IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Phaneuf v. 0896459 B.C. Ltd.,*
2024 BCSC 1343

Date: 20240725
Docket: S215588
Registry: Vancouver

Between:

Norman Phaneuf and Bradley Phaneuf

Plaintiffs

And

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

Defendants

And

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

Defendants by Counterclaim

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for Norman Phaneuf, Bradley Phaneuf, and WCIL Investments Ltd.:	T.M. Cohen, K.C. C.R. Phillips
Counsel for Vern Phaneuf:	R.W. Cooper, K.C. S. Sodhi
Counsel for Irene and Terry Phaneuf:	C. P. Dennis, K.C.
Place and Date of Hearing:	Vancouver, B.C. February 14, 2024 June 18, 2024
Place and Date of Judgment:	Vancouver, B.C. July 25, 2024

Table of Contents

I. OVERVIEW

[1] The Phaneuf family has been involved in the operation of A&W franchise restaurants in BC for many years. This action relates to two of these franchise restaurants, operated by the defendants, Fremont Development Ltd. and 0896459 BC Ltd. (collectively, the "Companies"). The central issue in the action is whether the Companies' articles of incorporation contain a mistake which requires rectification.

[2] The Companies were incorporated in 2010 and 2012. The Phaneuf brothers, Norman, Bradley, Terry, and Vern, are all shareholders in the Companies. The plaintiffs, Norman and Bradley Phaneuf, were each allotted 40% of the Companies' Class A shares; Vern and Terry Phaneuf were each allotted 10% of the Companies' Class B shares. Because the individual parties all share a surname, I refer to them in these reasons by their first names only for convenience; in doing so, I intend no disrespect.

[3] Norman and Bradley are the sole directors of the Companies. Vern is a chartered accountant; the parties disagree about the nature of his role within the Companies. Terry suffers from advanced dementia and currently resides in a care home. Irene is their 89-year-old mother.

[4] Norman and Bradley allege that the Phaneuf brothers reached an oral agreement regarding the rights and restrictions on their shares which is not accurately reflected in the Companies' articles. They submit that the Companies' articles incorrectly identify their shares as non-participating (i.e., not entitled to dividends or a sharing of the Companies' assets on liquidation, dissolution, or wind-up) instead of participating shares. They say they were unaware of this alleged error until 2020, when they attempted to issue a dividend from the Companies to the shareholders for the first time. They seek rectification of the Companies' articles to correct this alleged error.

[5] Norman and Bradley say that despite the two of them: 1) filling the positions of President and Secretary, respectively, within the Companies; 2) together holding 80% of the issued shares in the Companies; 3) having the only voting rights; and 4)

being the shareholders who financed the Companies, signed personal guarantees for bank loans, and oversaw the Companies' operations for more than 12 years, the articles provide that they have no participation rights. They submit that, left as-is, the articles do not accurately record the shareholders' oral agreement regarding their ownership and share rights in the Companies and that this mistake must be rectified.

[6] Norman and Bradley also advance claims against Vern in negligence and for breach of fiduciary duty and/or misrepresentation, on the basis that he knew or ought to have known of the alleged mistake in the articles when the Companies were incorporated.

[7] Vern denies the existence of the oral agreement that Norman and Bradley allege. He asserts that the ownership and operation of the Companies formed part of a broader family business endeavour which was governed by a different oral agreement. Vern says the Phaneuf brothers agreed that they would all be equal partners in the ownership and operation of the Phaneuf family business and that a family partnership arose out of their combined efforts in various businesses. He says that Norman and Bradley eventually pushed him out, contrary to his expectations as a partner and a shareholder, and that the Companies' articles are accurate.

[8] On September 22, 2023, after expiry of the time limit for doing so, Vern filed a counterclaim, with neither the parties' consent nor leave of the court. Norman, Bradley, and the defendants by counterclaim (Terry, Irene, and two other companies) apply to strike the late-filed counterclaim; Vern applies to extend the filing deadline.

[9] The hearing of these two cross-applications commenced but did not conclude on February 14, 2024; the parties scheduled a continuation of the hearing for June 18, 2024. On May 13, 2024, Vern filed a third application, seeking leave to file a late affidavit explaining his delay in filing his counterclaim.

[10] For the reasons that follow, I decline to admit Vern's late affidavit evidence and conclude that there is no real and substantive connection between the action

and the counterclaim, and no degree of dependence by the latter on the former. Vern's application to extend the time to file his late counterclaim is therefore dismissed, with costs in the cause.

II. PROCEDURAL HISTORY

[11] Norman and Bradley initially commenced these proceedings by petition filed June 10, 2021, and amended February 23, 2022. On September 29, 2022, Justice Jackson referred the petition to the trial list and ordered that: 1) the petition stand as the notice of civil claim; 2) Vern be added as a defendant to the action; and 3) his response to the petition stand as his response to civil claim: *Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706 at para. 78.

[12] On February 15, 2023, Norman and Bradley amended their notice of civil claim, adding claims against Vern in negligence, for breach of fiduciary duty, and alleging misrepresentation related to his conduct regarding the rights and restrictions in the Companies' articles. On May 16, 2023, they filed a notice of trial, setting the action down for a 13-day trial commencing March 25, 2024.

[13] On September 19, 2023, plaintiffs' counsel issued an appointment to examine Vern for discovery on November 20, 2023. On September 22, 2023, Vern filed his response to civil claim and a counterclaim, naming Irene, Terry, BPYA 1286 Holdings Ltd., and WCIL Investments Ltd. as defendants by counterclaim. Vern's November 2023 examination for discovery did not proceed as scheduled.

[14] On December 27, 2023, Norman, Bradley, and WCIL filed an application to strike the counterclaim. On January 3, 2024, Irene and Terry did the same.

[15] The trial of this action has now been rescheduled to proceed for 14 days commencing January 27, 2025.

III. THE CLAIMS

A. The Action

[16] Norman and Bradley describe the action as narrow in focus. They dispute Vern's characterization of it and deny that the action deals generally with the parties' relationships and business endeavours. Rather, they say that the action is focused on only one discrete issue: namely, determining the nature of the parties' agreement regarding the rights and restrictions of the Companies' Class A shares.

[17] Norman and Bradley allege that the share rights and restrictions recorded in the Companies' articles are inconsistent with the agreement the shareholders reached when they signed the articles. They seek to rectify the articles and claim damages against Vern for his allegedly negligent failure to ensure that the articles accurately reflected the shareholders' agreement.

[18] Alternatively, Norman and Bradley allege that Vern was aware of the error in the articles and that he now seeks to capitalize on this mistake, or that he either deliberately misrepresented or failed to disclose the error in the articles, in breach of his fiduciary obligations, thereby entitling them to damages.

B. The Counterclaim

[19] The parties disagree about whether or not Vern's counterclaim is related to the core issues pleaded in the action. Norman and Bradley describe it as starkly different from the action. They deny that any of the allegations in the counterclaim relate to the Companies' share rights and restrictions, which they describe as the action's sole focus.

[20] The counterclaim contains three central allegations:

1) Norman, Bradley, Terry, and Irene breached an alleged oral agreement, defined as the "March 2011 Agreement" (para. 74);

2) Norman, Bradley, Terry, and Irene breached their fiduciary duty, contrary to the Phaneuf family partnership (para. 73); and

3) Norman and Bradley engaged in oppressive conduct which violated Vern's reasonable expectations as a shareholder (para. 76).

[21] Vern pleads a breach of the alleged March 2011 Agreement in the counterclaim, as follows:

a) Beginning in at least 1996, Norman, Bradley, Terry, Vern, and Irene engaged in a partnership to own and operate A&W franchise locations and other business pursuits jointly, for the family's shared benefit and profit (para. 80);

b) Norman, Bradley, Terry, and Irene reached an oral agreement (the March 2011 Agreement) in or about 2011 (para. 87);

c) Pursuant to the March 2011 Agreement, Vern would retain control of the A&W franchise restaurant in West Maple Ridge operated by BPYA and WCIL and Vern was entitled to a right of first refusal to purchase 25% of Irene's interest in WCIL (para. 87); and

d) Norman, Bradley, Terry, and Irene breached the March 2011 Agreement:

1) When Irene sold her interest in WCIL in 2016, contrary to Vern's right of first refusal (para. 88);

2) To the extent that Norman, Bradley, and/or Terry purchased Irene's interest in WCIL in 2016 (para. 88); and

3) When Norman, Bradley, and Terry diverted the rights to A&W West Maple Ridge from BPYA to another company (from which Vern was excluded) after BPYA's franchise agreement was terminated in 2017 (para. 89).

[22] Vern also pleads that Norman, Bradley, and Terry acted in breach of a fiduciary duty that they owed to him, contrary to the Phaneuf family partnership, by:

a) Applying for a new franchise agreement for A&W West Maple Ridge in or around 2017 without Vern's consultation or input (para. 83); and

b) Taking ownership of the A&W West Maple Ridge store for themselves and not for the benefit of the family partnership (para. 84).

[23] Finally, Vern alleges that Norman and Bradley violated his reasonable expectations as a shareholder by:

a) Conducting the Companies' affairs in a manner that was unfairly prejudicial or oppressive to him (paras. 60–61, 76, 93, and 96), including by (para. 94):

    1) Denying him access to company records;

    2) Receiving unauthorized management fees;

    3) Refusing to fully compensate Vern for his services;

    4) Seeking repayment of certain management fees; and

    5) Making significant decisions in the management of the Companies without Vern's input; and

b) Conducting BPYA's affairs in a manner that was unfairly prejudicial or oppressive to him (paras. 61 and 97), including, in particular, that Norman (para. 95):

    1) Made unauthorized representations to A&W about BPYA's corporate structure;

    2) Caused BPYA to lose a franchise agreement for A&W West Maple Ridge;

    3) Excluded Vern from an interest in A&W West Maple Ridge; and

    4) Received unauthorized management fees.

[24] Vern seeks the following relief in the counterclaim:

a) Relief from Norman and Bradley's unfairly prejudicial and/or oppressive conduct under s. 277 of the *Business Corporations Act*, S.B.C. 2002, c. 57, including the repayment of management fees paid by the Companies to the plaintiffs (paras. 59–61 and 63);

b) Relief from Norman's unfairly prejudicial and/or oppressive conduct, including the repayment of management fees paid by BPYA and an order directing that either Vern or Norman be compelled to buy the other's shares in BPYA at fair market value (paras. 64 and 66);

c) Damages for breach of fiduciary duty and breach of contract against Norman, Bradley, Terry, and Irene (paras. 67–68); and

d) Punitive damages against Norman and Bradley (para. 69).

[25] Vern also seeks leave to bring a derivative action on behalf of BPYA, as against Norman, for breach of fiduciary duty in relation to events in 2017 involving A&W West Maple Ridge (para. 78).

[26] Norman, Bradley, Terry, Irene, and WCIL deny that any of the allegations in the counterclaim relate to the Companies' share rights and restrictions.

IV. ADMISSION OF LATE AFFIDAVIT EVIDENCE

[27] I begin my analysis by considering whether Vern's late Affidavit #2, sworn March 8, 2024, is properly admitted into evidence. In this affidavit, Vern purports to explain his delay in bringing the counterclaim. He deposes, in part, as follows:

a) He has been reluctant to resolve business disputes through litigation because he did not want to worsen already damaged familial relationships (para. 4);

b) Over the years he was reassured periodically that his family would figure out a solution or find a way to resolve their disputes (para. 5);

c) Before February 2023, he was a respondent in the petition but no claims were brought against him personally (para. 6);

d) When Norman and Bradley asserted in their amended notice of civil claim that Vern was simply providing accounting and other services to the Companies, Vern understood that they were challenging not only the accuracy of the Companies' articles of incorporation but also his overall ownership interest in the family businesses (para. 7);

e) Between February and September 2023, in addition to his busy practice as an Investment Advisor and Portfolio Manager, and supporting his wife's recovery from cancer treatment, Vern spent time considering whether to proceed with a counterclaim or try to negotiate a buyout, which was a difficult decision because he knew it would upset his mother (para. 8);

f) Vern did not conclude that it was in his best interests to litigate these issues until he felt he had no other option (para. 9); and

g) It then took him considerable time to review his records and put together what was needed to proceed with his counterclaim (para. 10).

[28] Vern filed his Affidavit #2 on May 13, 2024, more than two months after it was sworn, in response to the applications filed December 27, 2023, and January 3,

2024, to strike his counterclaim. Vern relies on R. 8-1(14) of the *Supreme Court Civil Rules* [*Rules*], which provides that a party must not serve any affidavits in addition to those served in accordance with Rules 8-1(7), (9), and (13), absent the consent of all parties or leave of the court. He says that this Court always retains the discretion to admit relevant and material affidavit evidence when doing so is necessary to prevent the hearing from becoming unfair, citing *Leskun v. Leskun*, 2004 BCCA 422 at para. 36, aff'd 2006 SCC 25.

[29] Norman, Bradley, WCIL, Terry, and Irene all object to the late filing of Vern's Affidavit #2, more than four months after they raised the absence of any evidence from him to explain his delay in bringing the counterclaim, and after they had all concluded their submissions in chief on their applications to strike the counterclaim on February 14, 2024. They submit that the discretion to admit additional affidavit evidence pursuant to R. 8-1(14) must be exercised sparingly in clearly meritorious cases only, where excluding it would result in a substantial injustice, citing *Proctorio, Incorporated v. Linkletter*, 2021 BCSC 1154 at para. 68, aff'd 2022 BCCA 150.

[30] The parties agree that the court's exercise of discretion to admit late affidavit evidence, after a hearing has already commenced, requires a balancing of the interests of truth-seeking, fairness, and prejudice, as summarised in *Victoria and District Cricket Association v. West Coast Cricket Association*, 2024 BCSC 65 at para. 28. This balancing exercise involves a consideration of the following non-exhaustive factors:

a) The relevance of the evidence to the issues before the court;

b) The necessity or importance of the evidence to deciding the issues;

c) Whether the evidence is reasonably capable of belief;

d) The timing of the application;

e) Whether the evidence existed before the hearing commenced;

f) The explanation for the delay in providing the evidence;

g) Whether there is any prejudice to the opposing party by the late admission of the evidence; and

h) Whether any prejudice can be mitigated (for example, by permitting the objecting party to file responding affidavits and/or make additional submissions, or by a costs award).

[31] I consider each of these factors in turn.

A. Relevance

[32] Vern's late affidavit purports to cure a deficiency in his response to the applications to strike the counterclaim: namely, his admitted failure to explain his delay in bringing the counterclaim. I accept that his Affidavit #2 is relevant to a consideration of that issue.

B. Necessity or Importance

[33] Vern submits that his Affidavit #2 clearly contains important evidence and that its admission would allow the applications to be decided fairly on their merits and in accordance with R. 1-3(1).

[34] Norman, Bradley, Terry, Irene, and WCIL deny that Vern's late affidavit provides an explanation for his delay in bringing the counterclaim. They say it fails to address the important period of delay before expiry of the applicable limitation period for bringing his claims.

[35] While I accept that Vern provides some explanation for his delay in bringing a counterclaim in his Affidavit #2, I conclude that it is lacking in detail. In my view, that fact undermines its necessity and importance on these applications.

C. Credibility

[36] Norman, Bradley, Terry, Irene, and WCIL describe Vern's late explanation for his delay in filing the counterclaim in his Affidavit #2, as vague, ambiguous, and not reasonably capable of belief. Vern denies that the lateness of his affidavit impugns his credibility.

[37] Vern deposes in para. 6 of his Affidavit #2 that there were no claims against him personally before February 2023. As noted, Jackson J. ordered that Vern be added as a defendant to the action on September 29, 2022. The plaintiffs amended the action to plead claims against Vern personally on February 15, 2023.

[38] Vern deposes in para. 7 of his Affidavit #2 that after Norman and Bradley filed the amended notice of civil claim, he understood they were challenging his ownership interest in the family business. Plaintiffs' counsel underscores that, in fact, Norman and Bradley do not challenge Vern's ownership interest in the family business in the amended notice of civil claim; rather, they say the shareholders agreed that their shares in the Companies would be participating shares.

[39] Norman, Bradley, Terry, Irene, and WCIL deny that Vern's Affidavit #2 is reasonably capable of belief. They say Vern's statement that he genuinely believed he and his brothers would resolve matters without going to court is belied by the fact Vern knew by February 2023 that Norman and Bradley had made allegations against him personally in the action. Vern's assertion that he was reluctant to sue because he had been reassured "over the years" that a solution would be reached, and that he had asked to see financial records so he could consider a buy-out, are undated and uncorroborated by any documentary evidence. Norman and Bradley describe Vern's assertion that he did not commence litigation because he did not want to upset his mother as not credible given the content of his Affidavit #1 filed in response to the petition.

[40] Vern is silent about when he concluded that commencing litigation was his only option; by September 2022, he was already a named defendant in the action. His explanation his late Affidavit #2 for his delay in commencing a counterclaim in these proceedings is imprecise. He offers no explanation for his failure to provide this evidence earlier, within the deadline required by the *Rules*, before the hearing of these applications began. In my view, this factor weighs against the admission of his late Affidavit #2.

D. Timing of Application

[41] Norman, Bradley, and WCIL applied to strike the counterclaim by notice of application filed December 27, 2023; Irene and Terry did so by notice of application filed January 3, 2024. Vern swore his Affidavit #2 on March 8, 2024; he filed it on May 13, 2024.

[42] Vern neither prepared nor served his Affidavit #2 on a timely basis in response to the applications to strike his counterclaim. He does not explain this delay. I conclude that this factor weighs against the admission of his late affidavit.

E. Existence of Evidence

[43] When a party seeks to adduce late evidence with no explanation about why they could not have included this material with their original affidavits, that is a factor weighing against its admission: *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 190 at para. 32.

[44] Vern admits the evidence that he now wishes to file on the applications to strike the counterclaim existed before the February 14, 2024 hearing, and that it could and should have been filed with his application to extend the time to file the counterclaim. He acknowledges that those factors weigh against the admission of his late affidavit.

F. Explanation for Delay

[45] As noted, Vern's Affidavit #2 says nothing about why he provided no explanation for his delay in bringing a counterclaim before the February 14, 2024 hearing date, in accordance with the *Rules*. He filed this late affidavit approximately three months after the hearing of these applications began but did not conclude due to time constraints. This factor weighs against the late admission of this evidence.

G. Resulting Prejudice

[46] Norman, Bradley, Irene, Terry, and WCIL all say that Vern effectively made a judicial admission, on which they relied, at the February 14, 2024 hearing when he

acknowledged that: 1) he had no explanation for his delay in commencing the counterclaim; and 2) this was a factor that weighed against him on his application to extend the time to file a counterclaim in these proceedings.

[47] Counsel for Norman, Bradley, Irene, Terry, and WCIL all note that they clearly highlighted in their notices of application seeking to strike the counterclaim, the absence of any evidence from Vern to explain his delay in bringing the counterclaim as a basis on which it ought to be struck. They deny that parties can sit on their rights and thereafter gain a tactical advantage by virtue of their own delay; they say this is precisely why deadlines and limitation periods exist.

[48] Norman, Bradley, Irene, Terry, and WCIL object to Vern attempting to exploit an unanticipated scheduling delay to his advantage by bolstering his position with new affidavit evidence at the eleventh hour, after they had all concluded their submissions in chief. They say that by doing so he is effectively splitting his case.

[49] I accept that there is prejudice to the responding parties if Vern's Affidavit #2 is admitted into evidence. While I acknowledge that there is also prejudice to Vern if his Affidavit #2 is not admitted into evidence, this is prejudice he could have avoided by filing a timely affidavit to explain his delay in bringing the counterclaim. In my view, this factor weighs against admission of his late Affidavit #2.

H. Potential to Mitigate Prejudice

[50] Vern submits that the relevant factors, considered as a whole, favour admitting his late Affidavit #2. He says that any resulting prejudice to the responding parties can be mitigated by allowing them an opportunity to respond, as necessary.

[51] This submission fails to address the prejudice to the responding parties if Vern is allowed to resile from his lawyer's informal admission that Vern had no explanation for his delay and that this factor weighed against Vern on a consideration of his application to extend the deadline to file the counterclaim. In my view, this factor weighs against the admission of Affidavit #2.

I. Conclusion

[52] Considered cumulatively, I conclude that the above-noted factors do not favour admitting Vern's late Affidavit #2 into evidence.

[53] By Vern's own admission, this evidence existed before the hearing on February 14, 2024; Vern offered no explanation for his significant delay in providing this evidence. The absence of any such explanation featured prominently in the responding parties' submissions on February 14, 2024, at which time Vern's counsel acknowledged this deficiency in the evidence and conceded that it weighed against Vern on a consideration of the applications on their merits.

[54] All parties expected to conclude the hearing of the original cross-applications on February 14, 2024. When the hearing was necessarily adjourned due to time constraints, Vern's lawyer was in the process of responding to the applications to strike the counterclaim. If this hearing had concluded within one day, as scheduled, Vern would have had no opportunity to file additional affidavit evidence. I am not persuaded that he should be permitted to exploit this unanticipated scheduling delay to his advantage, particularly absent any explanation for why he failed to provide this evidence earlier.

[55] For all these reasons, I decline to admit Vern's late Affidavit #2 into evidence.

V. EXTENDING TIME/STRIKING COUNTERCLAIM

[56] I turn next to the merits of the applications to strike the counterclaim and Vern's cross-application to extend the time to file it.

[57] After a petition is converted to an action, the defendants to that action have 21 days to file and serve a counterclaim, unless they seek leave to extend the time for filing. A failure to do so constitutes non-compliance with the *Rules:* Rules 3-3(3) and 3-4(1); *1133823 BC Ltd. v. Arvind*, 2022 BCSC 165 at para. 61; *Naudi Investments Ltd. v. 0899809 B.C. Ltd.*, 2021 BCSC 1121 at paras. 15–16.

[58] Rule 22-4(2) permits the court to extend or abridge any period of time provided for in the *Rules*, before or after expiry of the time. Rule 22-7(2) provides, in part, that if there has been a failure to comply with the *Rules*, the court may:

a) set aside a proceeding, either wholly or in part;

b) set aside any step taken in the proceeding, or a document or order made in the proceeding; or

c) make any other order it considers will further the object of the *Rules*.

[59] The party seeking an extension of time must apply to court for the extension. In this case, Vern filed his counterclaim without applying for an extension of time; he brought his application to extend the filing deadline in response to the opposing parties' applications to strike his late-filed counterclaim.

[60] Courts have generally found that an extension of time should only be granted based on the clearest and best evidence: *Durham v. Vancouver Island Health Authority and others*, 2023 BCSC 1309 at paras. 40–41. The parties agree that, on an application for a retroactive extension of time under R. 22-4(2), the court must consider the two-part test outlined in *Naudi Investments Ltd.* at para. 18:

1) The plaintiff by counterclaim must first establish that the claim in the proposed counterclaim is related to or connected with the subject matter of the main action; and

2) If the first step is satisfied, the court will then consider whether it should exercise its discretion to extend the time for filing the late counterclaim.

[61] I turn next to a consideration of this two-part test.

A. Threshold Connection between the Action and the Counterclaim

[62] Norman and Bradley deny that Vern has met the burden of establishing that the counterclaim is related to or connected with the subject matter of the action. They say the counterclaim attempts to use the action as a springboard to advance

multiple wide-ranging claims which raise several new causes of action, add four new parties, and span over 20 years. Irene and Terry concur.

[63] Norman and Bradley deny that the impugned transactions in the counterclaim have anything to do with the Companies, saying they relate to other corporate entities not named in the action, and center on events in 2017 involving A&W West Maple Ridge, A&W East Maple Ridge, and Irene's shares in WCIL. They deny that any of those events relates to the Companies' share rights and restrictions.

[64] The counterclaim alleges oppression regarding management fees in connection with BPYA; Vern intends to seek leave to bring a corresponding derivative action. Norman and Bradley deny this claim has anything to do with the action and note that Vern's oppression claim and application for leave to bring a derivative action must proceed by way of petition.

[65] Vern alleges that the counterclaim is both related to, and connected with, the subject matter of the action. He says the parties' dispute in the action clearly extends beyond the narrow issue of rectification of the Companies' articles.

[66] Vern argues that the decision by Norman and Bradley to amend the notice of civil claim to advance claims against him personally, put in issue the parties' duties to each other, the source of those duties, and whether or not Vern breached his duties in or around 2010–2012. Vern submits that the personal claims pleaded against him in the action place his role in the operation of the Companies in issue, a matter which he says is highly connected to the pleaded remedies in oppression and partnership law in the counterclaim. He argues that the action and the counterclaim arise from the same factual matrix and, given this high degree of connectedness, fairness dictates that they be tried together.

[67] Vern submits that the action and the counterclaim are both predicated on the same agreement, which governed the operation of the Phaneuf family partnership. He says that Norman and Bradley rely on a narrow view of this agreement while he maintains that it was broader in scope. Vern asserts that there was "give and take"

across various corporate entities and that the Phaneuf family operated these businesses for their shared benefit. He says the plaintiffs' narrow interpretation fails to recognise the interconnectedness of the Phaneuf family's various business pursuits and the disputes arising from them.

[68] Norman and Bradley submit that, to the extent Vern can demonstrate a threshold connection between the action and the counterclaim, this degree of connection is insufficient to overcome the resulting prejudice to them if the improperly filed counterclaim is allowed to stand. They deny that the existence of some overlapping background factual information is sufficient to demonstrate a connection (much less a substantive one) between the action and the counterclaim.

[69] I accept that there is some overlap in the background facts and named parties in the action and the counterclaim. In my view, while this could be construed as a threshold connection, it is a tenuous one.

B. Exercise of Discretion to Extend Time

[70] A court will exercise its discretion to grant leave to extend time only if it is just and convenient to do so, having regard to the factors set out in *Naudi Investments Ltd.* at paras. 18–19 and *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2014 BCSC 1049 at para. 24 [*Arbutus Bay*], including:

a) the length of the delay;

b) the reasons for the delay;

c) whether the counterclaim would be time-barred if commenced as a separate action;

d) the degree of connection between the proposed counterclaim and the plaintiff's claims; and

e) the relative prejudice to each of the parties to the counterclaim.

[71] The efficiency gained by dealing with matters concerning overlapping evidence in one proceeding is also a relevant consideration: *Arbutus Bay* at para. 37.

[72] I consider each of these factors in turn.

1. Delay

[73] Delay is an important factor when deciding whether a counterclaim ought to be struck: *Section 1 of the Owners, Strata Plan LMS 2643 v. Kwan*, 2009 BCCA 342 at para. 54 [*Kwan*]. Vern bears the burden of explaining his delay in filing the counterclaim.

[74] The petition was converted to an action on September 29, 2022, about one year before Vern filed the counterclaim. Norman and Bradley filed the amended notice of civil claim on February 15, 2023, approximately seven months before Vern filed the counterclaim. In his application response filed January 30, 2024, in response to the application by Irene and Terry to strike the counterclaim, Vern expressly acknowledged that this "moderate delay", and the absence of a reason for it, was a factor that weighed against extending the time to file the counterclaim.

[75] Vern offered no explanation for his delay in filing the counterclaim until May 13, 2024, after the hearing of the applications to strike the counterclaim had begun but not concluded due to time constraints. His late affidavit (which I have not admitted into evidence) makes general statements about the deterioration of familial relationships and reassurances he received "over the years" about how family disputes would be resolved. He provides some information about his personal circumstances between February and September 2023, but no information about why he commenced no legal proceedings before expiry of the applicable two-year limitation period.

[76] I conclude that Vern has not adequately explained his significant delay. This conclusion would not change, even if I had admitted his late Affidavit #2. This factor weighs against extending the time to file the counterclaim.

2. Expiry of Limitation Period

[77] Norman, Bradley, Terry, Irene, and WCIL all submit that the claims Vern now seeks to advance in the counterclaim are undeniably statute-barred. They say these

claims are all grounded in events that occurred in 2016 or 2017 at the latest, well beyond the statutory two-year limitation period for civil claims. By extension, they argue that these claims were all statute-barred well before Norman and Bradley started the action in June 2021, let alone by September 22, 2023, when Vern filed his late counterclaim, without leave.

[78] The *Limitation Act* permits a counterclaim in relation to claims that are beyond the expiry of a limitation period, provided it relates to or is connected with the original action:

> 22(1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both claims has expired:
>
> > (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
> >
> > …

[79] The purpose of s. 22(1) of the *Limitation Act* is to avoid the mischief that would result if plaintiffs could wait until the last minute to start an action, thereby "clearing the battlefield" of any competing claims or counterclaims for which the limitation period will have expired by the time the plaintiff delivers pleadings. Section 22(1) avoids this mischief by allowing related claims and counterclaims to be joined to the plaintiff's action after the expiry of a limitation period: *Kasian Estate v. Kasian*, 2021 BCSC 538 at para. 32; *Smithe Residences Ltd. v. Boffo Investment Corp.*, 2019 BCSC 2185 at para. 79.

[80] The Court of Appeal considered the impact of s. 22(1) of the *Limitation Act* (formerly s. 4(1)) when deciding whether to allow subordinate claims in the context of third-party proceedings in *Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315, 1985 CanLII 155 (C.A.) [*Lui No. 1*]. The Court confirmed there is no fall-back secondary limitation period for claims that are "piggy-backed" over limitation periods, and that the avoidance of a limitation period must therefore be a very influential factor for a court to consider when exercising its discretion: *Lui No. 1* at 330. The

Court held that permitting a third-party claim (brought after expiry of the limitation period that would apply if the claim were brought as a separate proceeding) depends on establishing a "real and substantive" connection between the time-barred proceedings and the original action, and some degree of dependence by the former on the latter: *Lui No. 1* at 331; *Smithe Residences Ltd.* at para. 64.

[81] Put another way, where the limitation period has expired, and the third-party proceedings set up a separate cause of action, prejudice to the third party must be presumed, and an explanation from the defendant who issued the third-party notice is required to explain the delay and the dependence of the third-party proceedings on the original action, before the third-party notice will be allowed to stand: *Lui No. 1* at 331.

[82] In *Lui v. West Granville Manor Ltd*. (1987), 11 B.C.L.R. (2d) 273 at 303, 1987 CanLII 164 (C.A.) [*Lui No. 2*], the Court of Appeal noted that similar guidelines apply, with any necessary modifications, to counterclaims against a new party.

[83] Norman and Bradley deny that Vern's failure to commence separate proceedings within the limitation period is due to the dependence of such a claim on the action. They say Vern could have brought his claim at any time and that it remains open to him to do so now, subject to their limitation defence. They deny it is open to Vern to resile from his previous decision not to start litigation by using bogus subordinate status to avoid an otherwise applicable limitation period: *Lui No. 2* at 300. They submit that the counterclaim ought to be struck on this basis alone.

[84] Norman and Bradley argue that, unlike cases where courts have found a sufficient connection between a counterclaim and the action in which it was brought, Vern's counterclaim does not: 1) arise only if the plaintiffs' claims on certain issues succeed (*Smith v. British Columbia*, 2010 BCSC 928 at paras. 16–17); and 2) is not based on the same "statutes, documents, acts, and declarations" as the main action (*Mathias v. Canadian Pacific Ltd.,* 1998 CanLII 3909 at para. 40, [1998] B.C.J. No. 1726 (S.C.)). Norman and Bradley deny that Vern has demonstrated any degree of dependence by the counterclaim on the action so as to explain why he did not bring

his own claim within the limitation period: *Kwan* at paras. 40, 63 and 67. They say this is particularly important when the counterclaim is brought well outside the time permitted by the *Rules*, with no adequate explanation for this delay, and purports to advance wide-ranging claims against four new parties. Terry and Irene concur.

[85] In *Kwan*, the Court of Appeal upheld the chamber judge's dismissal of an application to add a third-party claim after expiry of the limitation period. The Court confirmed that the requirements of dependence and a related explanation for the delay are significant and unique factors in a court's exercise of discretion to permit third-party proceedings after expiry of a limitation defence: *Kwan* at para. 71.

[86] Plaintiffs' counsel submits that the relevant test for a retroactive extension of the time for filing a late counterclaim is more onerous when the proposed claim is brought outside the applicable limitation period: *Lui No. 1* at 331; *Lui No. 2* at 303. She argues that allowing Vern's counterclaim to proceed at this late stage would permit him to use the court's process tactically. Alternatively, if he is not seeking the tactical advantage of potentially extinguishing a limitation period, she questions why he does not simply commence a separate action and seek to have it consolidated with the action, or to have the two actions heard together. Plaintiffs' counsel answers this question by underscoring that the vast majority of the claims Vern now seeks to advance were statute-barred long ago.

[87] Norman, Bradley, Terry, Irene, and WCIL all say that, if the counterclaim is allowed to stand, it would extinguish their limitation defence, thereby resulting in significant prejudice to them, citing *Mathias* at paras. 35–37 and 41–43. They deny this is the intended purpose of the *Limitation Act,* s. 22(1), citing *Smithe Residences Ltd.* at para. 79 and *Boutsakis v. Kakavelakis*, 2008 BCCA 13 at para. 43.

[88] While Vern acknowledges that the scope of his recovery might be limited if he brought the claims he seeks to advance in the counterclaim as a separate action, he submits that his claims in oppression, breach of contract, and breach of fiduciary duty all relate to a pattern of ongoing conduct and are not time-barred, citing

Brockman v. Valmont Industries Holland B.V., 2022 BCCA 80 at para. 39. He argues that this factor militates in favour of allowing his counterclaim to be filed late.

[89] Plaintiffs' counsel identified two problems with this argument:

1) It ignores the fact that the limitation period for the expired claims in the counterclaim would potentially be revived pursuant to s. 22 of the *Limitation Act*, if the counterclaim were allowed to stand, thereby resulting in unfairness to the plaintiffs (by allowing Vern to "hitch his wagon" to the small part of his counterclaim that references conduct in the last two years to revive disparate, wide-ranging, otherwise expired claims) and significantly increasing the risk of strategic pleading; and

2) It misconstrues the Court of Appeal's findings in *Brockman*.

[90] A claim is statute-barred if the facts giving rise to it were discovered more than two years before the date of filing: *Limitation Act,* s. 6; *Brockman* at para. 38. Continuing breaches do not create new causes of action, thereby restarting the limitation period: *Chancellor v. Maynes*, 2021 BCSC 391 at paras. 67–76.

[91] Vern's counsel conceded that the pleaded claims in the counterclaim would be subject to a potential limitation defence. He says that determination of the limitation issues on the merits is a matter that is properly reserved for the trial judge.

[92] Without deciding this issue, I note that most of the alleged conduct pleaded in the counterclaim preceded September 2021 (two years before the counterclaim was filed in September 2023). The breach of fiduciary duty claim relates to alleged conduct in the summer of 2017; the breach of contract claim relates to conduct that allegedly occurred in 2016 and 2017 (the same alleged conduct which forms the basis for the breach of fiduciary duty claim). The oppression claims depend on events that allegedly occurred before 2021 (paras. 30, 53–57, 91–95).

3. Degree of Connection

[93] The parties disagree about whether the action and the counterclaim are connected or distinct claims. Claims that are essentially "foreign" to an existing action require a new action: *Abney v. Silcorp Ltd.*, 1999 CanLII 5845 at para. 16, [1999] B.C.J. No. 2420 (S.C.). A plaintiff should not, as a hazard of commencing an action, face completely distinct matters, with wholly unforeseeable time and cost implications, attaching to the suit: *Abney* at para. 16; *Boutsakis* at para. 38. Addressing this factor requires a close examination of the pleadings.

a) The Action

[94] As noted, plaintiffs' counsel argues that the action focuses on a discrete issue: namely, whether or not the shareholders intended the Companies' Class A shares to be participating or non-participating. They say that the alternative claim pleaded against Vern personally is related to the same narrow issue: namely, whether or not he knowingly used his position of power to deprive Class A shareholders of their participation rights without disclosing that fact to them. They deny that the counterclaim engages those issues.

[95] I accept that the subject matter of the claims must be connected and that the pleaded material facts (i.e., those which must be proved in order to obtain the relief sought) define the subject matter of the claims.

[96] The action pleads the following material facts:

a) The shareholders agreed that the Class A Shares in the Companies would be participating, pursuant to their agreement that shares in the Companies would be divided 40/40/10/10 as between Norman, Bradley, Vern, and Terry, respectively (paras. 3–4 and 7);

b) Vern oversaw the incorporation of the Companies (paras. 3, 5, 25, 29, 42);

c) The articles of the Companies mistakenly state that the Class A Shares are non-participating (para. 8);

d) Neither Norman nor Bradley were aware of the error in the articles at the time they were signed (paras. 43–44);

e) Vern failed to exercise due care in overseeing the incorporation of the Companies or, alternatively, knew of the error in the articles and failed to disclose it to the plaintiffs (para. 12);

f) The shareholders' prior agreement was sufficiently definite that the articles can and should be rectified to carry out the agreement (paras. 12–13); and

g) Vern's conduct caused the plaintiffs to suffer loss and damage (paras. 12 and 69).

[97] Vern's counsel argues that the action and the counterclaim plead overlapping facts. He provided a chart setting out this information; it contains three references to overlapping pleaded facts, as set out below.

Allegation	**Action**	**Counterclaim**
1. Between 1987 and 2010, A&W franchises were opened by one or more members of the Phaneuf family.	Paras. 20–22	Paras. 12–23
2. The Phaneuf brothers have been in business with each other and with A&W for many years.	Paras. 20–28	Paras. 12–23
3. WCIL operated franchise restaurants since the 1990s and was involved in funding new franchise restaurants owned/operated by the Companies.	Para. 26	Paras. 16 and 29

b) The Counterclaim

[98] The counterclaim is broader in scope than the action. It pleads different material facts:

a) In 2010 or 2011, the shareholders agreed that Vern would not have voting rights or a directorship in the Companies in exchange for Vern retaining 50% ownership of A&W West Maple Ridge and a right of first refusal to purchase 25% of Irene's shares in WCIL (paras. 30 and 43);

b) Vern reasonably expected to retain a management role in the decision-making of the family businesses, including BPYA, and to be an equal participant in those businesses (para. 21);

c) Irene sold her interest in WCIL to someone other than Vern in or about 2016 (para. 36);

d) Norman and Bradley diverted the rights to A&W West Maple Ridge from BPYA to another company in 2017 (paras. 34–46);

e) This diversion was in breach of fiduciary duties owed between Norman, Bradley, and Terry (and potentially Irene), as partners in a family and legal partnership, pursuant to which they jointly owned and operated A&W franchise locations for their shared benefit and profit (para. 47);

f) Vern had a reasonable expectation of access to the Companies' books and records (para. 33(a));

g) Norman and Bradley breached Vern's reasonable expectations by denying him access to the Companies' records and proper compensation from the Companies, receiving unauthorized fees, and excluding Vern from the Companies (para. 33); and

h) Vern had a reasonable expectation that he would be permitted to continue to participate in the BPYA franchise (para. 30).

[99] I accept that the action and the counterclaim plead some shared background facts. I am not persuaded that this alone is sufficient to establish a real and substantive connection between them.

[100] Norman and Bradley deny that the agreement alleged in the counterclaim could explain the share participation rights in the Companies' articles. Vern seeks a declaration at para. 58 of the counterclaim that he holds 50% of the participation rights in the Companies through his Class B shares, relief which Norman and Bradley deny has any nexus to the pleaded facts in the counterclaim; they describe this request for relief as an apparent attempt to manufacture a connection between the counterclaim and the action. They deny there is any pleaded basis in the counterclaim which would entitle Vern to this declaratory relief.

[101] The pleaded claims against the Companies in the counterclaim are limited to oppression claims under s. 227 of the BC *Business Corporations Act,* S.B.C. 2002,

c. 57. Norman and Bradley deny that this allegedly oppressive conduct has any connection to the rights and restrictions of Class A shares in the Companies or the participation rights of Class A shareholders.

[102] Norman and Bradley argue that the subject matter of the action is their claim for relief, as defined by the pleaded material facts (which must be proved in order to obtain the relief sought). They deny the sharing of some limited background facts in the counterclaim with the action is sufficient to sustain a finding that the two claims are connected.

[103] Plaintiffs' counsel notes that the counterclaim incorporates by reference all of the facts pleaded in Vern's response to civil claim. She denies this is appropriate, saying the response to civil claim is irrelevant and must be disregarded: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 31–33. She argues that to do otherwise would permit a party to manipulate their burden of establishing a connection (between a late counterclaim and the main action) by raising extraneous facts in their response to the action, as she asserts Vern has done here.

[104] Norman and Bradley deny that determining whether or not Class A shares have participation rights has any bearing on Vern's role in the management or operations of the Companies. They deny the action will result in any changes to the shares that Vern holds in the Companies, or have any impact on BPYA and WCIL, the companies named in the counterclaim. They deny the action has any bearing whatsoever on Irene.

[105] Norman and Bradley say that, if the action succeeds, only their share rights will change to reflect their participation rights; the share rights of Vern and Terry will not change. They submit that, even if every disputed allegation in the counterclaim was found to be true, such a finding would have no impact on whether or not the Class A shares in the Companies have participation rights. They deny that the action's success or failure will have any impact on the claims Vern seeks to advance in the counterclaim.

[106] Irene and Terry say the counterclaim is properly struck on the basis it fails to clearly plead the underlying material facts on which it relies, citing Rule 9-5(1)(a); *Kindylides v. Does*, 2020 BCCA 330 at para. 32. Vern's counsel replies that any deficiencies in the counterclaim can be remedied by amendment.

[107] The substantive claims pleaded against Irene and Terry in the counterclaim are restricted to an alleged breach of fiduciary duty and breach of contract. The claim for breach of fiduciary duty against Irene and Terry alleges that:

a) Terry breached a fiduciary duty to Vern by applying (with Norman and Bradley) for a new A&W franchise agreement in West Maple Ridge, without Vern's consultation or input, while Vern allegedly was applying for the same location on behalf of the alleged family partnership, and despite the alleged March 2011 Agreement's requirement that Vern would hold and retain 50% ownership of A&W West Maple Ridge (para. 83); and

b) Terry acted in his own best interests, rather than in the best interests of the alleged family partnership when he, Norman, and Bradley took ownership of A&W West Maple Ridge on their own behalf and not for the benefit of the alleged Phaneuf family partnership (para. 84).

[108] The breach of contract claim against Irene and Terry alleges that:

a) Irene breached the alleged March 2011 Agreement when she sold her shares in WCIL without honouring Vern's alleged right of first refusal (para. 88);

b) To the extent that Terry purchased Irene's interest in WCIL, he breached the alleged March 2011 Agreement (para. 88); and

c) By diverting the rights to A&W West Maple Ridge from BPYA to another company, and excluding Vern from ownership in that company, Terry (together with Norman and Bradley) breached Vern's right to retain at least a 50% ownership of that franchise location under the alleged March 2011 Agreement (para. 89).

[109] Irene and Terry are named in only two of the 16 paragraphs in Part 2 of the counterclaim. The relief Vern seeks against them is limited to damages for breach of fiduciary duties against Norm, Brad, Terry, and Irene (para. 67) and for breach of contract against Norm, Brad, Terry, and Irene (para. 68). Vern seeks no relief

against Irene or Terry regarding any alleged oppressive conduct or the repayment of management fees.

[110] Counsel for Irene and Terry argues that the material facts pleaded in the counterclaim do not support the claims against his clients. He describes this pleading as fatally flawed and highlights the following:

a) Part 1, para. 46 of the counterclaim alleges that Norman and Bradley, but not Terry, obtained the rights to the A&W West Maple Ridge franchise and these facts are inconsistent with those pleaded in Part 3, para. 84 of the counterclaim (which references Norman, Bradley, and Terry) and do not support the claim against Terry;

b) Part 1 (para. 46) of the counterclaim pleads that Norman and Bradley successfully obtained those rights in or around the summer of 2017, almost seven years ago;

c) Part 1 (para. 36) of the counterclaim pleads that the sale of Irene's shares occurred in the summer of 2016, almost eight years ago;

d) Part 1 does not plead that Terry purchased Irene's shares;

e) Although the counterclaim seeks damages for breach of fiduciary duty against Irene, no facts are pleaded to support the existence of a fiduciary duty or the breach of one by Irene;

f) The counterclaim pleads that the Phaneuf brothers (and not Irene) formed the alleged Phaneuf family partnership, which is alleged to provide the basis for a fiduciary relationship (para. 24); and

g) It is not pleaded that either Irene or Terry is a party to the alleged March 2011 Agreement (defined at para. 30, without referencing the parties to the alleged agreement).

[111] Irene and Terry note that the counterclaim does not plead:

a) Who was a party to the alleged March 2011 Agreement (para. 30);

b) Material facts regarding the relationship of those individuals to the alleged Phaneuf family partnership (paras. 18–25); or

c) The facts supporting the existence of a fiduciary relationship involving Irene, or a breach of fiduciary duty by either Irene or Terry.

[112] Irene and Terry argue that absent these material facts, the counterclaim discloses no reasonable claim against them. They rely on *Meng Estate v. Liem*, 2019 BCCA 127 at para. 33, in which the Court of Appeal noted that not every breach of duty by a fiduciary is a breach of fiduciary duty; an allegation of breach of fiduciary duty carries with it the stench of dishonesty and those drafting pleadings should be careful of words that carry such a connotation.

[113] Irene and Terry deny there is any link between the pleaded claims against them in the counterclaim and those in the main action. They note that Vern has had their notice of application to strike the counterclaim since January 3, 2024, ample time to amend his pleading if he could do so, and that he has proposed no amendments to the counterclaim to address the deficiencies they have identified.

[114] Vern replies that pleadings are to be read generously on an application to strike pursuant to R. 9-5(1). He says the court should consider whether defective pleadings could be corrected by way of an amendment and, if so, whether it would be appropriate to grant leave to do so, citing *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142 at para. 15; *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22; *Jones v. Bank of Nova Scotia*, 2018 BCCA 381 at para. 35. There is no application to amend pleadings before me, nor any proposed draft amended pleading.

c) Reasons of Jackson J.

[115] Vern relies on the reasons of Jackson J., converting this petition to an action, and her statements at para. 51 that “it is not accurate to say that the sole or principal question at issue in this proceeding is one of construction (which I understand to mean the interpretation) of an oral agreement or a written document. The entire proceeding is predicated on the existence of the prior agreement, which is disputed”. The parties disagree about what Jackson J. meant by “the entire proceeding [being] predicated on the existence of the prior agreement, which is disputed”.

[116] Norman and Bradley submit that this can only mean the shareholders' agreement that Class A Shares in the Companies would be participating (rather than non-participating) as that is the only agreement on which the action is based.

[117] By contrast, Vern submits that the action and the counterclaim both relate to the disputed ownership of the Phaneuf family's business assets. He says that the parties' oral agreement was broader in scope than the plaintiffs allege and that it entitled him to management and participation rights which he has been denied. He says that while the counterclaim might raise additional legal issues, it arises out of the same agreement and factual dispute as the underlying action: *Kasian* at paras. 56–58.

[118] Norman and Bradley argue that Vern mischaracterizes the findings of Jackson J.; they deny she converted the petition to an action in order to permit an exploration of the broader relationship between the Phaneuf family members, or to address the involvement or addition of different companies, businesses, or parties. Rather, they say the petition was converted to an action because the Court found it could not determine whether or not there was an oral agreement that the Class A shares would have participation rights in a summary petition proceeding.

[119] I conclude on a plain reading of the reasons of Jackson J. that the "prior [disputed] agreement" she references at para. 51 was the same oral agreement she references at para. 70 "that the Class A shares in [the Companies] would have participation rights". In my view, this conclusion is reinforced on a reading of these reasons as a whole, including, in particular, the following statements:

a) The petitioners' position, whether on consideration of the doctrine of mutual mistake or unilateral mistake, is premised on a finding that there was a prior agreement between the [Phaneuf brothers] that the Companies' Class A shares were to include both voting rights (which they do) and participation rights (which they do not) (para. 55);

b) The petitioners argue that any uncertainty with respect to the prior agreement "are mere shadows which vanish when examined by the light of common sense'" (*Performance Industries* at para. 46) because the

articles of incorporation make no commercial sense as they are written (para. 57);

c) The petition seeks to enforce an alleged but disputed oral contract, not to construe it (para. 58);

d) "The existence of the oral agreement the petitioners allege is in dispute, and Vern is not bound to lose on that issue" (para. 59);

e) The petition proceeding is premised on a disputed oral contract (para. 69);

f) This case necessitates a credibility assessment of the key people involved in the central allegation that the [Phaneuf brothers] had an oral agreement that the Class A shares in [the Companies] would have participation rights (para. 70); and

g) In summary, the evidence before me is insufficient to support a finding that the alleged oral agreement exists, or that its terms are sufficiently certain to grant rectification (para. 75).

[Emphasis added]

[120] Ultimately, I conclude that any connection between the action and the counterclaim is tenuous at best. I am not persuaded that the outcome of the pleaded issues in the counterclaim bear on the outcome of the pleaded issues in the action. It is open to Vern to defend the action without advancing the counterclaim.

4. Prejudice

[121] The parties disagree about whether s. 22 of the *Limitation Act* extinguishes any limitation defence that would otherwise be available to the defendants by counterclaim, if the counterclaim were allowed to stand.

[122] Norman and Bradley say the counterclaim is grounded in events that allegedly occurred in 2016 or 2017 at the latest, far beyond the statutory two-year limitation period for civil claims. Plaintiffs' counsel submits it is arguable that their limitation defence would be extinguished if the counterclaim were allowed to stand: *Ferguson v. Dippenaar*, 2017 BCSC 1290 at paras. 53–55, aff'd 2018 BCSC 434; *Mullett (Litigation guardian of) v. Gentles*, 2016 BCSC 802 at paras. 42–48. She says the loss of a limitation defence represents significant prejudice which is not compensable in costs.

[123] Where there is inexcusable delay in proceeding, a presumption of prejudice arises: *Sharma v. Parmar*, 2022 BCSC 1442 at paras. 33–34; *Busse v. Chertkow et al.*, 1999 BCCA 313 at para. 18. The defendants by counterclaim deny that Vern has rebutted this presumption.

[124] Vern says there would be little prejudice to the plaintiffs if the time for filing his late counterclaim were extended. He asserts that this factor ought to be given limited weight in the court's exercise of its discretion and argues that any such prejudice is outweighed by the prejudice to him if he is unable to have his claims heard with the action. This submission overlooks his lawyer's admission that, if the counterclaim were allowed to stand, it would be subject to any available limitation defences, and that it remains open to Vern to pursue these claims by way of a separate action.

[125] Vern argues that, to the extent there is any prejudice to the defendants by counterclaim, they could have mitigated this risk by applying promptly to strike the late-filed counterclaim. Vern filed his counterclaim on September 22, 2023; plaintiffs' counsel advised on October 18, 2023 that they were seeking instructions to apply to strike it. On November 10, 2023, plaintiffs' counsel advised that they would not be proceeding with their examination for discovery of Vern, and would be applying to strike the counterclaim. They served their corresponding notice of application on December 27, 2023; counsel for Irene and Terry did so on January 3, 2024.

[126] Plaintiffs' counsel notes that the late-filed counterclaim has already delayed examinations for discovery, will significantly expand the scope of issues for trial, and risks a further adjournment of the trial. Striking the counterclaim would not prevent Vern from defending the action.

[127] The defendants by counterclaim argue that the resulting prejudice to them (if the counterclaim is allowed to stand) outweighs any inconvenience to Vern (if he is required to bring separate proceedings, which they say might be required in any event if he intends to pursue oppression claims and derivative relief on behalf of BPYA). Irene and Terry submit that they would be uniquely and significantly

prejudiced if these proceedings are further delayed due to concerns regarding Irene's advanced age and Terry's progressively declining health.

[128] Vern's counsel is of the view that all issues could be tried within the 14 days currently reserved for trial. Plaintiffs' counsel disagrees and advises that the parties reserved 14 days for trial on the assumption that the action alone would proceed. She says that the decision of Jackson J. to convert the petition to an action was premised on an understanding, as stated at para. 70 of her reasons, that the length of the trial needed to address the issues would not be extensive and the associated delay in scheduling the trial, and the expected costs, could therefore be controlled.

[129] Vern's counsel concedes that, if the counterclaim were permitted to stand, it would be subject to any available limitation defences. The parties disagree about whether or not that result would follow as a matter of law.

[130] In *Lui No. 2*, Lambert J.A., suggested that a court could exercise its judicial discretion to permit joinder, or to allow a counterclaim to stand, subject to the preservation of a limitation defence. As noted by plaintiffs' counsel, more recent decisions have declined to follow that approach: *Mullett* at 42–48; *Ferguson* at paras. 53–54. Without determining the limitation issue, it is my view that Vern's concession (that if the counterclaim were allowed to stand, it would be subject to any available limitation defences) undermines his argument that he would be prejudiced if he were required to commence separate proceedings in order to advance the claims he pleads in his late-filed counterclaim. If he did so, it would be open to him to apply to have this action heard together with the first action, and the trial judge could address any limitation defence on the merits and a fulsome evidentiary record.

[131] I accept that if the counterclaim were allowed to stand, it would result in significant prejudice to the defendants by counterclaim including, in particular, Irene and Terry. I conclude that this factor weighs in favour of striking the counterclaim.

5. Efficiency

[132] Norman and Bradley submit that the counterclaim requires much more extensive evidence than the action, thereby undermining any efficiencies in having the two proceedings heard together, particularly since the counterclaim is procedurally flawed and the oppression claims must proceed by way of petition. They argue that any minor efficiencies are far outweighed by the significant prejudice to them if the counterclaim is allowed to stand. They say that even if efficiencies exist, they cannot overcome what is fair and just in the circumstances. Irene and Terry concur.

[133] The defendants by counterclaim submit that the oppression claims must be brought by petition: *Sahsi v. Bhuthal* (17 January 2020), Vancouver S1913342 (B.C.S.C.); *Rules*, Rules 1-2(4) and 2-1(2)(b); *Business Corporations Act*, s. 227. They say any claimed efficiency is counteracted by this procedural flaw. Vern's counsel describes this as a remediable procedural irregularity.

[134] Vern's counsel argues that the action and the counterclaim both require a determination of the agreements that governed the ownership and operation of the related Phaneuf family businesses, and the brothers' respective roles in them. He submits that separate proceedings would risk inconsistent verdicts and increase costs. He notes that the plaintiffs' trial brief states an intention to call Irene and Terry as witnesses at the trial; he says that fact supports his argument that the action and the counterclaim will involve overlapping evidence and ought to be heard together.

[135] Plaintiffs' counsel denies there is any risk of inconsistent verdicts; she says the court will be asked to make factual findings and to grant remedies on different matters. While the action now pleads a claim against Vern personally, it focuses on the same discrete issue: namely, whether or not the shareholders agreed that the Companies' Class A shares were participating shares. She denies that the plaintiffs either intend, or are required, to prove Vern's relationship to the family business generally. She says they need only prove that Vern directed the incorporation of the

Companies, and that he knew or ought to have known about the alleged error in the Companies' articles, in order to prove the allegations against Vern in the action.

[136] In my view, any efficiencies that might be gained by hearing the action and the counterclaim together are insufficient to overcome the prejudice that proceeding in this manner would cause the defendants by counterclaim.

6. Conclusion

[137] Ultimately, I am not satisfied that Vern has met the burden he bears of establishing a real and substantive connection between the counterclaim and the action, or a degree of dependence by the former on the latter. He could have advanced the claims that he now wishes to pursue as a separate action many years ago; he could still do so now, subject to any available limitation defence.

[138] Having regard to the relevant factors, considered cumulatively, I conclude that the two-part test does not favour permitting the late-filed counterclaim to stand.

VI. DISPOSITION

[139] I make the following orders:

a) Vern's application to admit his late Affidavit #2 into evidence is dismissed;

b) The application to strike the late-filed counterclaim is allowed; and

c) Vern's application to extend the time for filing the counterclaim is dismissed.

[140] Costs of these applications are awarded in the cause.

"Douglas J."