IN THE MATTER OF AN ARBITRATION
PURSUANT TO S.148.2(1) OF THE REVISED REGULATION 1984
UNDER THE *INSURANCE (VEHICLE) ACT*,
B.C. REG 44/83 AND THE *ARBITRATION ACT*, R.S.B.C. 1996, c.55

BETWEEN:

[redacted]

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION DECISION

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Claimant's Written Reply Submissions	August 3, 2017
Respondent's Written Supplementary Submissions	August 14, 2017
Claimant's Written Sur-Reply Submissions	August 16, 2017
Date of Award	August 25, 2017

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INTRODUCTION

1. This Arbitration concerns an underinsured motorist protection (UMP) claim brought by [redacted] (the "Claimant") arising out of a motor vehicle accident that occurred on March 11, 2011 in Surrey, British Columbia. An underlying claim against the other motorist involved in the accident has been settled with the consent of ICBC (the "Respondent"). In these arbitration proceedings it is agreed that the Claimant is an insured person for UMP purposes; that the other motorist was solely liable for the accident; and that the other motorist is an "underinsured" motorist as defined in the *Insurance (Vehicle) Regulation* (the "*Regulation*"). The Claimant advances claims for non-pecuniary damages, past and future loss of earning capacity, cost of future care, special damages and costs.

2. An issue has arisen, however, respecting the Claimant's loss of earning capacity claim that, depending upon its resolution, may make it unnecessary to assess any other heads of damages, because the loss of earning capacity alone would potentially exceed the remaining UMP compensation limit after the reduction for proper deductible amounts. The narrow issue is whether the injuries that the Claimant sustained in the accident caused him to lose the opportunity to become a partner (part owner) of a mechanical contracting company (the "Company") founded by his father. Thus the parties have submitted this issue for initial determination and I remain seized of all other matters that may arise in this arbitration including the assessment of other heads of damages in the event that is required.

BACKGROUND INFORMATION

3. The Claimant born September 21, 1982 currently resides with his wife and two young daughters in Kamloops, British Columbia. The family moved to Kamloops in January 2017 having previously lived in Langley, British Columbia. The Claimant's parents divorced when he was four and growing up he was closer to his mother than his father although he had a good relationship with both. After graduation from high school he

worked for less than a year with UPS and then, with his father's encouragement, began to work at the Company in 2001. He passed a probationary six month period and completed a four year apprenticeship to become qualified as a journeyman plumber. He had his "red seal" plumbing license with an accompanying "B" gasfitters license. He worked continuously at the Company with the exception of approximately seven months between September 2008 and April 2009 when at the suggestion of a friend he worked as a journeyman plumber in Grande Prairie, Alberta. His father supported this move. The Claimant was laid off in Grande Prairie and returned to work at the Company. He preferred the type of work at the Company to the type of work in Grande Prairie. At the time of the accident the Claimant was still working in the journeyman plumber position. He had not advanced to a "lead hand" or "junior foreman" position, nor to the next position up in terms of responsibility, namely a foreman.

4. As a result of the accident the Claimant sustained injuries to his hand, neck, right shoulder and low back. For the purposes of this hearing it is sufficient to note that all the physical injuries with the exception of the injury to the right shoulder resolved in a fairly short period of time. The right shoulder injury and some related neck symptoms have persisted. The principal restriction is raising the right arm above shoulder height. This is problematic for a journeyman plumber working on commercial residential highrise construction projects which was the primary type of work of the Company.

5. The Claimant was off work from March 11, 2011 until October 19, 2012 (18 months). He did not apply for disability benefits or employment insurance as his full employment earnings through to September 28, 2012 were paid to him from his father's holding company. From October 19, 2012 to March 19, 2013 the Claimant worked as a pipefitter for KBR Wabi Industries in Dawson Creek, British Columbia. From April 2, 2013 to February 5, 2014 the Claimant worked as a pipefitter foreman in a supervisory role at J.V. Drivers Installations in Highland Valley, Alberta. From March 24, 2014 to May 27, 2015 the Claimant worked for PCL Energy in Saskatoon, Saskatchewan initially as a pipefitting foreman and subsequently as a general foreman in a supervisory position. From July 2015 to September 2016 the Claimant was unemployed and received

Employment Insurance benefits. From October 7, 2016 to December 23, 2016 the Claimant worked as a plumber for Robin Mechanical in Surrey, British Columbia.

6. In January 2017 the Claimant and his family moved to Kamloops, British Columbia. In February 2017 the Claimant commenced to work as a plumber for Westway Plumbing.

7. From March 20, 2017 to the present the Claimant has been working as a mechanical supervisor on the Peace River Hydro Project (Site C) Dam in Fort St. John, British Columbia.

8. As is evident from the above, the Claimant never returned to employment in any capacity at the Company following the Accident.

9. All of the Claimant's employment after the Accident, with the exception of the jobs for Robin Mechanical and Westway Plumbing, was in the industrial sector. I am satisfied based on the Claimant's uncontradicted evidence that plumbing and pipefitting in the industrial sector is much lighter work than that in the commercial and residential sectors. In the industrial sector, there are prohibitions against lifting in excess of specified weights and a variety of mechanical equipment is used for lifting and holding in place the pipes. In addition, in some of the post-accident industrial setting jobs the Claimant was employed as a supervisor which did not require him to be "on the tools".

HISTORY OF THE COMPANY

10. The Company was founded in 1992 as a result of a merger of a company owned by the Claimant's father and another company. At the outset the Company did "a bit of everything" including construction of wood frame residential homes but it subsequently came to focus on commercial highrise construction with two major developers as principal clients. In May 1997, a person who was to become a part owner (Partner A) was hired as a field superintendent. In 2000 he was invited to become a partner. This was achieved by the issuance of non-dividend paying "B" Shares in the Company which

were agreed to be transferred into dividend paying "A" Shares in 2005. After this transfer, Partner A held 40% of the shares and the Claimant's father held 60%.

11. In 2007 the Claimant's father indicated an intention to retire in 2012 at age 65. The Company's two shareholders agreed to enter into two separate employment contracts with two existing employees. One was an existing foreman (Partner B) and the other was the senior member of the office staff (Partner C). The agreement with Partner B converted his compensation from the previous hourly rate basis to an annual salary that increased progressively over the 4½ year term of the employment contract. At the end of the employment contract term in 2012, Partner B became the owner of 20% of the shares of the Company. The employment contract with Partner C provided that at the end of its 4½ year term in 2012 she would become the owner of 5% of the shares of the Company.

12. This 25% shareholding interest came from the interest of the Claimant's father and reduced his ownership interest in 2012 to 35%. I will address below what the Claimant's father intended to do with his remaining 35% ownership interest in the absence of the Accident. What in fact happened is that in 2012, a 20% interest was transferred to Partner A, a 10% interest was transferred to Partner B and a 5% interest was transferred to Partner C. With the Claimant's father now out of an ownership position (once he had been paid out for these shares) the ownership interest after 2012 was Partner A 60%, Partner B 30% and Partner C 10%.

13. There will be a further change in ownership effective October 1, 2017 as four new partners each with a 7% interest are being added. These are all long standing (more than 15 years) employees with the Company. With the addition of these new partners, the ownership interest of Partner A will be reduced to 32%. Coincidentally with the addition of the new partners, Partner A is intending to reduce his workload to five months a year and is intending to retire himself by September 30, 2022, or earlier if his remaining ownership interest is paid out.

EVIDENCE RE: THE CLAIMANT'S EMPLOYMENT AND PROSPECTS OF BECOMING A PARTNER

Evidence of the Claimant's Father

14. The Company employs four categories of workers namely apprentice, journeyman plumber, junior foreman (sometimes called a lead hand) and foreman. All of these positions require the employee to be "on the tools" i.e. performing heavy physical work. The Company is a "lean" company; it does not employ any "pure" supervisors. There is a lot of overhead work as the piping used is either cast iron or steel. One of the senior partners was responsible for estimating/budgeting. In the years preceding the Accident this office function was performed either by the Claimant's father or Partner A. In addition to a Christmas bonus paid to all employees, a performance bonus was paid to partners (shareholders) on an equal basis. Dividends were paid from the Company to shareholders based upon their percentage ownership of the Company. Whether either bonuses or dividends were paid and the amount of them varied depending upon the success of the Company each year. Sometime in 2007, as part of succession planning for the Company and in light of his intention to retire at age 65 in 2012, the Claimant's father and Partner A discussed bringing new partners into the Company. This resulted in the agreement to enter into the employment agreements in 2008 with Partners B and C.

15. The Claimant's father understood that the Claimant was well liked by other co-workers and was good on the job. Another son, the Claimant's younger brother, also worked at the Company for a while but he was let go after a number of incidents, one of which involved walking off a job site. There were also issues with timeliness and work ethic. In the words of the Claimant's father, "it was better to let his son go than to lose two (other skilled) guys".

16. With respect to the Claimant becoming a partner in the Company, his father's evidence included the following:

    a. he wanted his sons to come into the business;

b. the Claimant had to prove himself and was proving himself and was taking the right steps after 10 years with the Company;

c. as at the date of the Accident, the Claimant had not yet distinguished himself;

d. he planned to gift the Claimant a 10% share interest in 2012 to let him "get his foot in the door";

e. he could have given all his shares to the Claimant but that would not have been good for the Company as the Claimant was not knowledgeable enough to run the Company;

f. after his retirement in 2012 it would be up to the other partners to decide whether to increase the Claimant's ownership interest;

g. it was important to the Claimant's father that the Company succeed as he had long time employees to consider and he treated the Company's employees "like family";

h. had he gifted a 10% ownership interest to the Claimant in 2012, the Claimant's father would have allowed his remaining 25% interest to be distributed pro rata among the other partner shareholders;

i. it was the his idea to keep paying the Claimant's salary in full while the Claimant was disabled as a result of the accident;

j. the Claimant's father and Partner A discussed the gifting of a 10% ownership interest to the Claimant and Partner A, whose agreement was required, agreed to it.

17. The reason that this gift was not made was because at the time of the intended transfer at the end of the Company's fiscal year in September 2012 the Claimant had not been working for the Company for the last 18 months, and to the understanding of the

Claimant's father, the Claimant had a shoulder injury that prevented him from returning to work for the Company. In order to return to work at the Company the Claimant would have to have been able to do overhead work on a sustained basis. The Company had never had a "pure" supervisor. While it was possible (it had been done in the past) to accommodate an injured employee returning to work by giving him light duties, this could only be done for a short time. The Claimant's father did not see any medical reports or discuss the Claimant's injury with any of his doctors. He accepted the Claimant's statement that he could not do overhead work on a sustained basis. The Claimant's father would not have agreed to the Claimant returning to the Company as a partner if it required a different structure i.e. creating a new position of permanent light work and supervisory functions which had never been done in the past.

18. The Claimant's father was aware that another plumbing contractor in Penticton was considering retirement and suggested that the Claimant contact him to see if there was an opportunity there.

19. The progression from journeyman to lead hand usually occurs over a period of years as does the progression from lead hand (or junior foreman) to foreman. Employees who progress are expected to be good at their job, able to get on with co-workers, show initiative, responsibility and keenness as well as take courses (at the Company's expense) to improve skills or knowledge. Upward progression also depended upon the number of projects the Company had ongoing at any one time. The Claimant's father was not aware of any courses that the Claimant took during the 18 months that he was off work after the Accident.

20. If surgery would have "fixed" the shoulder problem, the Company would have held a position open for the Claimant.

21. The Claimant's father expects to be paid back the sum of approximately $116,000 that he advanced to the Claimant as salary during the period of his disability together with interest. Nothing has been paid back to date. Repayment has neither been offered nor

requested. During the 18 months the Claimant was off work after the Accident the Claimant's father and the Claimant did not discuss a return to work at the Company nor did the Claimant's father and Partner A discuss the Claimant's possible return to work.

22. The Claimant was concerned that he not be treated differently from other employees because he was the son of the founder of the Company.

Evidence of Partner A

23. Partner A joined the Company in May 1997 as a field superintendent. He confirmed that all the Company's workers, including himself as field superintendent, had to work "on the tools". The work was physically demanding; the pipes were either cast iron or steel. A lot of the work was overhead and someone with a shoulder injury could not do the work on a regular basis. "Light duties" were not available on a regular basis. Partner A was invited to become a partner in 2000. This was achieved by the issuance of non-dividend paying Class "B" shares over a 5 year period. In 2005 Partner A had a 40% ownership interest.

24. All field employees were paid on an hourly rate basis. Office staff were paid on salary. The partners were paid an equal salary. Performance bonuses were paid to partners equally, but dividends when distributed were paid out in proportion to the share ownership.

25. In 2007 the Claimant's father and Partner A discussed bringing in two new partners. This was achieved through 4½ year employment agreements signed in 2008 which resulted in Partner B acquiring a 20% ownership interest and Partner C acquiring a 5% ownership interest in 2012.

26. Partner A considered the Claimant to be a good, hard worker who was socially very good. Based on monthly meetings with all the foremen, Partner A believed that the Claimant wanted to move up in the Company and did not believe that the Claimant had been treated differently because he was the son of the Company's founder. Had there

been complaints about the Claimant, Partner A expected that other workers would have expressed them to Partner A rather than to the Claimant's father. Prior to the Accident, the Claimant had not formally advanced to the lead hand / junior foreman position.

27. Prior to the retirement of the Claimant's father in 2012, the Claimant's father had told Partner A that he intended to transfer a 10% interest to the Claimant upon his retirement. Partner A had no reservations about this transfer. There would have been an opportunity for the Claimant to increase his ownership interest in the Company, but only when an existing shareholder agreed to give up shares. If the Claimant had obtained a 10% ownership interest in 2012, the first opportunity to add shares would have been the present time, as Partner A is himself cutting back and some of Partner A's shares are being transferred to four new partners as of October 1, 2017. Any opportunity to advance would be based on how hard the partner worked and how they "stepped up" to challenges. When the Claimant's father did not gift shares to the Claimant in 2012, the 35% ownership interest of the Claimant's father was divided 20% to Partner A, 10% to Partner B and 5% to Partner C. If the Claimant had come in as a 10% partner in 2012, the Company would probably not have brought in four new partners as of October 1, 2017.

28. Partner A understood that the intended transfer of a 10% ownership interest to the Claimant was not subject to any conditions.

29. Partner A understood that the Claimant was a lead hand on the Capital 6 project with the accompanying increase in salary.

30. Employees tended to stay with the Company. Advancement required a good attitude, good workmanship, a good work ethic and a commitment to the Company. Not all journeymen want to advance to become foremen. Some are not suitable. Historically, with the exception of Partner C in the office, partners had all been foremen prior to becoming a partner. An aspiring partner needed to become involved in the business side including bidding, estimating, purchasing, budgeting and the logistics of deployment of workers.

31. Partner A was not personally familiar with the Claimant's injuries sustained in the accident. He understood however that the biggest issue was above shoulder lifting. He did not recall any conversation about the possibility of surgery. If the Claimant had undergone surgery with a good chance that he would be able to return to work, Partner A would have been agreeable to keeping a position open. Even without surgery, if the Claimant wanted to try to return to work, and got medical clearance to do so, he would definitely have been allowed a trial. The Company would try to accommodate a worker returning to work after an injury, but light work is only available for the last two months of a job and an injured employee who could not do overhead work would not be retained. The son of Partner A's cousin formerly worked at the Company but left to work "up north" because he wanted a supervisor position and there was not one available at the Company.

32. Partner A was questioned with respect to a statement given to a representative from the Respondent. He agreed that he may have told the representative that he would still be willing to sell his shares to the Claimant. Partner A agreed he was open to the Claimant returning to the Company conditional upon the Claimant being physically able to do the work. He would not agree to "gift" shares to the Claimant. The four new partners are all long time foremen who have done well in the Company.

Evidence of Partner B

33. Partner B joined the Company right out of high school. He apprenticed and became a journeyman in about 1998. He progressed to a lead hand position in 2000 – 2001 and to a foreman position in 2003 – 2004. As noted he became a junior partner in 2008 receiving a 20% ownership interest in 2012. As lead hand and foreman and partner he worked "on the tools".

34. He was foreman on one particular project on which the Claimant was one of his crew. Partner B described the Claimant as a good worker, smart, creative with a good attitude. No one was unable to work with him. The Claimant definitely liked the responsibility of being in charge of either other workers or some particular task. Partner B did not know

whether the Claimant sought out extra duties but extra duties were given to him. The Claimant was never given the title of lead hand although he could do the work of a lead hand. He was a reliable worker. Partner B was not aware of the plan for the Claimant to become a shareholder on his father's retirement. After the accident and on a social occasion Partner B told the Claimant's father that he thought the Claimant would make a good partner, unlike the Claimant's brother. The Claimant was a strong-willed leadership guy and other workers listened to him and wanted to emulate him.

35. In 2012 Partner B's salary was in excess of $[redacted] per year. No performance bonus or dividend was paid in 2012, 2013 or 2014 while the Claimant's father was being paid out. In both December 2015 and December 2016 Partner B received a large bonus ($[redacted] each year). He expects to receive a bonus in 2017, although it may be less.

36. In September 2016 Partner B was paid a substantial dividend ($[redacted]) based on his then 30% ownership. As the Company's retained earnings are being cashed out with the introduction of four new partners as of October 1, 2017 the Company owes Partner B a further substantial amount. Partner B expects a further substantial dividend to be declared in September 2017 although it will not be paid to him until Partner A is paid out. The Company has no history of outsiders buying in as partners.

37. The opportunity for "light duties" is short term i.e. two weeks to a month. Light work is an accommodation. It is not ideal and cannot be done on a permanent basis.

38. Partner B was not really familiar with the injuries that the Claimant sustained in the accident. If the Claimant required surgery to fix his shoulder, he would have been welcomed back after a period of rehabilitation. If the Claimant were able to do overhead work today he could come back to the Company and if Partner A wished to give the Claimant some shares, Partner B would not object.

Evidence of R.M.

39. R.M. is a certified professional accountant and chartered business evaluator who worked for a period of time for the Company's accountants. He prepared a report (Exhibit 2) dated April 29, 2016 providing an opinion on the loss of income sustained by the Claimant as a result of the accident. Unfortunately a major assumption that he was asked to make was not correct with the result much of the report is not relevant. He was nonetheless familiar with the financial organization of the Company and had access to many of the financial records of the Company and so was able to provide factual evidence concerning the remuneration paid to Partner B who in 2012 had a 30% ownership interest. On the assumption that the Claimant would have had a 10% ownership interest in 2012, the remuneration he would have received up to December 31, 2016 is calculated as follows:

a. partner salary at $[redacted] on average per year x 4 years = $[redacted]

b. performance bonus for partners in 2015 and 2016 at $[redacted] x 2 years = $[redacted]

c. 2016 partner's dividend based on 10% interest = $[redacted]

TOTAL: $[redacted]

Evidence of the Claimant

40. The Claimant described the type of plumbing work done by the Company as involving heavy physical labour. The pipe used was mainly steel or copper. The heaviest was six inch diameter pipe, in 20 foot lengths weighing 17 – 18 pounds per foot. As a journeyman, the percentage of overhead work was in the range of 60 to 70 percent. Prior to the accident the Claimant enjoyed the work. He felt he accomplished something with his hands and also enjoyed training apprentices.

41. He worked for about a year in 2008 – 2009 in Grande Prairie for a company doing renovation and residential service work. He did not like this work as it involved a variety of tasks and there was no structure to it. He was happy to return to the commercial plumbing work of the Company.

42. It was rough when he first started to work at the Company as he was introduced as the boss's son. He was given "garbage jobs" for a couple of weeks until it was recognized that he wanted to learn. Although some guys worked him harder than other apprentices, for the most part he was not treated differently. He worked most with Partners A and B with whom he felt he had a good working relationship. No issues were raised with him about the quality of his work or his attitude. The Claimant's long term plan was to work for the Company. Although his father was not easy to talk to, especially about finances, the Claimant did have informal discussions with his father indicating that the Claimant becoming a partner was "in the works". The Claimant "for sure" had an interest in becoming a partner and his father said that he wanted to see the Claimant as a partner. The Claimant knew his father was the major shareholder but did not know his exact ownership interest.

43. The progression to foreman involved hard work, learning all aspects of a project, having people skills, attending meetings with other contractors and trades, and there being a foreman position open. Prior to the accident the Claimant had not progressed to the position of lead hand formally, with its accompanying higher rate of pay although he had done some of the work usually assigned to a lead hand. The Claimant aspired to be a partner because he wanted his father's lifestyle. Prior to the accident the Claimant thought he was "next in line" to become a lead hand. S.L., who began his apprenticeship with the Company at the same time as did the Claimant, was a junior foreman. If the Claimant was not offered a lead hand position he was going to ask for it.

44. The Claimant was aware of his father's intention to retire at age 65. The Claimant did not raise with his father the subject of any implications for the Claimant. His father never told the Claimant words to the effect "when I retire you will be made a partner". The Claimant recalled a couple of informal chats – one possibly at a cabin in 2010 and

another over dinner at his father's place in which his father indicated that when the time was right his father would like to see him move up in the Company and become a shareholder. The Claimant never received an indication of what his shareholder interest might become.

45. After the accident the Claimant remained off work completely for 18 months. He remained under the care of his family physician, Dr. Gerhart, and took physiotherapy from Mylee Ross in Langley, British Columbia. Physiotherapy was ultimately discontinued based on advice from both the physiotherapist and his family doctor although the Claimant continues to do prescribed exercises, mostly stretching, using bands, for half an hour per day. The Claimant returned to work in October 2012. He discussed this with Dr. Gerhart and they agreed it was time to try. "Sitting around" at home was not good for the Claimant emotionally and was not in his nature. During the time the Claimant was off work his father paid his full wages. At the time of the accident the Claimant and his wife had recently bought a house and his wife was expecting their first child. He accepted the money from his father because he needed it. No one thought initially that he would be off work for so long. He intends to pay back his father with interest.

46. During the time he was off work after the accident he took two courses in 2011 or 2012. One was Excelling as a First Time Superintendent and the other was Planning and Cost Control.

47. When he returned to the work force in October 2012 he did not approach anyone at the Company about returning there to do light duties. There was no such position as a desk job for him and no other employee had ever come back for extended light duties. In his mind, it was not possible for him to return to the Company because he could not do overhead work on a sustained basis and this was a requirement for all workers including foremen. If he could have returned to the Company he would have. It was a difficult decision but he felt he had no choice as the decision was made for him by his physical limitations.

48. A friend and former employee of the Company encouraged him to work in the industrial pipefitting sector which is what the Claimant then pursued. The first job at KBR Wabi Industries in Dawson Creek was mostly bolting and mostly done at waist height. He worked there five to six months until the job ended. It was "14 days in / 7 days out".

49. On the next job at Logan Lake in the Highland Valley for JV Drivers Installations, he worked "on the tools" for three weeks but then took a proffered supervisory position which did not require him to be "on the tools". It involved site monitoring and safety policies. This was also a "14 days in / 7 days out" job. He worked until that job ended.

50. At PCL Energy, in a potash mine in Saskatchewan he was hired as a journeyman but after three days accepted a proffered foreman supervisory position. This was also a "14 days in / 7 days out" job where he worked until the project ended.

51. He then decided to take time off work so as to spend more time with his wife and (by then) two young children. This decision also allowed his wife, who was a licensed realtor, to spend more time advancing herself in that position. Also during this hiatus, the Claimant twice in 2016 studied for and wrote, but failed, the exam to acquire his "steam" ticket which was a desirable additional qualification for working in industrial pipefitting in Alberta. During this hiatus the Claimant was also looking for a supervisory position in the industrial plumbing field but there was not much out there.

52. In September 2016 the Claimant took a position as a journeyman plumber with Robin Mechanical on a project at the Surrey RCMP office. The work required was "on a par" with the work at the Company. The Claimant struggled to do the work but had a third year apprentice and put more of the physical work including installation on the apprentice while the Claimant did more layout and measurements. The Claimant's pain progressively worsened and he took more Advil. He could not have done this job on a sustainable basis. He took it because his EI had run out, he had not found an industrial supervisory job and he needed the money.

53. After moving to Kamloops to live in January 2017 the Claimant took a job at Westway Plumbing in February 2017. This was residential construction. The Claimant worked there for three weeks. He felt that he could not work at that job on a sustainable basis. He received an offer of a foreman position at the BC Hydro Site C Dam Project and commenced employment there on March 20, 2017.

54. He is aware that S.L., is one of the Company's employees, is about to become a shareholder effective October 1, 2017. The Claimant is resigned to not being a partner in the Company which he described as "a shitty deal" and something that was "not in the cards for me".

55. On cross-examination, the Claimant's evidence included the following:

a. prior to the accident, after the job in Grande Prairie, Alberta ended in April 2009 the Claimant took the summer off before returning to work at the Company;

b. from the summer of 2015 to the summer of 2016 when the Claimant was not working he received the maximum regular EI benefit;

c. when he ceased working for PCL Energy in Saskatoon in May 2015 the Claimant made a "life style" choice to stay at home. This allowed his wife a chance to develop her real estate career. PCL had two projects at Fort McMurray. The Claimant did not apply for work there although he probably could have had a job there if he had done so. He did not "quit" his job at PCL (as recorded by Dr. O'Connor). He was laid off on completion of the job;

d. his father told the Claimant that the salary continuance being paid by the father would not continue indefinitely. It stopped at the end of September 2012. This was before the Claimant obtained his first post-accident job at KBR Wabi Industries;

e. working out of town in the industrial sector was safer work and paid more. The pay differential compared to a local commercial plumbing job was between $[redacted] to $[redacted] per year. Working in the industrial sector provided a good opportunity for advancement if one were intelligent;

f. the most physically strenuous work the Claimant has done post-accident was at Robin Mechanical, installing overhead pipe which he had done for his whole career. He was able to perform the work. He did not drop anything. The employer had no complaints. He did not return to the doctor respecting ongoing shoulder symptoms;

g. at his current job at the Site C Dam, there are probably four more years of his type of work, but the fate of the entire project is under a cloud as a result of the new Provincial government. He guesses that he will earn something in the range of $[redacted] to $[redacted] per year there;

h. after his father mentioned that a Penticton contractor might be selling his plumbing business, the Claimant did talk with the owner but the owner had someone that he knew internally in mind to take over the business. The business was more residential than commercial. Except for ranchers, the Claimant disagreed that most of the plumbing installation in residential work was below shoulder level;

i. the Claimant agreed he was never a "lead hand" at the Company, contrary to what is reported in Mr. Kerr's report. Although the Claimant did some of the tasks of a lead hand, he had neither the title nor the pay. The Claimant disagreed with the statement attributed to him by Mr. Kerr that a junior partner would spend the majority of the time in the office;

j. his father encouraged him to work for the Company and the possibility that one day the Claimant would be a partner was "always on the radar". There was however never a clear idea of when or how that would occur. His father never

said that the Claimant must achieve specific things by a specific date in order to become a partner. His father always stressed the benefit of taking courses. The Claimant assumed that he would receive a 20% shareholder interest, like Partner B. He did not know the shareholdings of the other partners;

k. the Claimant is aware that Partner A is in the process of selling some of his shares. The Claimant has not talked to Partner A about buying into the Company. There is nothing stopping the Claimant from asking Partner A about that possibility. The Claimant has not worked at the Company for over six years. His father is no longer with the Company. Commitments have been made to bring in four new partners. (On re-examination the Claimant said that he thought he would be "laughed at" if he now sought to become a partner.) There was no one at the Company that had an axe to grind with him. He was concerned that he not be perceived as receiving special treatment because he was the boss's son;

l. between the date of the accident and the date of his father's retirement the Claimant was aware that he needed to learn more about the managerial side of the business in order to be promoted to foreman. During this time he did not approach his father about coming back and starting to learn some of the managerial tasks. His father was "not the easiest fellow to deal with on situations like that" and had made it pretty clear that the Claimant was not yet ready to be a foreman. Post-accident the Claimant never asked if he could go back to the Company in a supervisory / managerial role.

Evidence of the Claimant's Wife

56. The witness began dating the Claimant when he was working for the Company. She understood his career plan was to carry on working for the Company. He absolutely wanted to be a partner. When the Claimant and his father were together they talked about the business. The Claimant always showed interest and his father was always forthcoming with information. The Claimant rarely missed work. It was normal for him to work either a full or half day on Saturday. She did not know whether the Claimant

was a foreman. The finances of the Company were not her business. The Claimant's father had talked about retirement for years before actually retiring.

57. The Claimant's father covered the Claimant's salary when he was off work after the Accident. This was unexpected. The witness understood the Claimant was obligated to repay these monies.

58. After the Accident the Claimant's family moved into the home of the witness' parents. Although this provided good support for the witness it was a step back for the family.

59. The Claimant never returned to the Company after the Accident because he was not physically able to do the job. It was a huge disappointment for the Claimant.

60. At the post-accident jobs in the industrial sector, the Claimant has done supervisory work which he enjoys as he is a natural leader. The 14 days in / 7 days out nature of this work had a huge detrimental impact on the witness and the children.

61. The witness recalled that the Claimant was always on the telephone looking for work after the PCL Energy job ended in May 2015. The Claimant took the job at Robin Mechanical because he needed a job to qualify for a mortgage on the home they were purchasing in Kamloops. Whilst working at Robin Mechanical where the Claimant was on tools every day, he came home exhausted, was quite irritable and was "popping pills". The job was not sustainable from a physical point of view. The job at the Site C Dam is also not sustainable because of its impact on their family life.

SUBMISSION OF THE CLAIMANT

62. The issue to be decided is whether the Claimant's injuries prevented him from obtaining a partnership interest in the Company in the fall of 2012. This may be broken down into three factual issues requiring determination. They are:

a. was there an opportunity for the Claimant to become a partner at the Company in the fall of 2012?

b. if so, did the Claimant intend to pursue that opportunity? and

c. did the Claimant's injuries cause him to lose the opportunity to join the partnership at the Company?

63. The evidence of the Claimant's father is that he planned to retire in October 2012 and upon retirement he planned to give the Claimant a 10% interest in the Company. Following the Accident, the Claimant was completely disabled from working at the Company from March 2011 to October 2012. His injuries prevented him from performing overhead work which was an essential component of working as a commercial plumber. In October 2012 the Claimant had not returned to the Company and it was clear on the evidence that he would not be able to do so because he could not fulfill the physical demands of a commercial plumber. The Claimant's father did not gift to the Claimant a 10% interest in the Company as it would not have been in the Company's best interests. Had the Claimant become a 10% shareholder in the Company in October 2012 based upon the amounts actually paid to Partner B in the 6½ years since the Accident, to the end of 2016, a 10% interest would have earned the Claimant in excess of $[redacted]. The only evidence is that the Claimant's father intended to gift upon his retirement a 10% interest to the Claimant and that Partner A agreed to the plan.

64. All of the medical experts agree that the Claimant suffered a significant injury to his right shoulder as a result of the Accident. It is variously diagnosed as rotator cuff tendonitis and impingement syndrome (Dr. Kokan); strain to the right shoulder with supraspinatus tendinopathy (Dr. O'Connor) and rotator cuff syndrome (Dr. Locht). The functional capacity assessor retained by the Respondent confirmed that the Claimant was not well suited to the sustained demands of overhead work and it was unlikely he would be able to perform overhead labour on a sustained basis.

65. Because of his right shoulder disability, the Claimant knew it was not an option for him to return to the Company as he was unable to perform heavy overhead tasks on a sustained basis. He also knew there was no opportunity to return to a purely supervisory role at the Company as all workers were required to do some overhead work. The Claimant reasonably elected to use his existing skills in the industrial plumbing sector where lifting demands were significantly less and where he was able to be promoted to a supervisory position. This work also paid substantially more than what he would have earned as a journeyman plumber at the Company. The downside to this job change was the requirement to work 14 days in / 7 days off when he had a wife and young family at home.

66. It is submitted that both the Claimant and the other work witnesses were credible and if anything were understated in their evidence. None of the witnesses was impeached on any material point.

67. The Claimant's father wanted his son eventually to run the Company and could have given all his shares to the Claimant but did not do so as the Claimant was not yet ready to run the entire business. The continued success of the Company was a top priority of the Claimant's father; thus he intended to gift a 10% interest to the Claimant to allow him to "get his foot in the door". After that any further advancement would be a decision for the remaining partners.

68. The Claimant says that the primary test of causation is the "but for" test (*Resurfice Corp. v. Hanke* [2007] 1 SCR 333; *Clements v. Clements* (2012) 2 SCR 181; *Athey v. Leonati* (1996) 3 SCR 458). Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. The test must be applied in a robust, common sense fashion. The test does not require the plaintiff to show that tortious conduct was the sole cause of an injury. It is sufficient if the defendant's negligence was a cause of the harm.

69. With respect to claims for past or future loss of earning capacity involving hypothetical events, the legal test is set out in *Smith v. Knudsen* (2004 BCCA 613). A plaintiff must prove that an injury had an effect on the ability to earn income on a balance of probabilities, but once that has been established, hypothetical events need not be proved on a balance of probabilities. Rather they are to be given weight based on their likelihood.

70. In *Grewal v. Naumann* (2017 BCCA 159) the court stated that hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead they are simply given weight according to their relative likelihood. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.

71. In the present case, the Claimant submits that he has clearly established that the injuries he sustained in the Accident "impaired his ability" to obtain a partnership in the Company. Having established the impaired opportunity, the next step is to assess the likelihood that the Claimant would have become a partner in the Company. On the evidence in this case the Claimant submits that it borders on certainty that he would have become a partner on his father's retirement in October 2012 because his father intended to gift him a 10% ownership interest and Partner A endorsed the plan. It did not happen because the Claimant was unable to return to work for the Company due to an inability to perform required overhead work on a sustained basis.

72. On the unchallenged evidence the value of a 10% ownership interest in the Company from October 2012 to December 2016 alone vastly exceeds the available UMP compensation.

SUBMISSION OF THE RESPONDENT

73. The Respondent submits that the Claimant has not proven on a balance of probabilities that the injuries sustained in the Accident caused the loss of opportunity to become a

partner in the Company. Where a claim is advanced for a past loss of chance, the legal test is set out in *Smith v. Knudsen* 2004 BCCA 613. The Claimant must prove on a balance of probabilities that the injury caused the loss of opportunity. If causation is proven, then the hypothetical event (the materialization of the opportunity) is assessed or quantified by giving weight according to the likelihood of the opportunity materializing. The Respondent submits that it is important to distinguish the legal principles applying to a loss of opportunity claim as distinct from a pecuniary claim for loss of earning capacity generally.

74. In this case, if the opportunity to become a partner was lost, the cause was the Claimant's own conduct, his actions or inactions, and not the injuries sustained in the Accident. The Claimant had simply not progressed sufficiently or distinguished himself prior to the Accident and took no steps after the Accident to maintain or secure the opportunity.

75. The Respondent submits that the Claimant would not have become a partner even in the absence of the Accident. It asserts that the evidence of the Claimant becoming a partner is excessively vague. Nothing was in writing. There was nothing that could be characterized as an "agreement" between the Claimant and his father. There was no discussion with the Claimant regarding when he might become a partner, nor what percentage shareholding he might acquire nor what progress within the Company had to be achieved before becoming a partner.

76. The Respondent asserts that by his own actions the Claimant did not demonstrate a real commitment to becoming a partner. In 2008, when the intended retirement of the Claimant's father in 2012 was known and some of his ownership interest was being transferred to Partners B and C, the Claimant left the Company to work in Alberta from September 2008 to April 2009. Moreover, when he returned to British Columbia, he elected to go on EI for a few months. These are not the actions of someone anxious to prove himself worthy of becoming a partner in 2012.

77. The consistent evidence of the work witnesses is that each step of advancement within the Company from journeyman to lead hand, from lead hand to foreman, and from

foreman to partner takes "years not months". The Claimant's father was frank to agree that as of the date of the Accident the Claimant had not yet met the expectations of what was required for advancement. The Claimant's own evidence is that, although he thought he was next in line to be made a lead hand, his father had made it clear prior to the Accident that he was not yet ready to be a foreman.

78. The work witnesses were also consistent in their evidence that the Claimant was not afforded preferential treatment. This is demonstrated by the brief and unsuccessful career of the Claimant's brother with the Company.

79. Neither Partner A nor Partner B could recall instances where the Claimant had excelled or sought out extra responsibility. He appears to have been a good worker but not a particularly demonstrably, ambitious one.

80. Given that the Claimant had not distinguished himself in 10 years with the Company prior to the Accident, it would not have been possible for him to have demonstrated the qualities necessary for partnership in the 18 months between the date of the Accident and October 2012 when his father retired. The prior partners and the new partners effective October 1, 2017 were all foremen prior to becoming partners. There is no evidence of new foreman positions becoming available between the date of the Accident and October 2012 during which period there was a slowdown in the number of projects available to the Company.

81. The Respondent also relies on the Claimant's post-accident conduct as further evidence of the Claimant's lack of commitment to becoming a partner. The Claimant never attempted to return on a trial basis to his regular duties. He never even enquired about the prospect of a return performing light duties. During the 18 months he was off work he did not seek to learn from his father any of the managerial aspects of the Company which were needed for promotion and which he did not have. The Claimant never communicated with his father or Partner A about any kind of return to the Company before electing to seek work in the industrial plumbing sector.

82. The Respondent points to the Claimant taking a year off work between 2015 – 2016 when he received EI for lifestyle reasons. The Claimant did not return to any work for 18 months post-accident and that was only after his father had stopped his salary continuance.

83. In summary, the Respondent submits that the Claimant's lack of dedication, commitment and initiative to prioritizing a career at the Company means he would not have been made a partner even if the Accident had not occurred.

84. In the alternative, and based on the assumption that the Claimant would have received preferential treatment (contrary to the evidence), the Respondent submits that even with the Accident occurring, the Claimant could still have become a partner. There are four propositions supporting this submission. One proposition is that the actual overhead work required of a foreman / partner is much less than the Claimant asserts. The evidence of Partner B is that it is only between 12 – 20% of his work.

85. A second proposition is the Claimant was able to work for 3 months at Robin Mechanical in 2016 doing the same kind of work as he had done with the Company. He worked at Robin Mechanical without incident and without employer complaint. The Respondent submits that there is medical evidence to support the Claimant's ability to have returned to this work in 2012 had he made the attempt.

86. A third proposition is that the Claimant's father, Partners A and B were all willing to have the Claimant return to work for the Company at least to see if he was able to do the work.

87. A fourth proposition is that surgery could have fixed the Claimant's shoulder so that he could perform the required overhead work. This submission is based on the opinion of Dr. Kokan in his reports at Exhibit 4, Tabs 1, 2 and 3.

88. The Respondent further submits that the Claimant has failed to mitigate his losses. A claimant has a duty to mitigate losses (*Parypa v. Wickware* 1999 BCCA 88; *Palmer v.*

Goodall (1991) 54 BCLR (2d) 44 (BCCA); *Gregory v. ICBC* 2011 BCCA 144; *Janiak v. Ippolito* [1985] 1 SCR 146; *Naidu v. Mann* 2007 BCSC 1313).

89. The Respondent submits that the Claimant failed to mitigate his financial losses during the year in 2015 – 2016 in which he did not pursue available employment in Fort McMurray but chose for lifestyle reasons to stay at home with his family on EI. The duty to mitigate required the Claimant to take such employment even though it required him to live 2 weeks out of 3 away from his family.

90. In support of the failure to mitigate submission the Respondent relies on a number of the same facts relied on in its submission that the injuries sustained in the accident did not cause the loss of opportunity. These facts include a failure to attempt a trial return to usual work duties; a failure to return on a trial basis to light duties; a failure to attempt to learn any of the management side of the business during the time off work; and a failure to contact the Company at all about a return prior to taking up employment in the industrial plumbing sector. Had these steps been taken, the chance of continued employment with the Company and ultimate partnership would have been enhanced. Without taking these steps, the Claimant essentially eliminated any possibility of a return because he literally "walked away" and obtained employment in the industrial plumbing sector. Personal preference or pride are not a reasonable basis for failing to make any attempt to return to employment with the Company.

91. The Respondent also submits that the Claimant failed to mitigate his loss by failing to pursue the surgery option offered by Dr. Kokan. The Respondent in essence submits that what a reasonable person would have done is the following:

a. return to work on a trial basis on either light duties or on regular duties;

b. if the return to work aggravated his symptoms then he should have had an attempt to relieve symptoms with one or two corticosteroid injections; and

c. if the injections did not relieve symptoms on an ongoing basis then he should have undergone arthroscopic decompression acromioplasty of his right shoulder which carried about an 85% chance of improvement.

92. Thus, the surgery would likely have enabled him to return to work in his former capacity.

93. With respect to quantification of the lost chance, the Respondent submits that the chance of advancement to partnership by October 2012 without preferential treatment does not meet the base requirement of a real and substantial possibility. Alternatively, the Respondent submits a generous assessment would be a 10% chance of partnership. When the fact of potential surgery with an 85% success rate is factored in, the loss of opportunity is reduced to 1.5% which is well below a real and substantial possibility. Any hypothetical past wage loss is exceeded by what the Claimant actually earned or would have earned had he taken available employment in the industrial plumbing / pipefitting sector.

94. With respect to future loss of earning capacity the Respondent submits the loss on a limited capital asset basis should be assessed at between $60,000 and $120,000.

REPLY, SUPPLEMENTARY SUBMISSION, SUR-REPLY

95. In the Claimant's Written Reply he asserts that the Respondent's submission that the Claimant had not sufficiently progressed and distinguished himself prior to the Accident to obtain partnership entirely ignores the unequivocal evidence of the Partners at the Company. They had decided that the Claimant had progressed sufficiently so that the Claimant's father intended to give the Claimant a 10% interest in the Company on his retirement.

96. Importantly, the Respondent failed to put to either the Claimant's father or Partner A the proposition that the Claimant had not progressed sufficiently to have been made a partner in any event. The failure to put this proposition to the witnesses violates the rule in *Browne v. Dunn* (1893) 6 R. 67, H.L. In effect the Respondent's submission is that:

a. the Claimant had not done enough to earn partnership;

b. there was to be no preferential treatment; and

c. ergo the Claimant could not have become a partner in October 2012.

The last proposition was not put to either the Claimant's father nor Partner A and ought to have been if the Respondent intended to impeach the Claimant's father by arguing that his evidence of the intention to gift a 10% ownership interest should not be accepted. The Claimant relies on *R. v. Gill* (2017) BCCA 67 for further analysis of "the confrontation principal" on which *Browne v. Dunn* is said to be based.

97. The Respondent's submission that the Claimant could have or should have returned to work at the Company on either light duties or regular duties ignores the consistent evidence that no light duties were available except on a very short term basis and there was no purely supervisory position in existence.

98. With respect to the submission respecting a failure to mitigate by not having shoulder surgery, the Claimant responds that Dr. Kokan never recommended surgery and Dr. Locht considered it reasonable for the Claimant to seek a job with less physical demands as an industrial pipefitter. The Claimant therefore acted reasonably in obtaining higher paying employment in the industrial plumbing sector for which he was already qualified. Moreover the critical time for the opportunity to become a partner was October 2012 when the Claimant's father was transferring his remaining ownership interest. There is no evidence that the Claimant could have had the surgery prior to that date.

99. In the Respondent's Supplementary Submission it is submitted that the rule in *Browne v. Dunn* does not apply in this case as it traditionally applies where counsel intends to present contradictory evidence to a witness' testimony to impeach the witness. *R. v. Drygden* 2013 BCCA 253; *R. v. Pasqua* 2009 ABCA 247; *R. v. Lyttle* 2004 SCC 4.

100. In this case the Respondent did not call any evidence to impeach the Claimant's father. Rather it accepted his evidence that the Claimant had not distinguished himself as of the date of the Accident to be worthy of partnership and applied that evidence to the consistent evidence of the work witnesses that the Claimant was not given preferential treatment. Thus, there is no impeachment nor any ambush. The Respondent's counsel was not obliged to point out to the Claimant's father the logical consequences of his testimony. Counsel for the Claimant also never put to the Claimant's father the proposition that he intended to gift a 10% ownership interest to the Claimant even though the Claimant had not earned the position as had other partners in the past and even though it required giving his son preferential treatment.

101. All of the cases where the rule in *Browne v. Dunn* has been applied involved later calling evidence to impeach the witness.

102. In the Claimant's Sur-Reply, the Claimant asserts that the rule in *Browne v. Dunn* may apply where there is a failure to cross-examine on a point later advanced in argument (*R. v. Drydgen* 2013 BCCA 253; *O'Brien v. Shantz* (1998) 167 DLR (4th) 132 (Ont.CA); *Prowse v. Stockley* 2009 NLTD 90). In this case the Respondent chose not to make an opening statement summarizing the defence and chose not to cross-examine either the Claimant, the Claimant's father or Partner A on a central defence submission.

DISCUSSION AND ANALYSIS

Credibility

103. There was no serious challenge to the credibility of the major witnesses, the Claimant, the Claimant's father, Partner A or Partner B. The Claimant's father conceded that his statement to a representative of the Respondent that the Claimant post-accident was unable to work "in any capacity" was a bit of an overstatement. The evidence of the Claimant and his wife that they were "forced" to move in with her in-laws seems also to be a bit of an overstatement given that the house of the in-laws was apparently constructed with the move in mind. Nevertheless, I find that all of these witnesses were

credible and gave their evidence in a forthright manner. In particular, as is explained subsequently, I accept the Claimant's evidence as to why he did not attempt a return to work at the Company and I accept his father's evidence as to why he decided not to gift a 10% ownership interest to the Claimant in October 2012.

Causation

104. In order to establish causation for a loss, a claimant must prove on a balance of probabilities that but for the defendant's negligence, the injury or loss would not have occurred. (*Resurfice Corp. v. Hanke, supra*; *Clements v. Clements, supra*) A claimant need only establish that the defendant's negligence was a cause (not the sole cause) of the injury or loss. (*Athey v. Leonati, supra*)

Legal Test for Causation and Assessment of a Claim for Past Loss of Opportunity

105. Both parties rely on *Smith v. Knudsen, supra*, although they differ in their understanding of its application to this case. The law is clear that the assessment of loss based on past hypothetical events is governed by the real and substantial possibility test. The possibility must be more than mere speculation and loss is assessed by determining the percentage likelihood of the event occurring.

106. In *Grewal v. Naumann* 2017 BCCA 158, Mr. Justice Goepel at paragraphs 48 and 49 said as follows:

> "[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event.

> Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21."

107. (Although Mr. Justice Goepel wrote a dissenting opinion, his summary of legal principles in these paragraphs was specifically agreed with by the majority).

108. In *Dhaliwal v. Greyhound Canada Transportation Corp.* 2017 BCCA 260 at paragraph 29 the Court cited with approval the above passage from *Grewal.*

109. It is significant that neither the *Grewal* nor the *Dhaliwal* cases involved a discreet past loss of opportunity claim. Both were concerned with assessing loss of earning capacity "at large".

110. *Smith v. Knudsen* on the other hand does involve a discreet claim for loss of opportunity. The Plaintiff was the sole shareholder, director and officer of a company which manufactured ambulances. His company alleged it lost some $1.39M because, due to the plaintiff's injuries he was unable in particular to prepare a quality tender offer for a major contract with the Provincial Government to build ambulances. The trial judge ruled that the law required proof of causation for past loss on a balance of probabilities. He accordingly instructed the jury that the Plaintiff had to prove two issues on the balance of probabilities. First, that, but for the accident, his company would have got the ambulance contract and second, the amount of the plaintiff's loss of income arising from the company's failure to get that contract. The Court of Appeal ordered a new trial based

upon this misdirection to the jury. The Appeal Court cited passages from *Athey* as follows:

> "27. Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury, or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood. (citations omitted)"
>
> 29. This point was expressed by Lord Diplock in *Mallett v. McMonagle, supra*, at page 176:
>
> > The role of the court in making an assessment of damages which depends upon its view as to what will be or what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is a more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances whether they are more or less than even, in the amount of damages it awards."

111. In the application of these principles to the facts in *Smith*, the Court said at paragraphs 36 and 37 as follows:

> "36. In the case before us, there was a body of evidence which was capable of supporting a finding that the appellant's ability to prepare the necessary material for the bid on the ambulance contract was impaired by his injuries and by the medications he was taking for those injuries. However, a causal connection must be established between the accident and pecuniary loss claimed and that causal connection must be established on the balance of probabilities. In other words, to succeed in the claim, the appellant would have to establish, on the balance of probabilities, that the injuries he sustained in the accident impaired his ability to prepare or marshal the documents required for the contract bid.
>
> 37. The jury ought to have been instructed that if they were satisfied on the balance of probabilities that the injuries sustained as a result of the accident caused such an impairment, they had to go on to assess the chances of the appellant having been the successful bidder on the ambulance contract and to make an award using that assessment."

112. In this case the Claimant says that the right shoulder injury sustained in the Accident resulted in a permanent partial disability that prevents him from doing overhead work on a sustained basis. The injury caused him to be off work completely for 18 months and prevented him from returning to his previous work at the Company. In light of these facts the Claimant's father decided not to gift an ownership interest to the Claimant in October 2012. Thus, clearly on a balance of probabilities, the Claimant's injuries impaired his ability to become a partner.

113. The Respondent submits that the pecuniary loss claimed is the loss of partnership and the Claimant must prove on a balance of probabilities that the partnership was lost because of the injuries sustained in the Accident. If that is proven, then one proceeds to assess the value of the lost partnership interest.

114. In *Smith*, the causation element was satisfied by proof on a balance of probabilities that the plaintiff's ability to prepare a proper tender bid was impaired by his injuries after which, the jury would have assessed the quantification of the lost opportunity by determining the percentage likelihood of the Plaintiff having been successful in its bid.

115. The loss of partnership in the present case is equivalent to the loss of the Provincial Government contract in *Smith*. The impaired ability to prepare a proper tender bid in *Smith* is equivalent to the Claimant's impaired ability to work at the Company, not only in the 18 months leading up to the intended date of partnership but also on a permanent basis if he cannot do required overhead work.

116. Applying the legal principles in *Smith* to the facts of this case, I find that the Claimant must prove on a balance of probabilities that the injuries sustained in the Accident impaired his ability to obtain a partnership. If that causation element is satisfied, then one must proceed to determine the likelihood of the Claimant being made a partner and to assess the value of that loss. In the *Smith* case at the retrial, it would presumably have been open to the jury to decide that there was very little chance, or even no chance that the plaintiff would have been the successful bidder. Likewise, in the present case, if the Claimant establishes that his injuries on a balance of probabilities have impaired his ability to obtain partnership, it remains open for the Respondent to prove that the Claimant would never have been made a partner for other reasons.

117. On the evidence before me I am satisfied and find that the injuries sustained in the Accident did impair the Claimant's ability to obtain partnership. The expected partnership date was October 2012 coinciding with his father's retirement. Because of his injuries the Claimant was deprived of the ability for working for the Company at all in the 18 months preceding his expected partnership date. Moreover the Claimant's ability to do overhead work was impaired. Doing overhead work to some degree was a requirement. The inability to return to the Company as a worker was decisive in the decision of the Claimant's father not to make his son a partner.

Would the Claimant Have Been Made a Partner in the Absence of the Accident?

118. There was clearly an opportunity for the Claimant to become a partner in October 2012 because that was the date of his father's retirement and transfer of his share ownership. I accept the Claimant's evidence and find that he wanted to become a partner.

119. A primary defence of the Respondent is that the Claimant's injuries did not cause the loss of partnership but rather the Claimant would not have been made a partner in October 2012 in any event. The argument in summary is as follows:

a. the historical path from a journeyman to partner involved steps from journeyman to lead hand, from lead hand to junior partner, and from junior partner to full partner with each step taking years;

b. advancement to partnership required an employee to demonstrate a good attitude, good workmanship, good work ethic, a commitment to the Company, "stepping up" and excelling as well as learning all aspects of the business;

c. the Claimant's father agreed that as of the date of the accident the Claimant had not yet shown the attributes necessary for promotion to partner;

d. the work employees all agreed that the Claimant was not given preferential treatment at the Company;

120. From this factual basis the Respondent argues that, in the absence of preferential treatment, there was no possibility that the Claimant could have made the advances necessary in the 18 months after the Accident to have been made a partner in 2012 in accordance with established historical practice. Thus, and critical to the submission, the Respondent says that the Claimant's father would not in fact have made the Claimant a partner in October 2012 in any event.

121. Before addressing the merits of this argument it is necessary to consider the Claimant's objection to the argument, namely that it is not open to the Respondent because the proposition was not put to the Claimant's father in cross-examination, contrary to the rule in *Browne v. Dunn*.

122. A short summary of the Rule is found in *Prowse v. Stockley* 2009 NLTD 90 at paragraph 42 where the court stated:

> "The rule in *Browne v. Dunn* is a rule of fairness and commonsense which applies when the credibility of a witness is at issue. Its purpose is to give a witness an opportunity to explain and defend his or her own evidence before it is attacked later either by contradictory evidence or in argument when the witness is no longer in a position to explain or defend himself. Accordingly, if counsel intends to later impeach the credibility of a witness through other evidence or in argument, the counsel must give that witness an opportunity to comment or explain the anticipated evidence. This is simply fair play."

123. In *Browne v. Dunn* itself, Lord Herschell explained the reason for the Rule as follows:

> "My Lords, I have always understood that if you intend to impeach a witness you are bound, whist he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice

beforehand that there is an intention to impeach the credibility of the story he is telling."

124. The rationale for the Rule has more recently been explained in our Court of Appeal in *R. v. Gill* 2017 BCCA 67 at paragraph 25 where the fairness concerns that animate the confrontation principle were summarized as follows:

> "(i) fairness to the witness whose credibility is attacked;
>
> > The witness is alerted that the cross examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted; (citations omitted)
>
> (ii) fairness to the party whose witness is impeached:
>
> > The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and
>
> (iii) fairness to the trier of fact:
>
> > Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict."

125. In British Columbia, the application of the Rule is a question of law (*R. v. Drydgen* 2013 BCCA 253 at paragraph 22).

126. Where the Rule is breached, the trier of fact is not required to accept the evidence of the witness who is not challenged, especially in the presence of other contradictory evidence (*Dhir v. Ali* 2017 BCSC 1383 at paragraph 46).

127. The Rule designed to provide fairness to witnesses and the parties is not fixed. The extent of its application is within the discretion of the trial judge taking into account all the circumstances of the case (*R. v. Lyttle* 2004 SCC 4).

128. Although the Rule usually arises from a failure to confront a witness with contradictory evidence later called by the opposing party, it is not restricted to calling contradictory evidence but may also apply to submissions made in argument (*Steele-Wells v. Mahood* file number CA018597 Vancouver Registry, January 17, 1995; *O'Brien v. Shantz* docket number C23451, October 15, 1998, Ont. CA). In *Steele-Wells* on the issue of liability for a motor vehicle accident, counsel for the defendant in argument submitted that at the time of the accident the plaintiff was distracted in her driving by conversation with her fellow passenger. The plaintiff had never been asked whether she was having a conversation with her passenger and nothing was put to her to support that she was in any way distracted in her driving. A new trial was ordered. At paragraph 5, Southin J.A. stated:

> "It is of the utmost importance, in my view, that an inference should not be sought to be drawn against a witness, whether a litigant or a non-litigant witness, unless the inference which is sought to be drawn is squarely put. The rule is not absolute, and it is a concept which has been addressed before in this court."

129. In *O'Brien* voluminous WCB records were filed at the commencement of the trial by consent without any agreement concerning their admissibility. There was no reference to them by either side during the hearing of evidence. In submissions, defence counsel sought to impeach the credibility of the plaintiff by reference to inconsistencies between the plaintiff's evidence at trial and information in the WCB records. The trial judge dismissed the jury and rendered judgment. The defendant appealed, seeking a new trial,

on the basis that the trial judge erred in declaring a mistrial. The Court of Appeal agreed that the Rule applied and dismissed the appeal.

130. The Respondent submits that the Rule is not applicable because it did not call evidence to contradict the Claimant's father. Based on the authorities above, this proposition is incorrect as the Rule may apply where impeachment is raised in argument alone.

131. The Respondent further says that it is not "impeaching" the Claimant's father at all, but merely adopting the evidence of the Claimant's father (the Claimant's lack of progress up to the date of the Accident) and the evidence of all employee witnesses (no preferential treatment) and reaching the logical conclusion – no partnership in October 2012. I disagree. First, I think the evidence of no preferential treatment was directed to past conduct prior to the motor vehicle accident.

132. Second, the argument is too facile. It requires that the father's "true" evidence would be that he intended to give shares to his son; that he did not do so because his son had not worked at the Company for 18 months and was not able to return; but he would not have gifted the shares in any event because his son had not made sufficient progress towards advancement. The submission amounts to a finding that the Claimant's father told the "truth, but not the whole truth". The whole purpose of this hearing was to determine whether the Claimant would have become a partner but for the Accident. In my view it would be misleading bordering on deceitful for the Claimant's father to leave the arbitrator with the impression that he would have gone through with his intent to make his son a partner in October 2012 when in fact he would not have done so. The argument seeks a finding that the Claimant's father not be believed that he would have made his son a partner in 2012. In my view that is "impeaching" the Claimant's father on the basis of a proposition not put to him in cross-examination. I think the Rule in *Browne v. Dunn* does apply in this case and the Respondent's proposition should have been put to the Claimant's father in cross-examination.

133. I think there is merit to the complaint of Claimant's counsel that he was taken by surprise when this submission was advanced in argument. As it happens, the Respondent's

counsel declined an invitation (as was his perfect right) to make an opening submission at the outset of the case, following the opening submission of Claimant's counsel. It is fair to say that there was no explicit forewarning of this particular submission.

134. The consequential relief following a failure to cross-examine is in the discretion of the trier of fact. In this case, there was no opportunity to call rebuttal evidence, nor was there a witness giving contrary evidence whose credibility might be affected. The failure to cross examine does not require that I simply accept the evidence of the Claimant's father. In this case, I think the correct approach is to take the failure to cross examine into account as just one factor to consider in deciding whether or not to accept the submission.

135. Whether or not the Claimant's father should have been cross-examined on the point, there is another reason why the Respondent's submission fails. One of the foundational facts for the submission is that the Claimant was not to be given preferential treatment. In my view, as I have indicated, that evidence was directed to how the Claimant had been treated in the past and up to the time of the Accident. As an example, the Claimant was not a lead hand because he was not yet ready. But for the Claimant's father to have decided around 2008 with Partner A's concurrence to make the Claimant a partner in October 2012 self-evidently involves preferential treatment. First, there is evidence that each step from journeyman to partner could take up to four years. Partner B seems to have been a "star" who made the transition from journeyman to full partner in 14 years (journeyman 1998 – full partner October 2012). Second, the Claimant would have been "leap frogging" past other existing foremen. Moreover, to gift the Claimant "A" class shares immediately in 2012 involved preferential treatment, as all other partners had gone through a "junior partner" stage. The Respondent's submission requires the drawing of an inference that the Claimant's father would not have made his son a partner in October 2012 because to do so would have required preferential treatment. I decline to draw that inference. The plan to gift a 10% ownership interest immediately in October 2012 inherently involved preferential treatment, as was obvious to both the Claimant's father and Partner A. Partner A agrees that the advancement was "without conditions". The evidence of the Claimant's father was that the gift was intended to let the Claimant get

"his foot in the door". After that, any further advancement would be the decision of the other shareholders. I think this was the limited compromise made by the Claimant's father to his "no preferential treatment" approach. He had wanted his sons in the Company. The younger son had not succeeded. He intended to give the Claimant a minor interest as a partner.

Could the Claimant Have Become a Partner Notwithstanding the Accident?

136. Based on the Claimant's post-accident conduct the Respondent submits that even with the injuries sustained in the Accident he still could have become a partner with the Company. This submission is based on 4 propositions namely:

a. there is less overhead work required than the Claimant asserts;

b. the Claimant's ability to work at Robin Mechanical for 3 months demonstrates his ability to do the work that would have been required at the Company;

c. the Claimant's father and Partners A and B were all willing to have the Claimant back;

d. the Claimant should have had surgery on his right shoulder.

These propositions are presented both as issues of causation and mitigation, but as they rely on the Claimant failing to take available steps I think the submission is properly one of a failure to mitigate, the onus of proof of which is on the Respondent. (*Janiak v. Ippolito*, (1985) 1 SCR 146 at 168)

137. The test for a failure to mitigate is described in *Chiu v. Chiu* (2002 BCCA 618 at paragraph 57) as follows:

> "57. The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in

> which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the plaintiff must prove two things:
>
> (1) That the plaintiff acted unreasonably in eschewing the recommended treatment, and
>
> (2) The extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably."

138. In *Gregory v. ICBC,* 2011 BCCA 144 at paragraph 56 the court said:

> "I would describe the mitigation test as a subjective / objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment."

139. I address each of the propositions in paragraph 136in order.

140. The evidence respecting the amount of overhead work required of workers at the Company did vary considerably. Some of the variation is attributable to the question being directed towards a particular stage of a project. Some of the variation is attributable to the witness (eg. the Claimant's father) not having been "on the tools" for some years. Some of the variation is attributable to different types of projects. It is clear that the amount of overhead work decreases as one proceeds up the seniority ladder. I find the most reliable evidence on this issue comes from Partner B. Of the work witnesses he is currently closest to the work scene. He estimates that a foreman spends approximately 30% to 40% on physical work and 60% to 70% on administration. Of the physical work approximately 50% is overhead although the percentage varies on some aspects of a job. Using these rough approximations, 15% to 20% of the foreman's job involves overhead work. While that is less than some other estimates of overhead work,

it is nevertheless a significant part of the job. A major accommodation would be required if a foreman could not do overhead work.

141. The Respondent's reliance upon the Claimant's three month job at Robin Mechanical overstretches some evidence and ignores other evidence. While the Claimant's father agreed that a trial of 3 months was sufficient to determine whether an employee could do a job, the exchange did not address the impact on the employee. The Claimant's evidence is that the 3 months work at Robin Mechanical exacerbated his pain, caused him to increase his medication consumption and was not sustainable. The detrimental physical impact upon the Claimant at this job was supported by the Claimant's wife. I do not think that the 3 months at Robin Mechanical demonstrates that the Claimant could have worked permanently back at the Company. Moreover, the medical evidence which I accept is that continuing overhead work would probably cause the shoulder to be more painful and would not be sustainable (Dr. Kokan report - Exhibit 4, Tab 3, page 2; Mr. Kerr report - Exhibit 4, Tab 8, page 4). The decision to switch to lighter industrial plumbing work was reasonable (Dr. Locht report – Exhibit 4, Tab 7, page 7).

142. It is correct that the Claimant's father and Partners A and B were all willing to have the Claimant return to work at the Company, but each of them qualified that evidence with the assumption that the Claimant would be able to do the physical work including the overhead work required. The evidence is clear that a short term accommodation of 2 to 8 weeks for a worker returning from injury would have been available but there was no pure supervisory position in existence and the "lean" structure of the work force was not going to be changed for a worker who could not do the physical work required on a sustainable basis.

143. The Respondent submits that the Claimant failed to mitigate his loss because he did not even try a trial return to work at the Company nor did he even discuss the possibility of returning to the Company in some capacity with either his father or Partner A before switching to jobs in the industrial plumbing sector. The Claimant's explanation is that he knew overhead work was required; he knew that he could not do it on a sustained basis; and he knew there were no jobs with just "light duties". In fact, those beliefs were true

based on the evidence of his father, Partner A and Partner B. I sense there was some diffidence in the communications between the Claimant and his father. Whether that was because of the nature of their relationship or because the Claimant's father was the "boss" of the Company, even better communications would not have altered the facts that:

a. work at the Company required a not-insignificant component of overhead work;

b. the Claimant could not do overhead work on a sustained basis;

c. there was no opportunity for "light work" or a purely supervisory position at the Company.

144. I find there was no failure to mitigate. There was no real and substantial possibility that the Claimant could have returned to work at the Company. I find that any attempt to have returned to work at the Company would have been futile.

145. The possibility of surgery requires a review of the medical evidence.

146. In his first report (Exhibit 4 – Tab 1) dated December 20, 2011, Dr. Kokan, an orthopaedic surgeon, diagnosed rotator cuff tendonitis and impingement syndrome right shoulder. On the same date he administered a diagnostic injection of a corticosteroid. If symptoms persisted then further corticosteroid injections could be given but "in the event the corticosteroid injections do not work, (the Claimant) would probably have to consider arthroscopic decompression and acromioplasty of his right shoulder. This carries about an 85% chance of improvement. However, because he is such a heavy duty industrial plumber and gasfitter, he will probably need close to 6 months' time to recover from arthroscopic surgery in order to go back to work full time."

147. In his second report dated July 7, 2015, by which time the Claimant was working in the industrial plumbing sector, the diagnosis remained the same. The Claimant presented as a very genuine man with no evidence of pain magnification and being stoic on physical exam. At the time Dr. Kokan did not formally recommend any intervention including

corticosteroid injections, physiotherapy or certainly not surgical intervention. The Claimant's return to work had gone well. Only if symptoms persisted and were severe would surgical intervention be considered. The prognosis was that at best the shoulder pain would continue to be mild and aggravated with heavier and faster tasks. If the right shoulder were subjected to repetitive strain in a more forceful and prolonged and intense manner the shoulder would start to feel worse. The Claimant would be more likely to run into a flare up and probably aggravation of the shoulder tendonitis if he performed the sustained overhead lifting and working that was involved in the family run commercial plumbing business. The possibility that his shoulder would become aggravated by a return to the family business was probably greater than 50%. If his work involved lifting pipes overhead, operating a heavy wrench with the shoulder in the overhead position then there was a greater likelihood that the shoulder would become symptomatic. Even if the Claimant took Tylenol and anti-inflammatories the symptoms may be less intense but this would not guarantee that he would manage any better, as with the overhead pushing and sustained holding even the painkillers would not allow him to function better.

148. In a further opinion dated February 12, 2016, Dr. Kokan said he could "fairly easily" state that the commercial type job where the Claimant would be working in the family business would more likely lead to problems with the right shoulder. The Claimant would be unlikely to sustain the job in the commercial plumbing business unless he had a sedentary position which Dr. Kokan understood was not available.

149. Dr. Russell O'Connor is a specialist in physical medicine and rehabilitation who examined the Claimant and wrote a report dated January 18, 2012 (Exhibit 4 – Tab 4). His diagnosis was a strain to the right shoulder with superspinatis tendinopathy. He thought it was too early to determine long term prognosis. Further rehabilitation was required. There was a small chance in the range of 10% to 20% that he would not be able to tolerate the heavy overhead lifting as he had done in the past. He was at increased risk of re-injury as a result of his line of work, particularly with the amount of heavy overhead lifting and reaching required.

150. In a further report dated January 11, 2016 (Exhibit 4 – Tab 5) Dr. O'Connor responds to the report of Dr. Locht but also describes the Claimant as in the small percentage or subset of patients who develop chronic symptoms that do not resolve with the passage of time, conservative management and physiotherapy. The change to a more sedentary or supervisory job was appropriate. In some patients surgical decompression of an inflamed bursa or bursal thickening can provide some benefit and it is still possible that surgical decompression of the subacromial space would provide further improvement (my emphasis).

151. Dr. Locht, an orthopaedic specialist, provided an independent medical report to the Respondent dated November 2, 2015 (Exhibit 4 – Tab 7). Dr. Locht diagnosed a "left (sic) shoulder rotator cuff syndrome". He thought it was probable the Claimant would have been able to return to his regular full time duties as an industrial plumber / pipefitter by 18 months post-accident. It was reasonable for the Claimant to seek a job with less physical demands as an industrial pipefitter as a pain reduction strategy. The current symptoms did not support the need for a steroid injection. It was most unlikely that surgical intervention would be needed in the future.

152. Gerard Kerr, an occupational therapist and certified work capacity evaluator provided a report to the Respondent dated October 31, 2015 (Exhibit 4 – Tab 8). The work capacity testing identified functional limitations for sustained or repetitive above shoulder level reaching with the right arm that involved resistance and / or heavy lifting / forces. Mr. Kerr's view was that the Claimant was not well suited to the sustained demands of overhead work involving his right dominant shoulder. He was certainly able to do some overhead work but his ability to sustain the full overhead demands on a sustained basis was unlikely. The work capacity testing showed that the Claimant was fully capable of working as a supervisor in the pipefitting / plumbing industry.

153. The Respondent submits that the Claimant should have attempted a trial return to work at the Company. If the required overhead work caused an exacerbation of pain, he should have tried further corticosteroid injections. If they did not resolve his pain then he should have had the surgery mentioned by Dr. Kokan which would have "fixed" his shoulder

and permitted a full time return to work at the Company. The Respondent also relies on the Claimant's admission that no one told him that by continuing to do overhead work he would worsen his shoulder condition. The potential surgery had an 85% success rate with no risks.

154. There are several problems with this submission. It is noteworthy that the Claimant never refused shoulder surgery. It was never actually recommended to him by any doctor at any stage. The Respondent argues that the Claimant's evidence that he understood he could not have surgery was incorrect. However, it is correct that when Dr. Kokan first saw the Claimant the Claimant was not a candidate for surgery because it was premature. Later, when Dr. Kokan again saw the Claimant and when he was seem by Dr. Locht surgery was again not recommended or even considered because the Claimant had changed jobs and his minimal symptoms did not warrant any further treatment. Once the Claimant fell into the subset of patients with rotator cuff injuries who do not respond to conservative treatment, the medical evidence which I accept supports the reasonableness of the decision to seek other employment where there was no heavy overhead work or where the work was in a supervisory capacity (Dr. O'Connor report – Exhibit 4, Tab 5, pages 3 – 4; Dr. Locht report – Exhibit 4, Tab 7, page 7)

155. There is evidence of further re-injury as a result of continuing to do overhead work in Dr. O'Connor's first report on page 4 lines 27 – 28.

156. It is not quite correct to say that there were no risks of the right shoulder surgery. It is more accurate to say there is no evidence of risks. However surgery was never seriously considered with a detailed discussion of pros and cons.

157. Moreover there is some ambiguity in Dr. Kokan's statement of an "85% chance of improvement". "Improvement" may not mean a "fix" so that the Claimant could after a period of recovery work full time doing the overhead work required with the job on a substainable basis without significant pain. Dr. O'Connor in his second report refers to decompression surgery as providing some benefit or further improvement in some patients.

158. From a medical point of view the Claimant made the right decision, by switching to work that did not require heavy overhead positioning thereby avoiding further strain on the shoulder and avoiding surgery. I accept the Claimant's evidence that it was a difficult decision for him to make, abandoning the prospect of working at the Company and taking on industrial plumbing work out of town at the cost of a lessened quality of family life. It must also be kept in mind that at the critical time, up to October 2012 the Claimant was not aware of the shareholder interest he might be getting (because his father never told him) nor, more importantly, did the Claimant know the potential value of that partnership interest.

159. In the result I find that the Claimant did not fail to mitigate his loss by failing to undergo shoulder surgery.

Assessment of the Likelihood of the Claimant Becoming a Partner

160. I have not accepted the Respondent's submission that the Claimant's father would not have made the Claimant a partner in October 2012 for lack of distinguishing himself and I have not accepted the Respondent's submission that the Claimant has failed to mitigate his loss. The question remains however – what is the likelihood that the Claimant would have been made a partner. The Claimant submits that in the absence of contrary evidence it is a virtual certainty that he would have become a partner. However, that amounts to treating a still hypothetical event as a certainty. The pre-accident factors that the Respondent refers to, namely the Claimant working in Alberta in 2008 – 2009, the Claimant returning to spend time on EI, the Claimant remaining as a journeyman plumber and the Claimant not "distinguishing himself" all do raise a question about the Claimant's commitment to the Company and ambition to become a partner. Between March 2011 and October 2012, had the Claimant continued to work at the Company, it is possible that something may have occurred to cause either his father to change his mind about gifting shares or Partner A to change his mind about consenting to the gift. I conclude that there is a real and substantial possibly, beyond speculation, that the Claimant may have done or not done something between March 2011 and October 2012 to have resulted in either his father or Partner A changing their minds about the plan to gift the Claimant a 10%

shareholding interest in the Company. The chance of such a change is small, because the Claimant over 10 years with the Company while not "distinguishing" himself, was a competent, well liked worker whom other employees respected and he was taking the right steps for advancement. I conclude the likelihood of the Claimant becoming a 10% partner in October 2012 was 90%.

161. It then remains to value the 10% ownership interest in the Company from October 2012. Based upon the unchallenged evidence of the past loss of earnings to December 31, 2016 of a 10% ownership interest, I understand that such further evaluation is not necessary. If I am incorrect in this assumption, or if further findings based on the current evidence are required, I invite counsel to so advise.

CONCLUSION

162. I find the Claimant had a 90% chance of becoming a partner in the Company in October 2012.

Donald W. Yule, Q.C.