr. Ellis is a marine surveyor who estimated that the following capital expenditures are required:
 - i. deferred marina and electrical repairs will cost in the range of \$100,000;
 - ii. foreshore stabilization will cost \$1,253,700; and
 - iii. dredging will cost \$500,000.
- b) Mr. Henrey, a real estate appraiser, estimated the market value of the net income generated by the leasehold interest in the marina (Mr. Henrey takes into account (i.e. deducts) Mr. Ellis's suggested capital expenditures.)
- c) Mr. Sturgess, a chartered accountant and Chartered Business Valuator, applying a 5%-10% minority discount, concluded that Mr. Short's interest in RBYS as of September 4, 2020, is either:
 - i. Scenario 1: \$890,000 based on a scenario wherein Vancouver Marina takes half of its profit for the year and pays it as "rent" to Regent, and then the remaining profits are divided equally between RBYS and Regent (i.e., additional "rent" to Regent); or
 - ii. Scenario 2: \$1,394,000 based on a scenario wherein Vancouver Marina's profits are divided equally between RBYS and Regent (i.e., no additional "rent" to Regent).

[355] For the reasons set out above, I have concluded that it would not be fair or equitable to alter the decades-long practice of dividing the net earnings of Vancouver Marina equally between RBYS and Regent. Hence, Mr. Sturgess' "Scenario 1" does not accord with my findings. Accordingly, I base my discussion below on Mr. Sturgess' "Scenario 2".

[356] Although all parties made lengthy submission regarding valuation issues, I note that, as a starting point:

- a) Mr. Short's expert (Mr. Blair) valued Mr. Short's interest at \$1,680,000, (including the hard assets);
- b) Mr. Ewachniuk's Estate's expert (Mr. Sturgess) valued Mr. Short's at \$1,394,000.

[357] While those two valuations may appear to be "within a range", there are substantial differences between them. Three of the differences between the assumptions underlying the reports of Mr. Blair and Mr. Sturgess are relatively easy to resolve based on my findings above:

- a) First, Mr. Blair's report values the marina as at July 13, 2018, whereas Mr. Sturgess uses September 4, 2020. As set out above, I find that July 2018 is the appropriate date for valuation. Hence, Mr. Blair's date is correct.
- b) Second, Mr. Blair assumed that RBYS owned 50% of the hard assets of the marina and. Mr. Sturgess did not assume that ownership. I have found that RBYS does not own those interests. Hence, Mr. Sturgess' assumption is correct on this point. However, as discussed below, after years of depreciation, the book value of the hard assets is a negative number.
- c) Third, Mr. Blair did not apply a minority discount. Mr. Sturgess did apply a 5-10% minority discount. As noted above, I find Mr. Blair's approach is the correct one on these facts.

[358] There are two fundamental elements that are more difficult to resolve:

- a) Mr. Blair (relying on Mr. Balderson) did not set aside (or "deduct") the funds necessary to complete Mr. Ellis' capital repairs (including dredging and foreshore stabilization). Instead, Mr. Blair notionally set funds aside as an annual expenditure for capital expenses that will occur every five or ten years. Mr. Sturgess (relying on Mr. Henrey) indicated that an up-front capital payment of \$1,230,000 would need to be deducted from the value (in addition to setting aside an annual amount).
- b) The fundamental difference between the two reports is the approach taken:
 - i. Mr. Blair relied on Mr. Balderson's report which valued Regent's entire property, then worked backward to value the marina and then RBYS's interest in the marina.
 - ii. Mr. Sturgess relied on Mr. Henrey's report which used an income approach to value the marina.

[359] Although Mr. Henrey's report ultimately relied on the "income approach" to value, I note that he also used other methods to confirm his opinion on value. He reached similar valuations, using a "direct comparison" approach. Hence, Mr. Henrey's report, as the basis for Mr. Sturgess' report, is well supported.

[360] However, as noted, Mr. Henrey, valuing the marina in 2020, relied on two other reports that opined that the marina needed significant capital upgrades, including the docks and wiring. Further, the marina required both foreshore stabilization and dredging. Mr. Henrey calculated the current cost of those undertakings at \$1,230,000. He applied that as a one-time expense to the overall value of the marina. Hence, his initial "value" was reduced by \$1,230,000. He also created an annual expense, recognizing that dredging would have to be carried out every decade or so.

- [361] Mr. Blair took a different approach to these expenses. On the basis that dredging would take place on a ten-year cycle, Mr. Blair set aside a certain amount toward that expense every year, but did not account for that step to be taken immediately.
- [362] I have determined that the correct valuation date is July 2018. At that point, the Shorts were still managing the marina. There were plans in place to conduct the dredging. Thereafter, the Shorts ceased managing the marina. I was informed that, as of the date of the hearing, the dredging and foreshore stabilization had not been conducted.
- [363] Synthesizing the two reports, I find that the appropriate method of handling the capital upgrades falls somewhere between the "Henrey Approach" and the "Balderston Approach". Mr. Balderson's valuation acknowledges the requirement of a notional fund for the capital upgrades. That "fund" accounts for the large expenditures which Mr. Henrey applied as a one-time expense.
- [364] Having assessed the valuation reports, I find that:
- a) the appropriate date for valuation is July 13, 2018;
 - b) Regent is not entitled to receive "rent" in addition to 50% of Vancouver Marina's profits. It receives "rent" in the form of its share in the profits. Hence, the profits of Vancouver Marina are to be divided equally between its two shareholders;
 - c) no minority discount should be applied;
 - d) RBYS does not have a beneficial interest in the hard assets of the marina. However, those assets carry a negative value in Mr. Blair's assessment, having been depreciated over time. Mr. Blair values the hard assets at (\$107,000);
 - e) the valuation must take into account a yearly cost for capital maintenance, and that fund had not been created by July 2018.
- [365] On that basis, I find that the low end of Mr. Blair's valuation is an appropriate starting point. However, I apply a negative adjustment to that figure to account for, what was in 2018, the impending necessity to dredge the marina. On that basis, I reduce Mr. Blair's \$1,550,000 by \$100,000. I find that the figure of \$1,450,000 represents an accurate assessment of Mr. Short's 50% interest in RBYS.
- [366] Again, returning to the concept of a just and equitable remedy for Mr. Short in these circumstances, I find that object would be achieved by Mr. Ewachniuk's Estate buying out Mr. Short's interest in Vancouver Marina for the amount of \$1,450,000. I note that this amount does not include the funds that RBYS had in the bank as of July, 2018. Mr. Short is entitled to half of that amount in addition to having his shares purchased.

Remedy

- [367] As discussed, I dismiss the Estate's petition seeking remedies under the Partnership Act.

- [368] On the basis of the findings and analysis set out above, I find that a just and equitable remedy under ss. 324(3)(b) and 227(3) of the BCA is to order Mr. Ewachniuk's Estate to purchase Mr. Short's shares in RBYS for the amount of \$1,450,000. I order that purchase to occur within 60 days of the release of these reasons.
- [369] In addition, Mr. Short is entitled to half of the funds held by Vancouver Marina that were payable to RBYS as of the date of valuation (July 13, 2018). I understand that Vancouver Marina owed RBYS \$668,000 as of that date. Mr. Short is entitled to 50% of those funds. I further order that the other half of those funds be held by Vancouver Marina for a period of 60 days for the purpose of completing the remedy provided in these reasons, pending agreement of the parties or further order of this Court. The parties are at liberty to apply for further directions or orders regarding those funds.
- [370] Given the submissions of counsel, I have concerns regarding the financial ability of Mr. Ewachniuk's Estate to comply with the order to buy out Mr. Short's interest. I am aware that Vancouver Marina has continued to earn income in the period since July 13, 2018. The affidavit dated February 21, 2020, of Mr. Edwin Liu, external accountant to Vancouver Marina, states that, as of that date, Vancouver Marina held "approximately \$1,000,000 in cash on hand". I order that any funds held by Vancouver Marina be held in trust for a period of 60 days for the purpose of completing the terms of this order. The parties are at liberty to apply for further directions or orders regarding those funds.
- [371] I expect that issues may arise that require further submissions. Those matters include, but are not limited to, the following:
- a) The tax implications of the sale.
 - b) Mr. Ewachniuk's Estate may argue that it does not have sufficient funds to comply with this order. If that occurs, I grant liberty to Mr. Short to apply to make further submissions seeking an order directly against Regent.
- [372] On the basis set out above, the relief sought in Mr. Short's petition is granted. It follows that Mr. Ewachniuk's petition is dismissed.

Costs

- [373] Mr. Short has been successful in these proceedings. I have noted my findings regarding Mr. Ewachniuk's conduct in this litigation. I will hear submissions on costs if they cannot be resolved by the parties.

"A. Ross J."

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Prepared on 29 October 2026 · Esheria