Date: 20221130
Docket: CI 16-01-01948
CI 16-01-00868
CI 16-01-01986
(Winnipeg Centre)
Indexed as: Campbell et al. v. Brar et al.
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CI 16-01-01948	)	Rick Handlon
	)	Eric Blouw
ROB CAMPBELL,	)	for Rob Campbell
plaintiff,	)	
	)	
- and -	)	Richard Olschewski
	)	Derek Olson
RICKVINDER BRAR, 5174245 MANITOBA LTD. and SATNAM BRAR,	)	for Rickvinder Brar
	)	
defendants,	)	Faron Trippier
	)	Irina Vakurova
AND BETWEEN:	)	for Satnam Brar, 5174245
CI 16-01-00868	)	Manitoba Ltd. and Tartan
	)	Towing
RICKVINDER BRAR,	)	
	)	
plaintiff,	)	
	)	
- and -	)	
	)	
ROB CAMPBELL, SATNAM BRAR and 5174245 MANITOBA LTD., CARRYING ON BUSINESS AS TARTAN TOWING, AND THE SAID TARTAN TOWING,	)	
defendants,	)	

AND BETWEEN:	)	
CI 16-01-01986	)	
SATNAM BRAR,	)	
plaintiff,	)	
- and -	)	
	)	
RICKVINDER BRAR, 5174245 MANITOBA	)	
LTD., AND ROB CAMPBELL,	)	
	)	Judgment Delivered:
defendants.	)	November 30, 2022

EDMOND J.

Introduction

[1] Three separate applications/actions were tried together and all involve claims which relate to the conduct and actions of the directors and shareholders of 5174245 Manitoba Ltd. ("517"). 517 carries on business as Tartan Towing, which has been a successful towing company in the City of Winnipeg for a number of years.

[2] The primary parties in the actions include:

a) Rob Campbell ("Rob"), the President of 517;

b) Satnam Brar ("Sid"); and

c) Rickvinder Brar ("Rick"), the Secretary of 517.

[3] Rob's action can generally be described as seeking declaratory relief that he is the owner of 49% of the issued and outstanding shares of 517. He seeks a declaration that Rick has exercised his power as a director of 517 in an oppressive manner by refusing to transfer the 190 Class B common shares of 517 to him and requests an order rectifying the corporate register to reflect his ownership in 517.

[4] Sid's action can generally be described as seeking declaratory relief that he is the legal and beneficial owner of 51% of the shares in 517. Sid claims that there was an express trust, or alternatively an implied/resulting or constructive trust in which Rick agreed to hold shares in his name for Sid who is the beneficial owner. Sid also seeks a rectification of the corporate register, a finding that Rick acted oppressively and an order that Rick transfer shares he holds in 517 to Sid.

[5] Rick's action seeks declaratory relief that he is a 70% shareholder, or alternatively a 35% shareholder of 517 and an order that Rob and Sid have exercised their powers as directors, officers or controlling parties of 517 in a manner that is oppressive to Rick.

[6] The statement of claim advanced by Rick was amended on November 7, 2019. The motion seeking leave to amend the statement of claim was contested and the opposing parties took the position that if leave was granted to amend Rick's action, then the trial dates which were originally set to proceed on November 18 – 26, 2019, would have to be adjourned.

[7] I granted leave to amend Rick's claim and also permitted the trial to be adjourned subject to an order of costs, so that the discovery process could be completed and further relevant documents could be exchanged.

[8] The trial commenced on March 15, 2021 and was not completed in the time allotted. The trial resumed in June 2022.

[9] Since there were a number of issues regarding the fair and appropriate way to proceed with the three actions, I directed as follows:

a) Rob's action and Sid's action would proceed first and evidence was led regarding the various agreements reached and documents signed by the parties, the manner in which agreements were reached, who were the shareholders of 517, including, but not limited to, an alleged trust agreement or declaration of trust that Rick was holding shares in trust for Sid and others.

b) Rick's action would proceed after the evidence of the other two actions had been completed. This was ordered in part because Rick has the onus of proving oppressive conduct and undue influence. Rick testified on those issues first in direct examination. Rick was not required to testify twice. He testified regarding the allegations in his claim and in response to the evidence led by the plaintiffs in Rob's action and Sid's action. Rick was then cross-examined by counsel for the other parties, in connection with the issues in all three actions.

c) The plaintiffs in Rob's action and Sid's action and their witnesses were provided with the option of being re-called to give evidence as defendants in Rick's action regarding the allegations and evidence advanced in Rick's action.

[10] The evidence presented by the parties includes 14 volumes of an agreed book of documents and testimony from numerous witnesses during a 4-week trial. The evidence is convoluted and includes allegations of alleged wrongdoing by the parties regarding many incidents, some of which have minimal relevance to the main issue that

must be decided in this case. The main issue is who are the beneficial owners of the common shares of 517 and what remedy, if any, is fit and appropriate in the circumstances of this case.

Background Facts

[11] The Brar families were very close for a number of years and spent a great deal of time together. They owned homes across the street from one another in Winnipeg, socialized frequently and went on family vacations together. They also did business together. Sid and his brother, Balwinder Brar ("Billy") owned and operated three gas stations together and Billy's sons, Rick and Gagandeep ("Gagan") worked at one or more of the gas stations.

[12] From 1982-2006, Rob was a tow truck operator employed with a number of towing companies including: United Towing, Highway Towing and Dr. Hook Towing and by 2006 he had extensive experience in the towing business. In early March 2006, Rob met with Mr. Bill Bowden who was the owner of GLH Towing ("GLH"). Mr. Bowden wished to sell his towing business and wanted to negotiate and finalize a deal immediately. Rob believed this was a good opportunity, but he lacked the resources to invest.

[13] Rob knew that Sid owned and operated a number of gas stations in the City of Winnipeg and contacted him in March 2006 to determine whether he was prepared to invest in a towing business.

[14] Sid agreed to invest and on March 15, 2006, Sid and Rob negotiated an agreement with Mr. Bowden regarding the purchase of substantially all of the assets of

GLH for the purchase price of $100,000. There was a $30,000 cash payment with the balance due over a period of eight months. The agreement was secured by a promissory note in the amount of $70,000. The cash payment was made by way of a certified cheque drawn from an account in the name of Sid and his wife, Sarbjit Brar ("Sarbjit"), payable to legal counsel for GLH in the amount of $30,000. The first draft of the purchase and sale agreement showed Rob and Sid as the purchasers of GLH's assets. Before closing the transaction, on the advice of legal counsel, Sid and Rob agreed to purchase GLH's assets using 517 as the purchaser and changes were made to the purchase and sale agreement to reflect that.

[15] 517 executed a promissory note in favour of Sid in the amount of $30,000 to secure the repayment of the advance loaned by Sid. Rob signed the promissory note on behalf of 517 as its President.

[16] An option agreement was entered into as of March 17, 2006 and was signed by Rob, Rick and 517 (the "option agreement"). At the time of the first board of directors' meeting of 517, the common voting shares issued and outstanding were held by Rob, 30 shares and Rick, 70 shares. No shares were issued to Sid. The option agreement acknowledges the debt obligation for a loan made by Sid in favour of 517 in the amount of $30,000. The agreement specifically provided that upon repayment of a loan made by Sid to 517, Rick would sell to Rob 19 shares of 517 for $19. Rob was required to assume any tax consequences incurred by Rick in the transfer of shares at a price less than fair market value.

[17] The purchase and sale agreement between 517 and GLH was secured by a promissory note in the amount of $70,000. The promissory note was executed on March 15, 2006 by Rob, Sid and 517. No promissory note was executed by Rick. 517 also executed a security agreement in favour of GLH respecting the balance due and owing.

[18] Sid testified that Rick held the shares in 517 for him as the beneficial owner. Rick testified that there was no such trust relationship or agreement. Contrary to the evidence of Sid, Rob and the lawyers involved, Rick and his wife, Navjot Brar ("Navjot") testified that they advanced the $30,000 down payment for the purchase of GLH's assets and that Rick held 70% of the shares of 517.

[19] All documents to complete the purchase of GLH's assets and to deal with the organization of 517, including the issuance of shares, were prepared by Sid's legal counsel, Aikins Macaulay & Thorvaldson, now known as MLT Aikins ("Aikins"). Sid and Rob met with Mr. Harley Boles of Aikins respecting the purchase of GLH. Mr. Boles referred the matter to a junior lawyer in their commercial department, Ms. K.K. Pinkowski, and the closing documents and reporting letter were prepared by her.

[20] The reporting letter from Aikins to Sid dated April 7, 2006, states under the heading, "Down Payment – A certified cheque in the amount of $30,000 was forwarded to the Vendor's solicitor. This cheque was a loan made by Sid Brar in favour of the Purchaser in return for a Promissory Note. As well, an agreement was entered into whereby upon satisfaction of the debt obligation, Sid Brar (sic) will sell to Rob Campbell 19 shares of the Purchaser."

[21] 517 was a shelf corporation maintained by Aikins and used for the transaction. At the time 517 was organized and the shares were issued to the parties in 2006, no written trust agreement or trust declaration was executed by the parties.

[22] Rick and Navjot testified that they withdrew $25,000 from their joint Scotiabank account and added an additional $5,000 they had saved in cash and gave the investment directly to Sid.

[23] Rick testified that he, Rob and Sid were to be equal partners in the Tartan Towing business. Rick believed that each of the shareholders (Rick, Rob and Sid) were contributing $30,000 towards the purchase price. He admitted that he attended at the offices of Aikins to sign the closing documents and all agreements, but did not read any of them, stating that he trusted Sid, his uncle. He signed whatever he was asked to sign without question.

[24] During the first few years of operation, 517 was primarily run by Rob on the operations front and by Sid in terms of financing the operation. There were some initial cash flow issues which were financed by way of a number of shareholder advances.

[25] The details of the shareholders' advances were reviewed by Mr. Richard Raghunath, a Chartered Professional Accountant who reviewed all of the books, bank statements and general ledger accounts of 517 from 2006 to 2015. Mr. Raghunath took over as the corporate accountant for 517 after Mr. Hollis Marahaj passed away. The bookkeeper for 517, Narinder Sandhu ("Narinder") prepared draft schedules attached to Exhibit 4 which were reviewed by Mr. Raghunath and revised to correct transactions which were posted to the wrong accounts. He prepared a report (Exhibit

4) dated November 24, 2020, and testified respecting his analysis of the various transactions. I accept that his report accurately identifies the shareholders' advances from Sid, Rick, Rob and a related company owned by Sid, named Legend Homes during the period in question.

[26] Rick testified that he invested $80,000 in 517, comprised of the original $30,000 down payment investment and an additional $50,000, which was transferred from a line of credit in the name of Rick and Navjot with the Astra Credit Union ("line of credit 681676") to the operating account of 517.

[27] Line of credit 681676 was set up in the name of Rick and Navjot and was secured by a charge against property owned by an uncle, Atammjit Kler ("Atam"). Line of credit 681676 was used in the first month of operating 517, transferring $15,000 to the operating account of 517 on March 31, 2006. By July 2006, transfers totaling almost $50,000 had been made from line of credit 681676 to the 517 operating account.

[28] The agreed documents and the report of Mr. Raghunath establish that 517 repaid 100% of the principal and interest of line of credit 681676 and that the account was closed on July 11, 2013 when Atam sold his property.

[29] Rick testified that there were two line of credit facilities in the name of Rick and Navjot that were used to finance 517. Both lines of credit were in the amount of $50,000. There is no question that line of credit 681676 was used to finance the operations of 517. There was insufficient evidence of a second line of credit in the

same amount. There is also no question that line of credit 681676 was paid off by 517 and not as a result of payments made by Rick or Navjot personally.

[30] Rick testified that in 2008 he was asked by Sid to invest a further $15,000 in 517. Rick and Navjot testified that they withdrew funds from the Scotiabank and gave the funds to Sid. Sid denies that evidence.

[31] In 2010, a further line of credit was arranged through the Steinbach Credit Union in the name of Rick and Navjot in the amount of $25,000. The documents were prepared and signed by Rick and Navjot without reviewing them. It appears that the $25,000 was used to pay Mr. Rakesh Sharma and it is unclear as to Mr. Sharma's involvement in 517, if any.

[32] As the business of 517 grew, Sid negotiated an agreement on behalf of 517 to acquire 41 Higgins Avenue. The offer to purchase was signed by Sid on behalf of 517. At that time Sid was not an officer, director or shareholder on the registry of 517. Sid did have signing authority for 517. On the advice of 517's accountant at the time, Mr. Marahaj, the property at 41 Higgins was purchased by a new corporation, 5810621 Manitoba Ltd. ("581"). The transaction closed on April 1, 2009. Sid and Rob testified that the ownership split of 581 was intended to be the same as 517, 51% Sid and 49% Rob. Notwithstanding their evidence, when 581 was used to purchase 41 Higgins, Rick was shown as the sole director and shareholder, the president of 581 and signed the necessary corporate documents for 581 to complete the transaction.

[33] As President of 581, Rick executed the $270,000 vendor take back mortgage respecting the purchase of 41 Higgins. Payments were made pursuant to the vendor take back mortgage by 517 until it was paid out with new financing.

[34] In June and July 2009, steps were taken to renovate 41 Higgins and 517's operations continued at that location. Rob negotiated agreements with the Forks and Portage Place for significant towing contracts. Day-to-day operation decisions were made by Sid and Rob, not Rick.

[35] By June 2011, financing had been arranged for 581 and the vendor take back mortgage respecting the purchase of 41 Higgins was paid out.

[36] On June 30, 2011, 517 was awarded the City of Winnipeg Parking Authority contract as a result of a bid prepared by Sid and Rob.

[37] As Tartan Towing grew and in order to satisfy requirements of the City, a compound was required for motor vehicles. Sid and Rob completed the purchase of 14 Dawson Road for that purpose.

[38] On behalf of 517, Sid and Rob negotiated and completed the purchase of other towing companies, including AAA Academy and AAA Kildonan Towing.

[39] On March 31, 2009, Rick, as the President of 581, executed a vendor take back mortgage in the amount of $270,000. In January 2011, Rick executed a mortgage on behalf of 581 and the vendor take back mortgage was paid out. On June 29, 2011, Rick executed a $500,000 mortgage and he and Rob executed a personal guarantee in the amount of $155,000 in favour of Entegra Credit Union.

[40] On August 31, 2011, Rick executed documents respecting a further loan made by the Sunova Credit Union Limited to 581 respecting the purchase of the Dawson Road property. The documents executed by the parties included:

a) promissory note by 581 in the amount of $634,000;

b) line of credit agreement by 517 in the amount of $150,000;

c) real property mortgage by 581 in the amount of $784,000;

d) corporate guarantee by 581, in the amount of $150,000;

e) corporate guarantee by 517 in the amount of $634,000;

f) general security agreements by 581 and 517;

g) assignment of lease and rents by 581 in the amount of $634,000;

h) personal guarantee signed by Rick, Sid and Rob in the amount of $150,000. The personal guarantee was witnessed by Ms. Pinkowski and was signed, sealed and delivered on August 31, 2011; and

i) separate personal guarantee signed by Rick and Sid in favour of Sunova Credit Union Limited in the amount of $634,000. The personal guarantee was also witnessed by Ms. Pinkowski and was signed, sealed and delivered on August 31, 2011.

[41] In the fall of 2012, and up to March 2013, Rick began working for 517 as a tow truck driver. Prior to working at 517, Rick was employed at one of the gas stations owned and operated by Sid and his brother, Billy. He worked at a gas station on Salter Street between 1995 and 2012. Rick started out pumping gas and operating the cash register and his duties increased to take responsibility over operational issues at the gas

station. There were allegations about improper use of a "SuperPass" credit card to purchase fuel. As a result of irregularities discovered in the use of the credit card, Sid removed Rick as an employee at the gas station. Rick denied the allegations regarding improper use of the credit card.

[42] On March 22, 2013, an incident occurred at the Tartan Towing business premises involving two employees, Ms. Renanne Turner and Ms. Angela Kuchma. The account of the incident is well documented and I accept the testimony of the two employees about the incident. Rick treated them in a disrespectful and improper manner and was disciplined as a result.

[43] In March 2013, Rick was removed from his duties at 517. In early 2014, Rick was invited to come back to 517 to work in dispatch. He was working with his cousin Devon Brar ("Devon") and brother, Gagan.

[44] In the summer of 2014, Devon suffered a serious motor vehicle accident which had a devastating effect on all of the Brar family members.

[45] In December 2014, a decision was made to amalgamate 517 and 581. None of the witnesses had very much recollection about the amalgamation. It was recommended by Mr. Marahaj and lawyers for tax purposes. The amalgamation was handled by Aikins.

[46] An e-mail from Rob to Ms. Pinkowski dated December 4, 2014, provided instructions regarding the restructure and amalgamation of 517 and 581. The e-mail reads as follows:

> … we are ready to proceed to restructure and amalgamate both of our companies into 1. Our accountant (Hollis) says we first have to restructure both

> companies before amalgamating the 2. Hollis says both companies need to [be] divided into common shares with Sid having 350 class A, Rick having 350 class B, and Rob having 300 class C shares of each company and then have the amalgamation effective December 31, 2014. Hollis also wants the 5174245mb ltd to be the surviving company that will own everything. The shares will all be voting and will have equal rights. No shares can change hands without unanimous consent. Sid and I have a meeting tomorrow with Mr. Bock at 10:45 so maybe we will see you there. Thanks, Rob.

[47] Mr. Michael Ziesmann, a lawyer at Aikins handled the amalgamation documentation and gave evidence regarding the preparation of the articles for amalgamation and the other documents including declarations of trust. The amalgamation documents establish the shareholdings of 517 would be held as follows: 35% to Rick, 35% to Sid and 30% to Rob. Rick acknowledged during his testimony that he agreed to the ownership split based on his understanding that they were partners and that they would share profits through dividends. None of the witnesses including Rick, Sid, Gagan or Rob had any recollection regarding the declarations of trust respecting the common shares of 517 and 581.

[48] A declaration of trust respecting 517 was signed by Rick as the "Trustee" and states in part as follows:

> **NOW THEREFORE** the Trustee hereby declares that 52.5 of such common shares (the "**Trust Shares**") are not the property, either directly or indirectly, of the Trustee, but are held in trust for, and are the property of and beneficially owned by, **SID BRAR**, who holds beneficial ownership of 35 of the Trust Shares, and **GAGANDEET BRAR**, who holds beneficial ownership of 17.5 of the Trust Shares (hereinafter referred to as the "**Beneficial Owners**").
>
> The Trustee further declares that he has no beneficial interest whatever in the Trust Shares and that any amounts or distributions from time to time paid or payable in respect thereof, and any and all other rights in respect thereof, including any proceeds of or from the sale or other disposition thereof, do not in any manner whatsoever belong to the Trustee but are the property of and subject to the order and control of the Beneficial Owners and any costs in

> connection therewith are for the account of and are to be paid by the Beneficial Owners.
>
> The Trustee further declares that he shall deal with the Trust Shares in such manner as from time to time directed in writing by the Beneficial Owners and at the request of the Beneficial Owners shall cause all or a portion of the Trust Shares to be transferred to the Beneficial Owners in such manner and at such times as may be directed by the Beneficial Owners.
>
> Notwithstanding the date of execution of this instrument, the Trustee acknowledges and agrees that this instrument shall and shall be deemed to have come into force and effect as of and upon the 19th day of September, 2005.
>
> **IN WITNESS WHEREOF** the undersigned has executed these presents as of the 29th day of December, 2014.

[49] A second declaration of trust was signed by Rick as "Trustee" respecting the shares of 581. It is in substantially the same form as the declaration of trust respecting the shares of 517. The second paragraph of the declaration of trust for 581 states:

> **NOW THEREFORE** the Trustee hereby declares that 82.5 of such common shares (the "**Trust Shares**") are not the property, either directly or indirectly, of the Trustee, but are held in trust for, and are the property of and beneficially owned by, **SID BRAR**, who holds beneficial ownership of 35 of the Trust Shares, **ROB CAMPBELL**, who holds beneficial ownership of 30 of the Trust Shares, and **GAGANDEET BRAR**, who holds beneficial ownership of 17.5 of the Trust Shares (hereinafter referred to as the "**Beneficial Owners**").

[50] Rick testified that he recalled signing the declarations of trust, but did not read them or understand the nature of the documents. Sid and Rob testified that they could not recall giving instructions to prepare the declarations of trust and had no recollection as to why they were prepared and signed.

[51] The declarations of trust were created by Mr. Ziesmann. He testified that he received instructions from Ms. Pinkowski and/or Mr. Marahaj. Notwithstanding Rob's lack of recall about the declarations of trust, they are consistent with the instructions

provided in Rob's e-mail to Ms. Pinkowski dated December 4, 2014. Mr. Ziesmann testified that the documents including the declarations of trust were mailed or delivered to Rob for execution. The documents were colour coded for the signatures of Sid, Rick and Rob. Both Sid and Rick were attending a family wedding in Cancun and were not available until they returned in January 2015. Rick testified that the declarations of trust were signed in front of Sid without legal counsel and without any review. Rick stated that he trusted Sid and they were signed without question.

[52] In addition to the declarations of trust, Sid and Rob, as beneficial owners of shares of 517 and 581, executed directions to Rick to transfer the shares that were held in trust by him. Sid and Rob had no recollection of signing the directions respecting the transfer of shares. As well, Rick signed transfers of the shares of 517 and 581 consistent with the amalgamation documents. Resolutions were signed by Rick and Rob authorizing the issuance of new share certificates.

[53] The declarations of trust were the first time that there was a document stating Rick is holding shares of 517 and 581 in trust for Sid, Rob and his brother Gagan. Gagan testified that he had no knowledge of the declarations of trust or being a beneficial owner of any shares of 517 or 581. Although he was an employee of 517, he acknowledged that he had no interest whatsoever in the ownership of 517 or 581. Gagan supported is brother's position that Rick was entitled to 35% of the common shares of 517 at the time of amalgamation. Gagan was not involved in any discussions about the declarations of trust or the amalgamation.

[54] Mr. Zeismann sent a reporting letter to 517 to the attention of Rob dated January 15, 2015. Under the heading 1, "New Share Certificates of 517 and 581 Were Issued" the reporting letter states:

> In accordance with a direction dated December 30, 2014, Sid requested that 35 common shares in the capital stock of 517 held in trust for him by Rick be transferred into his name. By resolution dated December 30, 2014, the directors of 517 authorized the issuance of a new share certificate in the name of Sid representing 35 common shares in the capital stock of 517.
>
> In accordance with a directions dated December 30, 2014, Sid requested that 35 common shares in the capital stock of 581 held in trust for him by Rick be transferred into his name, and Rob requested that 30 common shares in the capital stock of 581 held in trust for him by Rick be transferred into his name. By resolution dated December 30, 2014, the director of 581 authorized the issuance of a new share certificate in the name of Sid representing 35 common shares in the capital stock of 581, and a new share certificate in the name of Rob representing 30 common shares in the capital stock of 581.

[55] In the fall of 2015, Sid and his wife were travelling to visit family in India. While they were away, a number of things occurred as described by many of the witnesses. Rick fired Narinder, he was rude to a senior person at the Winnipeg Parking Authority, adjusted the work schedule such that an employee had to work for nine straight days over the holidays, purchased a Mercedes Benz for his personal use at a cost of $115,000 and commenced putting the car payments through 517.

[56] Rick testified that in October 2015, he discovered, as a result of conversations with Mr. Marahaj, that Sid had been taking money out of 517 for his personal use and that Narinder was complicit in this. He maintained that he told her not to come back to the office after discovering that Sid was putting personal expenses through the company.

[57] Narinder testified that she was assisting Rick to learn the bookkeeping functions of 517. Once working with her for a few days, Rick advised that he could do the books from now on and that she should go on vacation and not return to the office. Rob was uncertain how to deal with this development and decided to wait until December 2015, when Sid was expected to return from India.

[58] On or about December 28, 2015, Rob and Sid decided to terminate Rick's employment with 517 and they delivered a letter to him terminating his employment. Gagan was also terminated from his position of employment with 517 in December 2015.

[59] In the months that follow in 2016, attempts were made to resolve matters and avoid litigation. That did not occur. The first oppression application was filed by Rick on March 7, 2016. The applications filed by Sid and Rob followed.

Issues

[60] The issues to be decided include the following:

a) Who holds the shares in 517 and 581 and was there a trust relationship between Sid and Rick, such that Rick was holding shares in trust for Sid or others as the beneficial owner(s) of shares in 517 and 581?

b) Is Rob entitled to 190 Class B common shares of 517 held in the name of Rick?

c) Were there acts or omissions and did the directors of 517 exercise powers in a manner that was oppressive or unfairly prejudicial or that unfairly disregarded the interests of any of the parties?

d) Is there evidence of undue influence or duress?

a) Who holds the shares in 517 and 581 and was there a trust relationship between Sid and Rick, such that Rick was holding shares in trust for Sid and others as the beneficial owner(s) of shares in 517 and 581?

[61] The corporate registry of 517 shows that at the time of purchase of GLH, Rick held 70 of the issued and outstanding common shares and Rob held 30 of the issued and outstanding common shares of 517. When 581 was incorporated, Rick was shown as the sole shareholder and director of the corporation. Notes and testimony of lawyers at Aikins show that they received instructions from Sid and Rob. Although Sid had no recollection of the instructions he gave Aikins, the evidence is that Sid instructed Aikins to put all of the shares of 581 in Rick's name. Both Sid and Rob testified that they agreed the beneficial owners of 581 would be the same as 517. No declarations of trust or trust agreements were prepared and signed at the time 517 acquired GLH or when 581 acquired 41 Higgins and 14 Dawson Road.

[62] Rick submits that pursuant to s. 250(1) of ***The Corporations Act***, the onus is on the party challenging the owner of the shares named in the corporate registry. Section 250(1) provides:

> **Certificate of corporation**
>
> 250(1) A certificate issued on behalf of a corporation stating any fact that is set out in the articles, the by-laws, a unanimous shareholder agreement, the minutes of the meetings of the directors, a committee of directors or the shareholders, or in a trust indenture or other contract to which the corporation is a party may be signed by a director, an officer or a transfer agent of the corporation.
>
> **Proof**

> 250(2) When introduced as evidence in any civil, criminal or administrative action or proceeding,
>
> (a) a fact stated in a certificate referred to in subsection (1); or
>
> (b) a certified extract from a securities register of a corporation; or
>
> (c) a certified copy of minutes or extract from minutes of a meeting of shareholders, directors or a committee of directors of a corporation;
>
> is, in the absence of evidence to the contrary, proof of the facts so certified without proof of the signature or official character of the person appearing to have signed the certificate.

[63] Similar sections are found in the ***Canada Business Corporation Act***, R.S.C. 1985, c. C-44 (ss. 257(1)(2)).

[64] In the absence of proof to the contrary, the persons in whose name the securities are registered are the owners of the securities mentioned in the certificate issued on behalf of the corporation. (See ***Mennillo v. Intramodal Inc.***, 2014 QCCA 1515, [2014] J.Q. no 8429)

[65] The question that must be assessed in this case is what evidence to the contrary was advanced by the parties. The evidence is conflicting and the position advanced by Rick changed as the litigation progressed. At the time that Rick made the motion to amend the statement of claim, which was granted, an affidavit sworn by Rick on October 30, 2019, stated that prior to the amalgamation of 517 and 581, he felt extreme pressure from Sid to transfer 35 of his shares to him. He describes in some detail the circumstances and states at para. 34 of his affidavit "Had I not been subject to intense pressure from Sid, had I been given an opportunity to obtain independent legal advice, and had I known how much money was being stripped from 517's profits by Sid and Rob, I would never have transferred any of my shares to Sid."

[66] On the basis of the evidence filed, the motion seeking leave to amend the statement of claim in Rick's action and the statements of defence in the other two actions was granted.

[67] At trial, the forensic investigation report prepared by Mr. Alan Martyszenko was not relied upon by Rick and filed as evidence. Further, very little evidence was filed regarding the allegations related to Sid and Rob using the funds of 517 from automobile auctions and acquiring vehicles in their own names or for their own personal use. It is undisputed that motor vehicles were purchased at auctions with corporate funds and used by Sid, Rob and other family members. No one complained about this until shortly before the oppression application was filed in 2016.

[68] Contrary to the allegations made in Rick's affidavit and the amended statement of claim, at trial, Rick testified that he, Rob and Sid were always equal partners in 517 and the shareholding in the amalgamation documents seemed fair, given the efforts of Rob and Sid expanding the business and profits of 517.

[69] In determining who owned the shares of 517 at the time of incorporation, and whether a trust relationship existed, the documents prepared at the time as well as the contributions made to purchase GLH are relevant.

[70] The applicable law respecting whether there exists an express trust, or the existence of a constructive or implied trust, is not in dispute.

[71] An express trust exists where there is three certainties:

a) The language of the settler must be imperative;

b) The subject matter or trust property must be certain; and

c) The objects of the trust must be certain. (See ***McLean v. McLean Estate***, 2012 MBQB 206, 281 Man.R. (2d) 264 (QL), at para. 29 and ***McDonald v. Radford Estate***, 2005 MBQB 39, [2005] M.J. No. 120, at para. 10)

[72] The law of resulting trust was reviewed in the ***McLean*** decision as follows:

> **25** The law of resulting trust has recently been addressed by the Supreme Court of Canada in ***Pecore v. Pecore***, 2007 SCC 17, [2007] 1 S.C.R. 795, and ***Kerr v. Baranow***, 2011 SCC 10, [2011] 1 S.C.R. 269. In ***Pecore,*** the court explained:
>
> > **20** A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).
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> > **24** The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
> >
> > **25** The presumption of resulting trust therefore alters the general practice that a plaintiff (who [page 808] would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
> >
> > **44** As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

> **26** The evidence to be considered to support or rebut a resulting trust must relate only to the intention of the parties at the date of the purchase or transfer (***Ehrmantraut v. Ehrmantraut (Trustee of)***, 2008 MBQB 140, [2008] M.J. No. 196, para. 21).
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> **27** Another type of resulting trust based on "common intention" was described in ***Kerr*** :
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> > **21** That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423. Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

[73] There is no question that the corporate documents that were prepared at the time of purchase of GLH establish that Rick and Rob were the shareholders of 517 and that a loan was made by Sid in favour of 517 in the amount of $30,000 in order to complete the purchase of GLH. The only cheque produced respecting the $30,000 payment was a certified cheque issued from the joint bank account of Sid and his wife, Sarbjit. The debt obligation of 517 was acknowledged in an option agreement executed by Rob, Rick and 517 on March 17, 2006.

[74] I do not accept the testimony of Rick and his wife, Navjot that Rick gave Sid a cheque and cash in the amount of $30,000 to complete the purchase of GLH. This is inconsistent with all of the other evidence and the corporate documents prepared at the time. In addition, Rick and his wife failed to provide any record of the payment. At the time of the transaction, Rick was 24 years of age and had been working at gas stations owned by Sid and his father Billy. Rick had no involvement in the operation and day-to-

day management of 517 until approximately 2012 when he started to work as a tow truck driver. The ongoing day-to-day operations of 517 was managed by Rob, with supervision by Sid as well as financial arrangements made by Sid.

[75] I am not satisfied that Rick's description of his investment in 517 in 2006 is credible for the following reasons:

a) No banking records or other evidence was produced to prove the investment of $30,000 was made by Rick and Navjot;

b) The corporate records and the documents produced at the time of closing show that a certified cheque in the amount of $30,000 was drawn from a joint account in the name of Sid and Sarbjit. The promissory note, the option agreement and other corporate records reference the loan by Sid to 517 and the fact that once the debt obligation is satisfied, Rick was to sell to Rob 19 shares of 517 for $19;

c) Rick's testimony respecting his use of the SuperPass card at the gas station, the incident involving the bookkeepers of 517, Ms. Turner and Ms. Kuchma that led to disciplinary action, Rick's firing of Narinder, as well as his alleged discussions with Rob about becoming equal partners, are simply not credible. I accept the evidence of Ms. Turner, Ms. Kuchma, and Narinder as being credible and reliable. The complaint of Ms. Turner and Ms. Kuchma was documented at the time and resulted in disciplinary action. They were extremely upset about the incident and I accept their recollection as to what occurred on March 22, 2013 as accurate;

d) I found Narinder to be a credible witness who gave her testimony in a straightforward manner about the accounting and bookkeeping issues. I accept her description of the discussion she had with Rick at the time she was fired by him;

e) I also accept the evidence of Rob that he approached Sid, not Rick to contribute to the purchase of GLH and that once 517 had paid off the loan made by Sid, the plan was that he and Sid would be equal partners with Sid owning 51% of the shares and Rob owning 49% of the shares of 517. Rob knew Sid, not Rick as the entrepreneur and he approached Sid to invest in the towing business.

[76] Rick's description of signing the required documents respecting both the formation of 517 and the closing documents for the purchase of GLH are incredible. He knew that important documents needed to be signed on March 17, 2006 when he met with the lawyer at Aikins, and acknowledged that he was given time to review the documents if he chose to do so.

[77] Unfortunately, Ms. Pinkowski suffered an accident and her recollection of the events that gave rise to the preparation and signing of all of the documents was impaired as a result of the serious injury she sustained. She had no recollection of the actual meetings and discussions regarding the 2006 transaction. She did testify however, that her standard practice was to provide her clients with an overview of each document that they were signing and that the amount of time that she would spend and the amount of detail that she would provide depended upon whether she knew the

person signing the document and the level of the person's sophistication. I am satisfied that given her standard practice, Ms. Pinkowski, in all probability, reviewed the documents prior to the documents being executed by Rob and Rick. It is clear that the option agreement provided that the debt obligation was owed to Sid and not to Rick. In my view, Rick knew, or ought to have known that all of the documents referenced a cheque for $30,000 which was provided by Sid, that 517 had a debt owing to Sid of $30,000 and that he signed the documents, including the option agreement acknowledging that 19 shares held in his name would be transferred to Rob once the debt was paid by 517 to Sid.

[78] Rick claimed to provide a bank draft or cheque in the amount of $30,000 to Sid a few weeks or a month before the purchase of GLH. This is contrary to the evidence that the agreement with GLH was made very quickly as the principal of GLH was going to jail. The sale and purchase agreement is dated March 15, 2006 and the balance of the documents are dated March 17, 2006.

[79] No one other than Rick and Navjot testified that they made any contribution or investment into 517. All other witnesses including Billy, testified that Rick was not a beneficial owner of 517.

[80] The evidence of Navjot is equally incredible. Although she testified that she contributed $25,000 towards the purchase of GLH, she acknowledged that she did not speak with either Sid or Rob about the investment or the towing business. She did not know anything about the purchase of GLH and was unable to produce any records to support the allegation that she and Rick contributed $30,000 to Sid or to 517. She was

unable to confirm whether Rick actually gave any money to Sid and while understandable that she supported her husband's testimony, she offered no documentary proof the investment was made.

[81] The further claim that $20,000 was taken from the "committee" which was managed by Narinder and was used to invest in 517, is not supported by the evidence of the accountant, Mr. Raghunath or the evidence of Narinder. I accept the evidence of Narinder and the accountant regarding the shareholders' advances made by Rick, Sid and Rob as outlined in the report and spreadsheets (Exhibit 4).

[82] Applying the principles outlined above, I am not satisfied that there was an express trust created at the time 517 was incorporated and the shares were issued. It appears that the parties intended that Rick hold some or all of his 70% interest in 517 in trust for Sid. This is consistent with how other companies were organized by Sid including Legend Homes. However, there was no evidence of discussions between Sid and Rick regarding how Rick was holding the shares and no instructions appear to have been given to Aikins at that time to prepare a trust agreement or declaration of trust to document the understanding that Sid was to be the beneficial owner of the shares placed in Rick's name.

[83] In my view, the evidence does not meet the three requirements for the creation of an express trust. I am not satisfied that there was certainty on any of the three requirements. A trust may have been intended, but there is insufficient evidence to find an express trust was created at the time 517 was formed and the transaction to purchase GLH closed.

[84] The declarations of trust signed at the time of the amalgamation in December 2014, are evidence of the intent of the parties at that time in December 2014 or January 2015. Although the declarations state that they are retroactive in their application back to the date 517 and 581 were incorporated, I have serious doubts that a declaration can be made years later and have retroactive effect. The date used in the declarations of trust are prior to the date that 517 and 581 were used to purchase assets by the parties. The authorities make it clear that the evidence to be considered to support or rebut a trust or a resulting trust must relate only to the intention of the parties at the date of the purchase or transfer. The declarations of trust are nevertheless evidence I did consider to be relevant to answer the first issue. More will be said on that below.

[85] The next question is whether a constructive or resulting trust arises under the facts and circumstances of this case. A constructive or resulting trust generally arises when title to property is in one party's name, but that party because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner. (See para. 25 of ***McLean***)

[86] While I am not satisfied that Rick made the original $30,000 contribution to purchase GLH, I am satisfied that Rick and Navjot made contributions to 517 and assumed risks by virtue of signing line of credit agreements and guarantees respecting the indebtedness of 517 and 581. The documents that were signed establish that Rick and Navjot were liable for a significant debt if 517 operating as Tartan Towing had not ultimately become a successful towing business. They assumed personal liability and

Rick's contribution is identified in the shareholder reconciliation and report prepared by the accountant (Exhibit 4).

[87] The role of the court is to weigh all the evidence in an attempt to ascertain the parties' actual intention in placing the shares in the name of Rick. In my view, Sid was an experienced business person and deliberately placed shares in the name of Rick for tax reasons or other purposes when the two families were very close. He may have intended the eldest son of the two families to eventually take over control and operate 517. He had done this with other business entities such as Legend Homes. When the two families were working together in a cooperative manner, no one questioned the share structure of 517. It is also reasonable to infer that Sid intended Rick assume some liability for the benefit he received. Line of credit 681676 was established to operate 517 and both Rick and Navjot assumed personal liability for the debts of 517 and then later for the debts of 581.

[88] Due to the numerous incidents that occurred and the falling out that transpired, Sid no longer intended to have Rick involved in the Tartan Towing business and took the position that he was the beneficial owner of Rick's shares in 517 and 581. The presumption in favour of a resulting trust arises when no value is given for the property (the shares in 517 and 581). However, in this case, value was given for the shares or Rick's ownership in 517 and 581 by virtue of executing numerous documents and assuming significant personal liability for the payment of the debts of 517 and 581.

[89] While I have determined that there was insufficient evidence to find that there was an express trust or a resulting trust applicable to the shares placed in Rick's name

at the time the assets of GLH were purchased and the transaction was completed, that does not end the matter. The agreed book of documents contains numerous relevant documents that were signed by the parties and must be reviewed to determine the intentions of the parties. As 517 grew, further assets were acquired and the parties agreed to restructure and amalgamate 517 and 581. General principles of contract law and interpretation of contracts apply to assess the documents and the evidence of the parties.

[90] Contrary to the evidence of Sid and Rob, that they were the sole owners of 517, the records and evidence establish that the parties agreed on the manner in which it was structured. The parties knew and agreed that Rick would hold 70 common shares in 517 and all of the shares in 581. Rick had no involvement in the day-to-day operations of 517 or 581 and while I agree that it appears Rick was holding some or all of the shares in trust for Sid, there is lack of certainty regarding the terms of the trust at the time 517 and 581 were used to purchase assets.

[91] The detailed accounting of shareholders' advances (Exhibit 4) and the evidence of the accountant, Narinder, Sid and Rob establish that Sid's initial loan of $30,000 was repaid by October 2012. There is no evidence that interest was paid on the loan even though the documents prepared contemplated the payment of interest. Sid acknowledged the debt was paid. Had the parties put their mind to the timing of when the $30,000 had been repaid and a request had been made to comply with the terms of the option agreement, I accept that Rick was required to comply and 19 shares held by Rick would have been transferred to Rob prior to the amalgamation. However, the

request to transfer the shares of 517 pursuant to the option agreement and tendering the $19 did not occur until after the amalgamation of 517 and 581 and after the oppression application was filed by Rick in 2016. The request was rejected by Rick's lawyers who denied the loan was repaid and gave notice to terminate the option agreement.

[92] The parties were still working cooperatively at the time of the amalgamation of 517 and 581 and I am satisfied the common intention of Sid, Rob and Rick at the time of amalgamation, was to split the shareholdings with Sid and Rick each holding 35% of the shares (subject to the declarations of trust) and Rob holding 30% of the shares of the amalgamated corporation, 517. The declaration of trust respecting 517 signed by Rick clearly states he is holding 52.5 common shares of 517 in trust for Sid and Gagan, such that he beneficially owns 17.5 common shares in 517. The declaration of trust signed by Rick respecting 581 clearly states he is holding 82.5 common shares in trust for Sid, Rob and Gagan such that he beneficially owns 17.5 common shares of 581. Once the amalgamation is completed the parties intended that Rick hold 350 Class B common shares of the amalgamated corporation (517) of which he beneficially owned 175 Class B common shares.

[93] The amalgamation documents and amalgamation agreement were prepared by Mr. Ziesmann, a lawyer with Aikins. Mr. Ziesmann testified that he received instructions from Mr. Marahaj and/or Ms. Pinkowski about who held the shares and that Rick was holding shares in 517 and 581 in trust for Sid, Rob and Gagan. Mr. Ziesmann received a copy of the e-mail Rob sent to Ms. Pinkowski dated December 4, 2014, outlining the

specifics of the shareholdings relevant to the amalgamation. The declarations of trust were prepared for tax purposes and to confirm the shareholdings, as no trust agreement had been signed in the past.

[94] Mr. Ziesmann met with Sid and Rick on December 29, 2014 to sign Part 1 of the amalgamation documents that had to be filed before year end at the Companies Branch. He witnessed the signature of Rick on the articles of amalgamation and statutory declaration. Although he had no specific recollection of the discussions, he stated his general practice was to explain the documents that are being signed. These documents confirm the agreed shareholdings of 517 after the amalgamation and I am satisfied there was no reason for Mr. Ziesmann to depart from his general practice and therefore the documents signed were reviewed and explained to Sid and Rick.

[95] The balance of the documents required to be signed by Sid, Rob and Rick were delivered to Rob with instructions for execution. Although none of the witnesses, Sid, Rob or Rick had a recollection of the declarations of trust or the directions to transfer shares, I am satisfied the only reasonable inference to be drawn from the evidence is they were prepared based on instructions from Sid and Rob to the corporate accountant and/or Ms. Pinkowski. Lawyers and accountants provide advice and clients make decisions and provide instructions on the shareholdings based on the advice received. In this case, Sid and Rob provided instructions based on advice received from the corporate accountant and Ms. Pinkowski who then passed on the specific instructions to Mr. Ziesmann to prepare the required documents.

[96] Although Sid, Rob and Rick had no specific recollection of the declarations of trust or signing the directions to Rick to transfer shares in 517 and 581 at the time of amalgamation, there is no denying they signed the documents and I find that they knew or ought to have known the purpose and intent of the declarations of trust and directions to transfer shares relating to the shareholdings of 517 and 581.

[97] After the fact and once the falling out happened, Sid's and Rob's recollection of events is selective only remembering that they (Sid and Rob) were partners in the towing business and they both maintain that Rick made no contributions and is not entitled to any of the shares of 517. As I explained earlier, Rick did make significant contributions to 517 and 581 by signing lines of credit, personal guarantees and assuming personal liability for the indebtedness of 517 and 581.

[98] Similarly, after the fact and once the falling out happened and lawyers were retained to file the oppression application, Rick's memory regarding the amalgamation and the trust declarations is selective and changes to suit the position he advanced in these proceedings.

[99] It is not an answer for any of the witnesses to say "I did not read the legal documents and therefore they are void and unenforceable", barring proof of undue influence or duress, which I will review later in these reasons. Rick testified that he trusted his uncle Sid and signed whatever he was asked to sign and never received any independent legal advice. While that may be true, and in hindsight, it would have been advisable that Rick receive independent legal advice at the time he signed the option agreement and the amalgamation documents including the declarations of trust, the

failure to do so does not mean that the documents signed are unenforceable. The question that must be determined is the true intentions of the parties.

[100] It is important to put the claims advanced by Rick in proper perspective. From the time 517 was formed, Sid decided to confer a benefit on Rick by making him a shareholder in 517 and then later by placing all of the shares of 581 in Rick's name. In my view, no one intended that Rick would be the beneficial owner of 70% of the shares of 517 and 100% of the shares of 581. Sid and Rob were responsible for the operation and success of Tartan Towing, not Rick. Rick's involvement in addition to working for 517 was to assist with financing 517 through lines of credit and guarantees that were arranged by Sid, and he and Navjot signed. I am not satisfied he put up any funds personally to purchase assets or operate 517 or 581.

[101] The other significant fact is that while Rob was a shareholder of 517, the offer to purchase 41 Higgins was negotiated and the down payment was made by Sid. The parties decided and agreed to take title to the property in the name of 581, not 517 and from the beginning Rick was the sole owner of the shares of 581. Rob knew or ought to have known that he had no ownership interest in 581. Sid instructed Aikins to place the shares of 581 in Rick's name. Although the lawyers could not recall the discussions and instructions, notes made by Ms. Pinkowski on March 26, 2009 of a telephone call with Mr. Boles state "Dec of Trust to Rick". Notes made on the same day of a telephone call to Sid state: "wants Rick to own" and "1 - Put in #'d co" "Rick sole s/h" and "Tartan can buy co". Further, the notes state: "Tartan has option to buy Rick's shares for $1 at any time including follow death of Rick" and below that and circled "or

Dec of Trust held for Rick". Another undated note made by Ms. Pinkowski on the purchase of 41 Higgins Aikins' file is a note of a telephone call with Sid and states: "Wants title to go to Rick Brar" "Says he already told HCB" and "Beneficial Interest?"

[102] It is reasonable to infer that these are notes of instructions from Sid that Rick is to be the sole shareholder of 581 pursuant to either an agreement with 517 or a declaration of trust. It is undisputed that 581 was incorporated to hold real property used for the Tartan Towing business and that the revenues generated by 517 were used to pay the debt of 581.

[103] Ms. Pinkowski had no independent recollection of the discussion she had with Mr. Boles and Sid or precisely what her notes meant. She acknowledged that they were her notes of the telephone conversations she had with them. Consistent with her notes, 581 was used to purchase 41 Higgins and Rick was the sole shareholder of 581. However, no other documents were prepared at the time in March 2009, including a trust agreement or declaration of trust and at trial no witness gave any explanation as to why.

[104] At the time of amalgamation, I am satisfied the accountant and lawyers gave advice to the parties and they put their minds to a fair ownership split of the amalgamated corporation taking into account the shareholdings of the two entities and agreed on the shareholdings going forward at the time the amalgamation documents were signed. The documents were prepared by the lawyers based on instructions provided by Sid and Rob. Rob received the documents including the declarations of trust and he arranged for them to be signed.

[105] The declarations of trust were signed by Rick and the copy produced at trial shows there was no witness. Rick testified that Sid witnessed his signature and Sid had no recollection of the circumstances surrounding the execution of the declarations of trust. Other documents were signed by the parties to complete the amalgamation. Both Sid and Rob executed directions to Rick to transfer shares to them in accordance with the declarations of trust. Rick signed transfers of the shares in both 517 and 581 transferring shares in 517 and 581 to Sid and Rob.

[106] Sid, Rob and Rick all signed a special resolution of shareholders approving the amalgamation, adopting the amalgamation agreement and authorizing any one director or officer to do all things necessary to give effect to the resolution.

[107] I mentioned earlier that general contract law principles apply to determine whether an agreement was reached. As pointed out in the decision of The Manitoba Court of Appeal in ***Matic v. Waldner***, 2016 MBCA 60, 330 Man.R. (2d) 107 (QL), the standard for determining whether an agreement has been reached is whether an "objective reasonable bystander" looking at all the material facts, would say so. (See para. 55). "The law is concerned not with the individual parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms." (See para. 55, ***Matic*** and test from GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at p 15)

[108] In examining all of the agreed documents and reviewing all of the evidence, I am satisfied the objective reasonable bystander would find that the parties intended to contract on the terms referenced in the amalgamation agreement and the declarations of trust.

[109] The essential terms of the contract pursuant to the amalgamation agreement were that the issued share capital of 517 and 581 were as follows: Rick – 35 common; Sid – 35 common and Rob – 30 common. As well, Rick held 17.5 of the shares in 517 and 581 in trust for Gagan as a beneficial owner. Once the amalgamation was completed, 35 shares of 517 and 581 became 350 common shares of the amalgamated corporation, 517.

[110] I am satisfied the common intention of the parties was to hold the following shares in 517:

a) Sid – 350 Class A common shares;

b) Rick – 350 Class B common shares of which he was the beneficial owner of 175 Class B common shares; and

c) Rob – 300 Class C common shares.

b) Is Rob entitled to 190 Class B common shares of 517 held in the name of Rick?

[111] Rob's position is that in accordance with the terms of the option agreement and promissory note, the loan payable to Sid was paid off by October 5, 2012 and he is therefore entitled to 19 shares of 517 before amalgamation and 190 Class B common shares of 517 after amalgamation. Although the promissory note made reference to

interest being payable on the loan, Sid acknowledged the loan was paid in full regardless of whether interest was paid or not. If Sid's claim is successful such that Rick holds shares in trust for Sid, then Rob says that 19 shares of 517 were to be sold to Rob for $19 pursuant to the terms of the option agreement. Rob seeks 190 Class B common shares of the shares held by Rick in the amalgamated corporation, 517. Rob submits he is entitled to shares equivalent to a 49% interest in 517.

[112] Whether Sid is successful in his claim or not, Rob takes the position that he has a valid and enforceable claim against Rick, both at law and in equity to have the shares transferred into his name. Rob's claim is based on the terms of the option agreement signed by Rob, Rick and 517 at the time of purchase of GLH and a claim in equity, pursuant to s. 234 of ***The Corporations Act***.

[113] Rob relies on the oppression provisions submitting that Rick breached the reasonable expectations of the original shareholders by refusing to transfer the equivalent of 19 shares of 517 to Rob, pursuant to the option agreement.

[114] In essence, Rob submits that the court should rectify the corporate registry of 517 based on compliance with the terms of the option agreement because the amalgamation of the two corporate entities did not extinguish the existence of the amalgamating entities and the original rights of the shareholders. Therefore, the court should grant Rob's request that he is the owner of 49% of the shares of 517.

[115] Rick submits that Rob's position is untenable at law as Rob is asking the court to recognize the validity of the option agreement and ignore the amalgamation agreement

that was executed by the shareholders in 2014. Prior to the amalgamation, Rob held 30 of the shares of 517 (30%) and held none of the shares of 581.

[116] Further, Rick submits that Rob's position is contrary to the evidence that he promised Rick they were partners and Rick would have 35% interest in the amalgamated company.

[117] Rick submits that Rob exercised his rights pursuant to the option agreement one year after the amalgamation, which Rick submits can be defended by the legal doctrine of promissory estoppel. By entering into the amalgamation agreement and Rick agreeing to transfer shares, Rob promised that the terms of the amalgamation could be relied on and, to his detriment, Rick transferred his majority shares in both 517 and 581 to Sid and Rob.

[118] Rick also advances arguments based on laches, the conditions precedent to a transfer of the shares was not established and there was no consideration to enter into the option agreement.

[119] In my view, the difficulty with Rob's position is that he seeks to enforce the terms of the option agreement after the amalgamation occurred. The amalgamation agreement clearly addressed the shareholdings going forward in the amalgamated corporation. The preamble of the amalgamation agreement states that the parties have each made full disclosure of all of their respective assets and liabilities. Rob provided initial instructions to Ms. Pinkowski and signed a number of documents dealing with the amalgamation. Rob knew or ought to have known about the terms of the amalgamation and the split of the shares of 517. There is no dispute that he agreed to

accept 30% of the shares of the amalgamated corporation. At the time of amalgamation, even if Rob's position is accepted, he was arguably entitled to 49% of the shares of 517 pre-amalgamation and owned no shares of 581.

[120] As I stated earlier, I am satisfied that the parties received advice and agreed on a fair ownership split in the amalgamated corporation, taking into account the shareholdings of the two entities at the time of amalgamation.

[121] I am not satisfied the legal doctrine of promissory estoppel applies in this case. Rick's submission is based on a promise that was not proven on a review of all the evidence. I am also satisfied that the submissions relating to the doctrine of laches or whether there was consideration for the option agreement have no merit.

[122] The fact of the matter is that the parties agreed on the terms of the amalgamation agreement together with the declarations of trust. These documents represent a fair and equitable split of the shareholdings based on the evidence and corporate history. These documents override or supersede agreements that were entered into prior to the amalgamation and represent the agreement of the shareholders.

[123] Rob's submission relating to the shareholder oppression remedies will be addressed under the next issue.

c) Were there acts or omissions and did the directors of 517 exercise powers in a manner that was oppressive or unfairly prejudicial or that unfairly disregarded the interests of any of the parties?

[124] Each of the shareholders of 517 and 581 advance submissions pursuant to s. 234 of ***The Corporations Act*** generally referred to as the oppression remedy. The grounds for an oppression application are set forth in s. 234(2) as follows:

> **Grounds**
> 234(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result; or
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner;
>
> that is oppressive or unfairly prejudicial or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[125] The powers of the court to make an order in connection with an oppression application are listed in s. 234(3) of ***The Corporations Act***:

> 234(3) … the court has the discretion to fashion a remedy it thinks fit including, without limiting the generality of the foregoing,
>
> . . . .
>
> (d) an order directing an issue or exchange of securities;
> (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
> (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
> (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;
>
> . . . .
>
> (k) an order directing rectification of the registers or other records of a corporation under section 236;
> (l) an order liquidating and dissolving the corporation;

[126] An order directing a corporation or any other person to purchase securities is subject to the limitation in s. 234(6) which provides:

Limitation

234(6) A corporation shall not make a payment to a shareholder under clause (3)(f) or (3)(g) if there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

[127] The leading case on oppression remedies is ***BCE Inc. v. 1976 Debentureholders***, 2008 SCC 69, [2008] 3 S.C.R. 560. A good summary of the test was reviewed by the court in ***3461662 Manitoba Ltd. et al. v. 3211304 Manitoba Ltd. et al.***, 2017 MBQB 204, [2017] M.J. No. 343:

> [27] As stated by the Supreme Court of Canada in ***BCE Inc. v. 1976 Debentureholders***, 2008 SCC 69, [2008] 3 S.C.R. 560, there are:
>
> > [68] … two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?
>
> [28] As for the first prong of the inquiry, the cornerstone of the oppression remedy is the reasonable expectations of corporate stakeholders. An applicant must be able to identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held (see also ***Cohen v. Jonco et al.***, 2005 MBCA 48, paras. 32-36).
>
> [29] Whether a reasonable expectation exists is a question of fact, determined objectively (***BCE***, at para. 62). In ***BCE***, the court set out a list of factors that may be used to assist in determining whether an expectation is reasonable. In this case, the parties ask that I focus on general commercial practice, the nature of the corporation, the relationship between the parties, and past practice.
>
> [30] The jurisprudence provides that shareholders may have a reasonable expectation to be treated equally and share in the profits of an enterprise according to their ownership interest, and that one shareholder should not be entitled to appropriate to himself a disproportionate share of the remuneration, management fees, bonuses and other like payments (***Cholakis v. Cholakis et al.***, 2006 MBQB 91, para. 16).

> [31] It is not every unmet reasonable expectation will give rise to the equitable considerations that ground an action for oppression. To complete a claim for oppression, there must be unfair conduct that has prejudicial consequences. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard". These concepts were addressed in ***BCE*** (paras. 91-94). While "oppressive" conduct has been called "burdensome, harsh and wrongful" or "a visible departure from the standards of fair dealing", conduct involving "unfair prejudice" and "unfair disregard" entails wrongs falling short of the conduct connoted by "oppression". Conduct that "unfairly disregards" the interest of the applicant is the least serious of the three. The three types of conduct do not constitute watertight compartments, and often overlap and intermingle. Quite simply, the oppression remedy seeks to ensure fairness – what is just and equitable.

See also ***63833 Manitoba Corporation v. Cosman's Furniture (1972) Ltd. et al.***, 2018 MBCA 72, [2018] M.J. No. 177 and ***Wilson v. Alharayeri***, 2017 SCC 39, [2017] 1 S.C.R. 1037 and ***Cohen v. Jonco Holdings Ltd.***, 2005 MBCA 48, 192 Man.R. (2d) 252.

[128] Each of the parties identify what they consider to be reasonable expectations that were violated by the conduct of the other party or parties.

[129] Rick submits that his reasonable expectations as a shareholder were that he would receive a share of the profits of 517; that he would receive the same benefits as the other shareholders; that Sid would not use 517 resources for his personal benefit; and that his shares would not be disputed. Rick maintains that each of these reasonable expectations were violated and the conduct of Sid and Rob was oppressive, unfairly prejudicial or unfairly disregarded his interests.

[130] Rob submits that his reasonable expectation was that upon the loan being repaid to Sid, he would receive 19% of the issued shares of 517, thus making him a 49% owner of 517 and a partner with Sid in the Tartan Towing business. The condition

precedent was met, notice was given to Rick by Rob and he tendered $19 for the shares of 517 held by Rick. Rob submits that Rick violated the terms of the option agreement and his reasonable expectations when he refused to transfer the shares and Rick's conduct amounts to oppression, unfair prejudice or unfairly disregarded Rob's interest.

[131] Sid submits that the evidence supports a reasonable expectation of Sid that because Rick did not contribute to the success of 517, Rick was never a beneficial owner of 517 and 581 and that all the shares of 517 and 581 were held in trust for the benefit of Sid and Rob. Rick violated Sid's reasonable expectation by failing to acknowledge the trust and that his conduct amounts to oppression, unfair prejudice or unfairly disregarded the interests of the other shareholders.

[132] As explained in ***BCE Inc.***, … "the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations." (See para. 62)

[133] In ***BCE Inc.***, the court listed factors that may be used to assist in determining whether an expectation is reasonable. I considered the following factors:

a) General commercial practice;

b) The nature of the corporations;

c) The relationship between the parties;

d) Past practice;

e) Representations and agreements, including the option agreement, the amalgamation agreement, the declarations of trust and other corporate documents signed by the parties; and

f) The fair resolution of conflicting interests between the shareholders.

[134] In this case, 517 and 581 are relatively small closely held by parties who knew one another well or were related. It is important to keep in mind that it was Sid and Rob who took steps to acquire GLH, incorporate 517 and operate the towing business to make it successful. While it is clear Rick was a shareholder of 517 and 581, I agree his conduct while employed with 517 did not advance the interests of 517 and 581. In fact, his conduct was objectionable such that he was disciplined or terminated from his position of employment with 517 on two occasions.

[135] That said, the parties agreed to make Rick a shareholder and one of the important issues to consider in this case, is a fair resolution of conflicting interests between the shareholders.

[136] As a shareholder, I agree it was reasonable for Rick to expect that he would receive a share of the profits of 517 when it became profitable and that the individual shareholders would not use 517 resources for their own benefit to the exclusion of others.

[137] In my view, the evidence is insufficient to establish that there was a violation of those reasonable expectations held by Rick. There was some evidence regarding the purchase of motor vehicles at auctions and using those vehicles by Rob and the Brar

family members. There was also some evidence regarding the use of funds from 517 for the personal benefit of the Brar family members. That is a practice that had developed and appears to have been acquiesced in by the shareholders. Rick did not complain about this at the time and there was evidence that he used a company motor vehicle and then decided to use funds from 517 to make payments for a motor vehicle for his personal use. Rick made reference to but did not rely upon the expert report that was referenced prior to the trial and did not lead sufficient evidence to prove that the other shareholders used 517 resources for their own personal benefit to his detriment.

[138] While he was employed with 517, the evidence is that Rick received the same salary as Sid and Rob. Considering all of the evidence, I am not satisfied that Rick proved on a balance of probabilities that Sid or Rob violated his reasonable expectations concerning the profits and use of 517's resources.

[139] As to the shares held by Rick, the position advanced by Sid and Rob that Rick was not a shareholder at all, is contrary to the corporate documentation signed and in my view, amounts to a violation of Rick's reasonable expectations as a shareholder of 517 and 581, particularly given that Rick assumed significant risk and liability for the debt of 517 and 581.

[140] As pointed out in ***BCE Inc.***, the second question involves determining whether the claimant shows the failure to meet the reasonable expectations involved unfair conduct and prejudicial consequences under s. 234.

[141] Notwithstanding my concerns about Rick's credibility regarding a number of salient factual issues (as previously discussed), to the extent that I accept Rick's position, largely when corroborated by other reliable evidence and the agreed documents, in applying the governing legal principles, I find that Sid and Rob unfairly disregarded Rick's interest in 517 and 581.

[142] In my view, there is ample evidence to conclude that there was a complete breakdown in the relationship of the shareholders of 517. This was precipitated by the objectionable conduct of Rick, the termination of his employment and the inability to agree on terms to purchase his interest in 517.

[143] There is no question that conflicting interests arose between the parties and as emphasized in ***BCE Inc.***, it falls to the directors of the corporation to resolve the conflicts in accordance with their fiduciary duty to act in the best interests of the corporation. In this case, Rob as a director and Sid as one of the controlling partners, had a duty to treat Rick equitably and fairly at the time of his termination in December 2015. Sid and Rob did make efforts to act in the best interests of 517 by trying to resolve matters with Rick recognizing that he was entitled to be paid fair value for the shares he held in 517. Unfortunately, the parties were unable to resolve their conflicting interests. The inability to resolve the conflict in a fair manner does not mean that Rick's claim fails altogether.

[144] As pointed out in all of the authorities, the oppression remedy seeks to ensure fairness and what is just and equitable in the circumstances. In my view, the appropriate remedy and what is just and equitable is to order that Sid, Rob and/or 517

purchase the shares of 517 beneficially held by Rick (175 Class B common shares of 517) at fair value, to be determined as at the date of his termination of employment in December 2015. This order is subject to the limitation in s. 234(6) of ***The Corporations Act***. In the circumstances it is just and equitable as well, to remove Rick as an officer and director of 517 and that order is granted.

[145] I am not ordering precisely who ought to be required to purchase Rick's shares as the parties may wish to receive professional advice on the most tax efficient manner in which to complete the purchase. I am mindful of the fact that the parties agreed to bifurcate the trial. If the parties are unable to agree on the mechanism to complete the transaction and/or the quantum of the fair value of Rick's interest, those issues can be addressed at a second hearing.

[146] Once Rick is paid fair value for his shares, the corporate register of 517 must be rectified such that the shareholdings of 517 are held in accordance with the reasonable expectations of the remaining shareholders, namely: 49% held by Rob; and 51% held by Sid. This is consistent with their reasonable expectations and the evidence of Gagan that he has no interest whatsoever in the ownership of 517.

d) Is there evidence of undue influence or duress?

[147] Although Rick alleged in his amended claim that he was subject to undue influence and duress by Sid, this aspect of the claim was not pursued during final submissions. Generally, duress and undue influence center on a person's ability to dominate another person's will by exercising a pervasive influence on him, whether

through manipulation, coercion or outright by subtle abusive power. (See ***Geffen v. Goodman Estate***, [1991] 2 S.C.R. 353 (S.C.C.))

[148] As pointed out in the ***Goodman Estate*** case, the party who alleges undue influence has the burden of proving that his/her mind was overborne by the influence exerted by another person, such that there was no voluntary approval of the contents of documents that are signed. In most cases undue influence and duress are alleged in the context of signing wills.

[149] The burden is the civil burden of proof on a balance of probabilities. The degree of influence required to constitute undue influence is that which is so great and overpowering that the person is forced or coerced into doing that which he or she does not want to do. It is not sufficient to establish that the benefiting party had the power to coerce the person; it must be shown that the overbearing power was actually exercised and that it was because of its exercise that the documents in question are signed. (See ***Estate of Walter Konyk***, 2022 MBKB 192, [2022] M.J. No. 185, and ***Ronald v. Ronald***, 2003 MBQB 122, [2003] M.J. No. 195, at para. 19 for a description of the principles involved where undue influence is alleged)

[150] I am not satisfied on a review of all of the evidence and the agreed documents that Sid exercised undue influence or duress towards Rick when the key documents were signed including the option agreement, amalgamation agreement and declarations of trust. As stated earlier, Sid decided to confer a benefit on Rick by putting shares of 517 and 581 in Rick's name. Rick also incurred potential liability as a result of signing other documents required to finance the Tartan Towing business. The steps taken in

December 2014 and January 2015 at the time of the amalgamation were an attempt to document the understanding between the parties. Neither Sid nor Rob exercised undue influence or duress over Rick at the time corporate documents were signed. I am satisfied that Rick either knew or ought to have known what he was signing and at the time believed that the allocation of shares to him was fair.

[151] Once the falling out occurred and the parties were unable to agree on a payment for the shares held by Rick, the first oppression application was filed. At the time the trial was adjourned Rick submitted he was entitled to 70% of the shares of 517. At trial he amended his position, submitting that the allocation in the amalgamation agreement was fair in the circumstances.

[152] The evidence and my findings detailed above demonstrate that Rick has not met the onus of proving he was subject to undue influence or duress. Further, there is insufficient evidence to support a defence of non est factum, unconscionability, or fraud, nor were these argued.

Conclusion

[153] I conclude and/or order the following:

a) The beneficial owners of the common shares of 517 are:

   i) Sid – 350 Class A common shares of 517;

   ii) Rick – 175 Class B common shares of 517;

   iii) Rob – 300 Class C common shares of 517.

b) Sid, Rob and/or 517 are ordered and directed to purchase Rick's 175 Class B common shares at fair value determined as at the date of termination of

his employment with 517 in an amount to be either agreed upon or determined at a further trial.

c) Rick shall be removed as an officer and director of 517 and the corporate register shall be amended accordingly.

d) Once the purchase of Rick's shares has been completed, the corporate register shall be amended such that the shareholders of 517 shall be Sid holding 51% of the common shares of 517 and Rob holding 49% of the common shares of 517.

e) The balance of the claims for declaratory relief made by Rick, Rob and Sid are dismissed.

f) There is no basis for an award of aggravated, exemplary or punitive damages and those claims are dismissed.

g) Rick's claim, based on undue influence and duress is dismissed.

[154] If the parties are unable to agree on costs, they may arrange a hearing to have costs determined. The previous cost order made when the original trial dates were adjourned remains in place and is not affected by this decision.

_____ J.