COURT FILE NUMBER	1501 12220
COURT	**Court of Queen's Bench of Alberta**
JUDICIAL CENTRE	**Calgary**
APPLICANT	**ALBERTA TREASURY BRANCHES**
RESPONDENTS	**COGI LIMITED PARTNERSHIP, CANADIAN OIL & GAS INTERNATIONAL INC. AND CONSERVE OIL GROUP INC.**
DOCUMENT	**BRIEF OF PROVEN OIL ASIA INC. IN CONNECTION WITH THE COMMERCIAL CHAMBERS APPLICATION TO BE HEARD ON NOVEMBER 27, 2015**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Field LLP 400 - 604 1 ST SW Calgary AB T2P 1M7 Lawyer: Douglas S. Nishimura Phone Number: (403) 260-8548 Fax Number: (403) 264-7084 Email Address: dnishimura@fieldlaw.com File No. 61737-1

TABLE OF CONTENTS

INTRODUCTION

1. The following are the written submissions of Proven Oil Asia Ltd. ("**POA**") with respect to the Application brought by MNP Ltd., in its capacity as Receiver/Manager ("**Receiver**") of COGI Limited Partnership, Canadian Oil & Gas International Inc. ("collectively referred to as "**COGI**") and Conserve Oil Group Inc. ("**Conserve**").

2. The Receiver seeks the extraordinary relief of essentially placing a non-party to these proceedings, namely POA, into Receivership. The Receiver wishes to be able to control all business affairs of POA, including termination of management and operation of POA's assets, which assets are not subject to any debt or security of Alberta Treasury Branches ("**ATB**"), the Plaintiff in these proceedings and which are subject to secured debt of a third party.

3. Based upon correspondence from counsel for the Receiver, the grounds of the Application are based in the oppression remedies under the *Business Corporations Act* (Alberta) (the "**ABCA**"). However, the basis of this allegation is not clear from the Application materials, which only refer to the *Bankruptcy and Insolvency Act* and the *Judicature Act*.

4. For the reasons which follow, POA opposes this extraordinary relief.

FACTS

5. COGI and Conserve were placed into Receivership on October 26, 2015, upon the Application of ATB. ATB was a secured creditor of COGI and Conserve.

Receivership Order granted by the Honourable Justice A. D. Macleod on October 26, 2015 (the "**Receivership Order**")

6. At the Application for Receivership, it was made clear to the Court (and was not disputed by any party), that POA was not being placed into receivership and had its own business and creditors. The Court was made aware that Conserve was a shareholder of POA and apparently provided administration services to POA.

Affidavit of David Crombie sworn November 23, 2015 (the "**Crombie Affidavit**") at para 2

7. Immediately following the Receivership, the Receiver terminated all of the personnel at COGI and Conserve, including personnel involved in the administration of POA's

accounts and assets. The Receiver did not advise POA of any continued operational or administrative services which would or could be provided following this termination. Further, POA did not receive any reporting or accounting with respect to amounts which would have been paid and/or received in respect of POA assets by the Receiver. As a result, POA took steps to engage some of the former Conserve personnel to ensure that it had staff capable of performing administrative duties. POA did not issue any termination of any agreement with Conserve, nor did it state to the Receiver at any point that it considered any agreements with Conserve to be at an end. POA has stated that it is prepared to continue to use Conserve for administrative services, so long as they are actually provided.

Crombie Affidavit, para 4

8. Soon after its appointment, the Receiver demanded, *inter alia*, the minute book of POA as well as other information. Counsel for POA advised that POA would provide the Receiver with all documents to which Conserve was entitled as a shareholder, but was concerned with respect to confidentiality with respect to other documentation. Counsel for POA also proposed a method by which information could be provided on a confidential basis with remedies available should the Receiver wish to publish such information. This proposal was ultimately accepted and the minute book and other information has been provided to Receiver's counsel.

Crombie Affidavit, para 5

9. POA's business involves the acquisition and operation of petroleum and natural gas producing properties. It has acquired a number of properties from COGI in the past. In each instance, the properties were purchased on the basis of reserve reports and the net proceeds of these sales were paid by COGI to ATB in reduction of COGI's secured debt. ATB supplied a "No Interest" letter in connection with each acquisition.

Crombie Affidavit, para 3

10. In order to finance such acquisitions, POA uses funds raised and advanced by Capital Asia Group PTE Ltd. ("**Capital**"). Capital has security over all of POA's assets including security against POA's petroleum and natural gas assets by way of fixed charges. POA has no debt obligations to ATB.

Crombie Affidavit, para 8

11. As of the date of the Annual Reports last filed in January, 2015, Conserve was the 100% shareholder of POA. However, in March, 2015, in connection with a $7,000,000 secured subordinate loan by Arrow Point Oil & Gas Ltd. ("**Arrow Point**") to POA, Arrow Point subscribed for and was issued 100,000 Common Shares of POA. Subsequently, Arrow Point subscribed for 100,000 First Preferred Shares of POA. The First Preferred Shares are convertible by Arrow Point into Common Shares.

Crombie Affidavit, para 6, Exhibit B

12. As a result of the Receivership of Conserve and the Receiver's attempt to control the business and assets of POA, Capital became concerned and took steps to preserve its position and control the management of POA. On November 20, 2015, Capital notified POA that it had acquired the First Preferred Shares owned by Arrow Point and converted them to Common Shares.

Crombie Affidavit, para 9, Exhibit D

13. If the Receiver was able to obtain control over POA, POA believes that Capital would be forced to immediately enforce its security and ultimately liquidate all of the assets of POA, thus destroying POA's business.

Crombie Affidavit, para 10

ISSUES

14. The within Application raises the issue whether the Receiver has established the grounds for the extraordinary relief of the appointment of a receiver in circumstances where there is no secured creditor attempting to enforce its debt, in turn which requires consideration of the tri-partite test for an injunction.

ARGUMENT

15. There is no authority under the existing Receivership Order for the Receiver to take control over POA's business, as evidenced by the Receiver's Application seeking an expansion of its powers.

16. Essentially, the Receiver wishes to put POA (and other subsidiaries) into receivership by having the Receiver control their management, business and assets, notwithstanding that

neither Conserve nor ATB are creditors of POA (much less secured creditors with the power to appoint a receiver).

17. The appointment of a receiver outside the circumstances of an enforcement of secured debt (including in the context of oppression) is equivalent to an injunction application. In the *Murphy v. Cahill* case, the Court stated, at paragraph 7:

> [7] An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or to the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act*, (brought by a person other than a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor company), is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the so-called "tripartite test" for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief.

Murphy v. Cahill, [2013] ABQB 335 (CanLII), at para 7 [**TAB 1**]

18. The Court in *Murphy* further stated, at paragraph 60, that the appointment of a receiver is extraordinary and very intrusive relief and should only be done sparingly, with due consideration for the effect on the parties, as well as consideration of the conduct of the parties. In deciding whether to appoint a receiver, the Court must have regard to all of the circumstances, but in particular, the nature of the property, rights and interests of all parties in relation thereto. In the present case such parties include the Receiver, POA, POA's employees and creditors, as well as Capital, whuch has the greatest financial stake.

Murphy, supra, at paras 60 and 64

19. The Court in *Murphy* at paragraph 73 quoted, with favour, the following statement from *Bennett on Receiverships:*

> If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor.

Murphy, supra, at para 73

20. Finally, the Court in *Murphy* noted that an undertaking of damages is typically required on application for interlocutory injunctions in commercial matters. The Court adopted the approach by Romaine J. in *MTM Commercial Trust*, and held that it was useful to do the same with respect to the interim application for a receiver/manager in a corporate context.

Murphy, supra, at para 79

21. The dangers of establishing a receivership over a company in a non-secured debt situation, especially one with investigative powers was outlined in *Akagi v. Synergy Group (2000) Inc. et al.* In that case, the Plaintiff obtained an ex-parte receivership order and then proceeded to obtain several further orders vastly expanding the receiver's powers to investigate and alleged fraudulent scheme, not only on behalf of the Plaintiff, but on behalf of all investors into the scheme. The Order applied to both the Defendants in the action as well as non-party affiliates. The Court of Appeal canvassed the *jurisprudence* regarding "investigative" receiverships and concluded that, while it was a useful concept, it must be used with caution. The tri-partite injunction test must be applied and there must be a proper record of steps taken including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons.

Akagi v. Synergy Group (2000) Inc. et al, [2015] ONCA 368 (CanLII) at paras 93, 96 and 100 **[TAB 2]**

22. The Court in *Akagi* found that the relief granted was based on a "faulty premise" that a receiver could be appointed to carry out a broad, standalone, investigative enquiry for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons and that this flawed premise was compounded by the overreaching nature of the relief granted which included the authority to investigate without notice the private affairs of a myriad of targets and to tie up and freeze the assets and property of those targets pending termination of the receivership.

23. In accordance with the foregoing cases, the Receiver must, in order to obtain the relief it seeks, establish all three parts of the tri-partite test or its Application must be dismissed. With respect to "serious issue to be tried", the Receiver has simply alleged "oppression", without specifying the alleged oppressive acts. In *Munro v. Nopper*, the Court, at

paragraphs 25 to 28 canvassed the cases regarding the meaning of "oppressive" and "fair" under the oppression legislation. The Court noted:

(a) "Oppressive" connotes an inequality of power or authority;

(b) Conduct which is obstinate, perverse or recalcitrant is not automatically "oppressive" or "unfair";

(c) The legislation was not intended to diminish but rather to temper the the ordinary presumption of majority rule;

(d) While minority shareholders must be protected from unfair treatment; that the Court not ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority;

(a) Business decisions, honestly made, should not be subjected to microscopic examination.

Munro v. Nopper et al, [2002] ABQB 810 (CanLII), at paras 25 to 28 **[TAB 3]**

24. In the *Munro* case, the Court declined to order rights of oversight relative to the business decisions of the company to the plaintiff and it refused to require the management of the company to produce an expensive accounting of transactions. The Court noted that the shareholder could "continue to make use of the statutory rights to information" enjoyed as a shareholder.

Munro, supra, at para 32 to 34

25. More recently, the Court has noted that the basic principles underlying oppression actions and available oppression remedies revolve around ensuring fairness and upholding the reasonable expectations of stakeholders in the context of their particular relationships. A claimant in an oppression action must establish:

(a) The reasonable expectation asserted by the claimant;

(b) Violation of that reasonable expectation by conduct that falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest.

It is essential that the claimant prove wrongful conduct, causation and compensable injury.

Shefsky v. California Gold Mining Inc., [2014] ABQB 730 (CanLII), at paras 72 and 73 **[TAB 4]**

26. In the present case, there is no specific act of oppression which has been alleged. It is difficult, if not impossible, for POA to respond to a simple general allegation of oppression. To the extent that the oppression alleged is a failure on the part of POA to comply with informational requests by the Receiver, POA takes the position that compliance with the ABCA is not oppression and that refusing to provide additional information is not only not evidence of oppression, but a responsible act taken to avoid compromising POA's confidential documents.

27. To the extent that the alleged oppression is based upon an alleged termination of the Receiver's Administration Agreement with POA, it must be stated that there is no evidence of an Administration Agreement, no evidence of a termination of any said agreement and POA has stated that it is prepared to adhere to and continue any such agreement. Further, to the extent there was a termination of the agreement, remedies available under the existing terms of the Receivership Order can be taken, as opposed to the institution of a receiver over POA.

28. In short, the Receiver has not established any oppressive acts by POA justifying the appointment of a receiver. Therefore, it has not established a serious issue to be tried, and the Application might be dismissed on that basis alone.

29. With respect to the second prong of the tri-partite test, the Receiver has adduced no evidence to establish that it will suffer irreparable harm, should its relief not be granted. To the extent the Receiver has complained about an alleged termination of a management or administration agreement, POA has indicated that it would honour any existing arrangement, so long as the services are actually provided. To the extent that the Receiver wanted information from POA, an arrangement has been reached whereby information can be provided while at the same time preserving confidentiality of such information (subject to Court direction).

30. The Receiver has not established that the balance of convenience favours the significant intrusion into POA's business sought by the Receiver through the proposed expansion of powers. As indicated above, arrangements have been made with respect to provision of information and continuation of any existing administration or management agreements. The Receiver is at liberty to make such further inquiries as are appropriate with respect to

past transactions involving POA and the companies which are actually in Receivership. On the other hand, the proposed expansion of powers would almost certainly destroy POA's business, since they would cause Capital to enforce its security.

31. Finally, no undertaking in damages has been provided. The damages to POA should the Receiver be granted the power to take its desired actions are significant and severe and should be protected by such an undertaking.

CONCLUSION

32. In summary:

(a) The appointment of a receiver in circumstances apart from the enforcement of secured debt is an intrusive and extraordinary action which requires the satisfaction of the "tri-partite test" for obtaining an interlocutory injunction.

(b) In the present case, there is no serious issue to be tried, no evidence of irreparable harm should the receiver not be appointed and no evidence that the balance of convenience favours the appointment of a receiver.

2. Accordingly, the Application by the Receiver should be dismissed.

Submitted this 23rd day of November, 2015.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
FIELD LLP

Per: _____
Douglas S. Nishimura,
solicitor for Proven Oil Asia Ltd.

TABLE OF AUTHORITIES

TAB

1. *Murphy v. Cahill*, [2013] ABQB 335 (CanLII);
2. *Akagi v. Synergy Group (2000) Inc. et al*, [2015] ONCA 368 (CanLII)
3. *Munro v. Nopper et al*, [2002] ABQB 810 (CanLII)
4. *Shefsky v. California Gold Mining Inc.*, [2014] ABQB 730 (CanLII)

TAB 1

Court of Queen's Bench of Alberta

Citation: Murphy v. Cahill, 2013 ABQB 335

Date: 20130816
Docket: 1203 04666
Registry: Edmonton

Between:

Gerald Murphy and Gerald Murphy in his capacity as Trustee of the Gerald Murphy's Children's Parallel Life Interest Settlement Trust

Applicant

- and -

Margaret Cahill, Christopher Cahill, 1248429 Alberta Ltd., 554168 Alberta Ltd., 1247738 Alberta Ltd., and Canadian Consolidated Salvage Ltd.

Respondents

Memorandum of Decision of the Honourable Madam Justice J.B. Veit

---

Summary

[1] Since 2006, Gerald Murphy has provided all of the capital funding, amounting to millions of dollars, for the CCS group of companies. In this interlocutory application, relying on s. 242(3) of Alberta's *Business Corporations Act* and on s. 13(2) of the *Judicature Act*, Mr. Murphy asks for the appointment of a receiver-manager on an interim basis based on evidence of what he describes as mismanagement of the companies by the respondent Margaret Cahill, Mr. Murphy's sister. The mismanagement complained of is extensive, relating both to relatively

large matters - such as the funding by the companies of residences that were then put into Ms. Cahill's name - and to small ones - such as Ms. Cahill's authorization of the purchase of baby clothes for the new-born children of two employees. There is abundant evidence that Mr. Murphy's serious complaints about management raise serious issues to be tried.

[2] In the originating application which commenced these proceedings, in addition to the appointment of a receiver-manager, Mr. Murphy also asks for rectification of the share register and corporate documents and for related relief.

[3] The respondent Cahills have complaints relating to Mr. Murphy: they assert that Mr. Murphy has failed to recognize their equity interest in the companies and Ms. Cahill's right to manage the companies, including her right to authorize payment to others, including her adult son, for work done on behalf of the companies. The evidence on which the Cahills rely consists of corporate documents which appear to have been executed by Mr. Murphy, and which state on their face that, despite his sole funding of the companies, Mr. Murphy only has a 50% voting position with respect to the operation of, and an 80% equity stake in, the companies. In addition, according to the Unanimous Shareholders' Agreement, also apparently executed by Mr. Murphy, internecine corporate disputes must be arbitrated. There is abundant evidence that the Cahills' complaints raise serious issues to be tried.

[4] The application for an interim receiver-manager is denied.

[5] The court is entitled, in assessing the application, to consider the hearsay information contained in the Inspector's Third Report. However, in the circumstances of this case, the court does not attach any weight to that hearsay evidence.

[6] The applicants cite Margaret Cahill in contempt for having, in the face of the court's sealing order, provided a copy of the Inspector's Third Report to a non-party, Chris Cahill Jr., who was the focus of much of the information contained in the Third Report. In the circumstances here, the sealing order was not sufficiently clear and unequivocal so as to constitute an adequate basis for contempt proceedings.

[7] An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or to the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act,* (brought by a person other than a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor company), is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the so-called "tripartite test" for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief.

[8] Moreover, the test itself must be interpreted within the court's equitable jurisdiction. One effect of the equitable character of the relief is that the granting of this exceptional relief is

discretionary. Another is that general equitable principles infuse the court's assessment of the positions of the parties on such an application, especially with respect to the balancing of convenience; as one example of the overarching effect of equitable principles in this context, the dictates of fairness may exceptionally be so overwhelming that interim relief is justified even where one or more branches of the tripartite test have not been met.

[9] It can be misleading to express the appropriate test as consisting merely of a requirement that the applicant has established a strong *prima facie* case of oppression. In any event, even if the test could be formulated in that way, the applicant has not satisfied that test.

[10] Dealing then with the test as elaborated in the case law, as is agreed by the parties, the first branch of the tripartite test has been met: clearly there are serious issues to be tried.

[11] However, in relation to the second branch of the test, Gerald Murphy has not established that he, or the Trust, will suffer irreparable harm if the relief is not granted. There is no need for immediate corporate action; as the Inspector observes, nothing much will change in the companies' outlook within the next several months. There is no important corporate issue that must be addressed in the near future. Also, the lowest appraisal of the current market value of the real property owned by the CCS companies establishes that the current value of those properties significantly exceeds the original investment. If Ms. Cahill has been responsible for financial losses suffered by the companies, her apparent equity interest in the companies appears to be adequate to compensate the Trust for such losses.

[12] Nor, with respect to the third branch of the test, has Mr. Murphy been able to establish that the balance of convenience favours the appointment of an interim receiver-manager. The evidence on this application is that Mr. Murphy has considerable financial resources whereas the financial resources of the respondent Cahills are tied to their employment at, and apparent equity position in, the companies. The granting of interim relief which deals with Mr. Murphy's concerns but not those of the Cahills and which virtually cuts off the financial ability of the Cahills to advance their apparently legitimate interests would create an inappropriate balance in favour of Mr. Murphy.

[13] In considering the equities of the overall application, Mr. Murphy has not established that this is a situation where the dictates of fairness are so overwhelming that they justify the appointment of a receiver-manager. Mr. Murphy's legitimate expectations do not justify the appointment of a receiver-manager on an interim basis: there has been no material change of management style of the CCS group since Mr. Murphy acquired the companies and put Ms. Cahill in charge of the day to day operations of the companies. Furthermore, the appointment of an interim receiver-manager would presume that Mr. Murphy's position with respect to the corporate structure is correct and that he is therefore entitled to present this application. However, the only evidence on this application with respect to the corporate structure consists of documents apparently executed by Mr. Murphy which require him to go to arbitration to solve management disputes rather than to invoke the assistance of courts. Also, in light of the Inspector's opinion about the current status of the companies, it is obvious that the appointment of an interim receiver-manager would not deal effectively with the real problems facing this

group of companies. Also, the appointment of an interim receiver-manager would give Mr. Murphy the relief which he requests without addressing the fundamental issue of corporate structure.

[14] Lastly, the biggest hurdle which Mr. Murphy faces in obtaining this relief on an interim basis is his acknowledgement that he would be prepared for a final hearing on the merits of his oppression application within months, a timing estimate with which the respondents agree. In such a situation, especially where the consequences of the appointment of a receiver-manager would be so dire from the respondents' perspective, there can be no justification for proceeding with an interlocutory remedy without a full hearing on contested evidence when a full hearing can finally resolve the crucial factual disputes between the parties.

Cases and authority cited

[15] **By the Applicants:** ***Murphy v. Cahill***, 2012 ABQB 220; ***R v. Canadian Consolidated Salvage Ltd.***, 2012 ABPC 133; ***Murphy v. Cahill***, 2012 ABQB 446; ***Murphy v. Cahill***, 2012 ABQB 530; ***Murphy v. Cahill***, 2012 ABQB 531; ***Murphy v. Cahill***, 2012 ABQB 793; ***Murphy v. Cahill***, 2012 ABQB 754; *Business Corporations Act*, R.S.A. 2000, c. B-7, s. 242(3)(b) and Part 8; ***HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.***, 1999 ABQB 406; ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69; ***Seidel v. Kerr***, 2003 ABCA 267; *Judicature Act*, R.S.A. 2000, c. J-2, s. 13(2); ***Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance***, 2002 ABQB 430; ***Kumra v. Luthra***, 2010 ABQB 772; ***Citibank Can. v. Calgary Auto Centre*** (1989), 98 A.R. 250; ***MTM Commercial Trust v. Statesman Riverside Quays Ltd.***, 2010 ABQB 647; ***Chow v. Bresea Resources Ltd.*** (1997), 209 A.R. 284 (C.A.); ***Garratt v. Charlton et al***, 2012 ONSC 1129; ***Fernando v. 2023928 Ontario Inc.***, [2007] O.J. No. 1644, 2007 CarswellOnt 2619; ***781952 Alberta Ltd. v. 781944 Alberta Ltd.***, 2003 ABQB 980; ***Deluce Holdings Inc. v. Air Canada***, 1992 CarswellOnt 154, 98 D.L.R. (4th) 509; ***Simonelli v. Ayron Developments Inc.***, 2010 ABQB 565; ***Connelly v. Connelly-McKinley Limited***, 2010 ABQB 515; ***Seymour Resources Ltd. v. Hofer***, 2004 ABQB 303; ***719946 Alberta Ltd. v. Alberta's B.E.S. T. Inc.***, 2005 ABQB 771; ***Such v. RW-LB Holdings Ltd.***, 15 Alta L.R. (3d) 153; ***Stech v. Davies*** (1987), 80 A.R. 298 (Q.B.); *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, ss. 96(3), 323(1) and 330; *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended, s. 227.1; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 128; ***Alpha Investments & Agencies Ltd. v. Maritime Life Assurance*** (1978), 23 N.B.R. (2d) 261 (C.A.); ***J.P. Capital Corp, (Trustee of) v. Perez*** (1996), 38 C.B.R. (3d) 301 (Ont. Gen. Div.); ***Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*** (1992), 31 A.C.W.S. (3d) 1283 (Ont. Gen. Div.); ***Weaver v. Cahill***, 2011 ABCA 290; **R. v. Cahill**, 2006 ABCA 119.

[16] **By the Respondent, Margaret Cahill:** ***Paragon Capital Corporation Ltd. v. Merchants & Traders Company***, 2002 ABQB 430; *Bennett on Receiverships*, Second Edition, pages 130-132; *Bennett on Receiverships*, Second Edition, pages 138-140; ***MTM Commercial Trust v. Statesman Riverside Quays Ltd.*** (2010) ABQB 647; ***Murphy Oil Co. v. Predator Corp.*** (2003) 7 Alta LR (4th) 369; ***Spartan Drilling Ltd. v. Snowhawk Energy Inc.*** (1986) 46 Alta LR (2d) 67; ***Kumra v. Luthra***, [2010] A.J. No. 1581 (Q.B.); ***Citibank Canada v. Calgary Auto Centre***, [1989] A.J. No. 347 (Q.B.); ***Alberta Health Services v. Networc Health Inc.***, [2010] A.J. No.

627 (Q.B.); ***BG International Ltd. v. Canadian Superior Energy Inc.***, 2009 ABCA 127, 2009 CarswellAlta 469 (para 18); ***MTM Commercial Trust v. Statesman Riverside Quays Ltd.***, [2010] A.J. No. 1189; ***BG International Ltd. v. Canadian Superior Energy Inc.***, [2009] A.J. No. 358, 2009 CarswellAlta 469 (Alta. CA) at paras. 16 & 17; ***BG International Ltd. v. Canadian Superior Energy Inc.***, [unreported, February 9, 2009] (Alta. Q.B.) para 9; ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994]1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385; ***Goebel v. Edmonton (City)***, [2004] A.J. No. 193 (CA); ***Monco Holdings Ltd. v. B.A.T. Development Ltd.***, [2005] A.J. No. 1218 (Q.B.); ***Lindsay Estate v. Strategic Metals Corp.***, [2008] A.J. No. 1076 (Q.B.); ***Principal Group Ltd. (Trustee of) v Principal Savings & Trust Co.*** (1993) 11 Alta. L.R. (3d) 222 (Q.B.).

[17] **By the Respondent, Christopher Cahill (Sr.):** ***BG International Ltd. v. Canadian Superior Energy Inc.***, 2009 ABCA 127; ***RJR- MacDonald Inc. v. Canada (Attorney General)***, [1994]1 S.C.R. 311.

[18] **By the Inspector:** ***Envirodrive Inc. V 836442 Alberta Ltd.*** 2005 ABQB 446. ***Consolidated Enfield Corp. v Blair*** 1995 CarswellOnt 1067 (Div. Ct.); ***Catalyst Fund General Partner 1 Inc. v Hollinger Inc.*** 2005 CarswellOnt 2193 (Sup. Ct. of J.)

[19] **By the court:** ***Leggat v Jennings*** 2013 ONSC 903; ***Nicolas c. Perrier*** 2012 QCCA 99; ***176283 Canada Inc. c. St-Germain*** 2011 QCCA 608; ***Cassels, Brock & Blackwell LLP v 1578838 Ontario Inc.*** 2013 ONSC 4194; F. Bennett, *Bennett on Receiverships*, 3rd ed., 2011, Carswell

Appendix A: Sections 242 and 243 of Alberta's *Business Corporations Act*
Section 13(2) of Alberta's *Judicature Act*

1. Background

a) Factual

[20] In March, 2012, under the authority of ss. 242 and 244 of Alberta's *Business Corporations Act* and s. 13 of Alberta's *Judicature Act*, and claiming oppression, Gerald Murphy brought an originating application in his personal capacity and in his capacity as trustee of the Gerald Murphy's Children's Parallel Life Interest Settlement Trust, hereafter "the Trust", to appoint a receiver-manager of the CCS Group of companies, to rectify the registers and records of the CCS Group to reflect that Murphy is the sole shareholder of the CCS Group, and to compensate himself for loss caused by the oppressive conduct of the respondents. This special chambers application is for the appointment of an interlocutory receiver-manager in these proceedings.

[21] Between 2006 and 2008 the Trust invested between $9 and $16 million dollars in an Alberta group of companies, the CCS Group. The exact amount of the investment is known to the parties but is not repeated here because of privacy issues relating to the potential marketing of the properties. The money invested in the CCS Group was part of the proceeds of the sale by

Gerald Murphy of his interest in a family-run salvage business in Ireland. Gerald Murphy is the sole funder of the Trust and the Trust is essentially the sole capital funder of the CCS Group.

[22] Margaret Cahill, Gerald Murphy's older sister, had emigrated to Canada with her family in the late 1970s. In 2006, she had no experience in the management of a junk yard or a salvage yard, and, indeed, no experience in the management of a large commercial enterprise. She is, nevertheless a woman of ability, having trained as a nurse.

[23] Margaret Cahill's husband, Christopher Cahill Sr., read law at Trinity in Dublin. However, there is no evidence that he was ever admitted to the practice of law either in Ireland or in Canada.

[24] Although Gerald Murphy, or his representatives and agents, has visited the Edmonton business on a few occasions, Gerald Murphy continues to reside in Ireland.

[25] In 2006, Gerald Murphy, an adult person with no disabilities, executed documents which established a share structure in the CCS Group in which Margaret Cahill, Gerald's sister, and Christopher Cahill Sr., Margaret's husband, each owned 10% of the equity shares and the Trust owned the remaining 80% equity shares, but Margaret and Gerald together owned 50% of the voting shares and the Trust owned the remaining 50%. Amongst the various documents Mr. Murphy executed when the company structure was set up was a Unanimous Shareholders Agreement which, among other terms, required the parties to arbitrate disputes:

> 8.02 Arbitration
>
> If at any time during the continuance of the Corporation or after the dissolution or termination thereof, any dispute, difference or question shall arise between the Shareholders touching the Corporation, or the amounts or transactions thereof, or the dissolution or winding up thereof, or the construction, meaning or effect of these presents or anything herein contained, or the rights or liabilities of the parties under this agreement or otherwise in relation to the premises, then every such dispute, difference or disagreement shall be referred to a single arbitrator, if the parties agree upon one, but should the parties be unable to agree upon the identity of such single arbitrator, then each such dispute, difference or disagreement shall be referred to a single arbitrator, to be appointed by a Judge of the Court of Queen's Bench of the Province of Alberta pursuant to *The Arbitration Act* of Alberta and every award or determination thereof shall be final and binding. Any arbitrator under this clause shall not be bound by legal precedent, nor by the rules of evidence or procedure. He shall be bound to impose the solution which is most equitable, having regard to the terms hereof, under the circumstances, and every award or determination so imposed shall be final and binding.

[26] Gerald Murphy swears that he did not read any of the documents he signed, that he was not aware of their contents, and that in signing every document that was put before him he was relying on his lawyers and on his brother-in-law, Christopher Cahill Sr. - as a person who had represented to him that he was a practising lawyer, as a fellow trustee of the Trust, and as a

member of the family. Mr. Murphy maintains that the documents were not explained to him by his then law firm, that he did not retain copies of the documents that he signed and that he never received the advice of the Trust's Irish lawyers with respect to those documents. Because he asserts that the USA is not binding on him, he has declined to access the arbitration provisions of the USA to resolve any corporate disputes he had with the Cahills.

[27] Mr. Murphy swears that he first became aware of the share structure in the CCS Group in 2008. In that year, his relationship with his sister changed from one of trust to one of contestation. For example, in the original corporate records, Mr. Murphy agreed to dispense with an auditor and with an annual meeting and also waived receipt of financial statements; by 2008, Mr. Murphy was demanding financial disclosure. Mr. Murphy initiated proceedings with respect to the share structure of the Group in 2010; he asserts that the period between 2008 and 2010 was taken up with settlement negotiations between himself and the Cahills.

[28] After the relationship with his sister became acrimonious, the CCS Group received an unsolicited offer to purchase one of the three groups of real properties owned by them. The amount of the offer was for one property and, had the offer been accepted, it would have equalled more than half of the total amount of money invested by Mr. Murphy in the companies. Mr. Murphy refused to accept the offer.

[29] In 2011, the parties agreed to the appointment of Deloitte, as a consultant to Mr. Murphy, and became vested with the role of making inquiries into various matters relating to the companies. The type of information requested by Deloitte included financial statements, real estate appraisals, corporate income tax returns, general ledgers, HR information about management and employees, inventory, insurance coverage, management fees, etc. From the beginning, there were difficulties in obtaining the requested information. For example, as a result of water damage to the premises in February 2011, it was not possible for Deloitte to actually work at the premises occupied by the companies. Deloitte eventually reported that it had not been able to obtain all of the information which it had requested.

[30] In August, 2012, Mr. Murphy asked the court for additional relief, including the appointment of an interim receiver-manager. Although that relief was denied, the court did appoint an Inspector, BDO Canada Ltd., whose task was defined, in general terms, as reviewing and assessing the CCS companies' current and historical financial position and historical operating results; reviewing and assessing the group's accounting and control procedures with respect to accounts receivable, accounts payable, inventory, and in general; and, attempting to address the questions and issues arising from the Deloitte report. One of the terms appointing the Inspector provided that the Inspector's reports would be sealed. The Inspector's First Report was presented to the Court on November 22, 2012. That report stated that, despite often repeated requests for information, the information had "generally been slow in delivery, and a significant amount of information remains outstanding as at the Cut-Off Date": para. 11. The report also continues, in para. 12, however, that "there does appear to be some merit to the concerns raised by the Management of the CCS Group"; those concerns were identified by the management as: shortage of staff, limited knowledge/expertise in the area of accounting; the use of an external accounting firm for some aspects of the information requested, including compilation of

financial statements and preparation of tax returns; pressures on existing personnel to comply with information requests in relation to the ongoing legal dispute; a power outage in the week of October 9, 2012 which caused the group's computer network to crash and delayed matters for approximately one week; and, the demands of ongoing management. In addition, the Inspector fairly observed that, despite requests made by it to Deloitte to obtain from Deloitte the information which it had already received from the management of the companies, the Inspector only received the information from Deloitte on October 10, 2012. The Inspector was "hesitant to try and continue the review without first having access to, and reviewing the information previously provided to Deloitte". Nevertheless, the Inspector attempted to retrieve information from the management of the group which it had previously provided to Deloitte; this "required a tremendous amount of time and effort by both the Inspector and the CCS Group": para. 13. Nor surprisingly, the CCS Group was "not pleased with the Inspector's numerous requests to provide information that they indicated had been provided previously.": para. 14. As a result of these experiences, the Inspector instituted a "Cut-Off Date" of October 23, 2012. Its First Report was based on information received from the CCS Group up to and including the Cut-Off Date.

[31] On January 31, 2013, this court granted an order that required the Inspector to provide the CCS Group by February 4, 2013 with a comprehensive written list of outstanding issues from the Inspector's own work and from the work undertaken by Deloitte; that authorized the Inspector to attend the Group's premises on February 5, 2012 to attempt completion of the outstanding internal control testing and documentation referred to in the First Report, and that required the CCS Group to provide responses to the Inspector by February 14, 2013. In the event, the Inspector granted some short extension to the time allowed to the CCS Group to answer the Inspector's queries. In its Second Report, tendered on March 8, 2013, the Inspector commented:

> 20. Generally speaking, despite the efforts of the CCS Group, and the extension of time granted by the Inspector, there still remains a significant amount of information outstanding and questions to be addressed/resolved as of February 19, 2013, (hereinafter referred to as the "Second Cut-Off Date"). Furthermore, the information supplied by the CCS Group up to the Second cut-Off Date as not materially altered the information previously reported to the Court by the Inspector to date.

[32] The Second Report states that the bulk of the information requested in the Deloitte Report has been provided: see para. 36.

[33] At paras. 22 and 23 of the Second Report, copies of which are in the hands of each of the parties, the Inspector sets out three key facts and an opinion with respect to the issues which it was asked to address. Because of privacy concerns relating to the market position of the companies, the court will not reproduce the Inspector's identification of key facts or its opinion. However, it is crucial to note that the Inspector identifies systemic problems rather than problems attributable solely to Margaret Cahill. Indeed, Margaret Cahill is not in a position to unilaterally remedy the problems identified by the Inspector. On the contrary, one of the main problems identified by the Inspector is a problem to which Margaret Cahill proposed a solution some time ago, but which Gerald Murphy declined to accept.

[34] The Inspector's Concluding Comments in the Second Report include the following:

> Notwithstanding the significant volume of information that remains outstanding as at the Second Cut-Off Date, at this stage in the proceedings, the Inspector feels that continued work and expense under its current mandate will not result in any additional benefit to the Court or the Parties as it is clear that . . . . . .

[35] For the privacy reasons mentioned earlier, the court does not reproduce all of the Inspector's Comments. Nonetheless, it is clear that one of the problems identified by the Inspector is the significant weakness in the Companies' internal controls. The cause of that weakness is not spelled out and is not attributed to delinquency on the part of Margaret Cahill.

[36] In addition to the current proceedings, there has been parallel litigation involving the same parties involving, on the one hand, an apartment building in Edmonton, and, on the other, debt actions alleging a failure of the CCS Group to repay a debt owing to the Trust. In July 2012, Mr. Murphy made a first receivership application, which was dismissed: see 2012 ABQB 446. The existence of parallel proceedings can legitimately be taken into account when assessing the ability of the respondents to answer requests for information from Mr. Murphy at the same time as it was defending other lawsuits.

b) Legislative

[37] The oppression provisions of the *Business Corporations Act* and the authority under the *Judicature Act* to appoint a receiver or receiver manager are set out in Appendix A.

2. How should the material contained in the Inspector's Third Report be treated?

[38] On June 11th, 2013, i.e. 5 days after the conclusion of the three day special chambers application in the month of June, the Inspector was advised by Mr. Murphy that Mr. Murphy had become privy to new information relative to the affairs of the companies which was relevant and material. The Inspector contacted my office stating that the new information raised serious concerns with respect to the information previously provided by the Inspector. Discussions then ensued with all the parties relating to this development.

[39] Although there is not yet any evidence before the court with respect to the exact circumstances concerning the tendering of this new information, it appears that the individual who brought the information to Mr. Murphy had been, from some date which is not yet clear on the information before the court up to the time of the special chambers hearing in early June, employed on a contract by the CCS companies to assist in answering various queries from the Inspector, especially with respect to the period during which she had been employed by the companies. It may be that, shortly after the June special chambers meeting, she had had a meeting with the lawyer for Ms. Cahill and that a difference of opinion had arisen between them. In any event, the individual shortly after June 6 attended at the offices of the lawyers for Mr. Murphy.

[40] On June 12, 2013, this individual entered into an agreement of indemnity with Gerald Murphy's Children's Parallel Life Interest Settlement Trust pursuant to which the individual requested, and the Trust agreed to provide: the costs of fully furnished accommodation for a period which has been redacted from the agreement included in the Third Report, must which term "may be extended as necessary depending on the status of the lawsuit and upon the request of the Indemnified Party to the Indemnifier; the costs of a rental vehicle for a term similar to the term relating to the accommodation; all costs and damages which may be incurred by the Indemnified party related to any lawsuit commenced by any of the Cahills relating directly to the provision of the information; and, all legal fees and disbursements for the provision of independent legal advice to the Indemnified party. The solicitors for the Trust in these proceedings executed the agreement on behalf of the trust.

[41] The solicitors for Mr. Murphy and the Trust have advised this court that they asked the individual to present her information to the Inspector direct, rather than through the law firm representing Mr. Murphy, because they were concerned that Rule 4.03 of the Law Society of Alberta's Code of Conduct may have prevented them from interviewing the witness themselves. In particular, the law firm was concerned about the Commentary to the rule which highlights the fact that, although there is generally no property in a witness, there are certain recognized exceptions to that rule.

Interviewing witnesses

4.03 Subject to the rules respecting communication with a represented party set out in Rule 6.02 (8-10), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or advise or encourage a witness or potential witness in a matter to refrain from communicating with other parties involved in the matter.

Commentary

There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding must be free to impart it voluntarily and in the absence of improper influence. The rule does not, however, prevent a lawyer from responding in the negative if a witness specifically asks if it is mandatory to talk to opposing parties.

In Alberta, there are certain recognized exceptions to the rule:

. . . .

(b) Decision makers within a corporate client. Since a corporation must act through human agents, it is necessary to identify those within a corporate client having authority to act on its behalf. Generally, all directors and officers, as well as management level personnel with decision-making authority, have sufficient

identity with the corporation to be considered equivalent to the client for the purposes of this Rule.

[42] In this context, it is potentially useful to note that the person who presented herself to Mr. Murphy's lawyer had been, until 2011, employed as a book-keeper for the companies. She had never been a director or officer of the companies. On the other hand, on an undated letter sent some time after December 3, 2010 but prior to the termination of her initial employment, she had sent a letter on CCS letterhead in which she had signed herself "Executive Assistant". Also in this context, it might be useful to note that the Inspector referred to the management team with whom it met as being composed of Margaret Cahill and Mr. Filipiak who, in August 2011, appears to have assumed the position previously occupied by the individual who went to Mr. Murphy's lawyer. It will be seen, therefore, that the concern expressed by Mr. Murphy's lawyer in dealing with this potential witness was understandable.

[43] On July 16th, 2013, the Inspector provided to the court and to the parties a Third Report consisting of allegations made by a former book-keeper of CCS, whose employment with the companies had ceased in 2011. Recently, the individual had been retained by Margaret Cahill, on a contract basis, to answer the various questions put to the management of the CCS companies by the management. That individual told the Inspector that while she had not provided erroneous information to the Inspector in her previous dealings with them, she had deliberately withheld relevant and material information, in part at the request of Margaret Cahill and Chris Cahill Jr.

[44] The Inspector prudently advised the court that it had not had either the time or the opportunity to test the allegations made by the former book-keeper. Indeed, in response to the court's questions at the August 6 hearing, the Inspector candidly advised that there was relatively little that it could do in the relatively short term to assess the validity of the allegations made by the former book-keeper.

[45] It goes without saying that the Inspector acted in an entirely appropriate fashion in ensuring that the court had access to the hearsay material with a view to determining what use should be made of that material.

[46] As to the use which the court should make of the Third Report, Ms. Cahill acknowledged, on the authority of ***Principal Group Ltd.,*** that even though information in an Inspector's report was, typically, hearsay, it was the kind of hearsay which could be tendered in evidence and considered by the court.

[47] This raises a procedural issue that is relevant to the issue of contempt which must be addressed by the court. The ***Principal Group Ltd.*** decision emphasizes that an Inspector's report, albeit hearsay, can become evidence. While Canadian case law generally holds that Inspectors, as court officers, are to be shielded from cross-examination on their reports - see, for example, ***Consolidated Enfield Corp.***, that does not mean that the reports should not be filed as court exhibits. Here, because of an earlier decision in these proceedings which provided for the sealing of the Inspector's reports, the Reports have not in fact been introduced as exhibits. The

court hereby orders that each of the three reports shall forthwith be entered as exhibits in the proceedings, and, according to the order of Lee J., shall be sealed until further order of the Court.

[48] Although the respondents do not object to the Court's consideration of the Inspector's Third Report, they ask the court to consider the content of the report to be mere hearsay, even contested hearsay, and to give it no weight.

[49] Mr. Murphy asks the court to give full weight to the hearsay evidence contained in the Inspector's report. He states that the court has not required other individuals to provide sworn evidence before it could be considered by the Inspector.

[50] I have concluded that, because they are not sworn and been subject to cross-examination, I should give no weight to the allegations made by the CCS's former book-keeper. Although an Inspector's report is admissible, even if it contains hearsay, the court retains the discretion to give the hearsay content of the report little weight: ***Envirodrive Inc.***, at para. 38.

[51] In coming to that conclusion, I have taken the following into account:

- although it is obvious that the Inspector has not required all individuals who have provided information used as the basis for the First and Second Reports to provide that information by way of affidavit or equivalent. However, much information in these proceedings, and certainly most of the information which is contested, has in fact been provided by affidavit or equivalent and there has been the opportunity to cross-examine on that evidence. Both Mr. Murphy and Ms. Cahill have been subject to questioning with respect to the affidavits they have provided;

- the evidence before the court on this application establishes that there was a personal relationship between the former book-keeper and Chris Cahill Jr. which may provide an explanation for the former book-keeper's current information. This is not a situation where the source of the new information is disinterested;

- on the basis of the very information provided by the former book-keeper to the Inspector, that individual has acknowledged that, in the past, she has not been forthright with the Inspector. When a witness admits to having deliberately withheld evidence in the past, that individual's current statements must be assessed in light of her acknowledged past lack of candour. It is reasonable to require the new information to be provided under oath and to be subject to questioning.

3. Should Ms. Cahill, or her lawyer, be found in contempt, and sanctioned, for having disclosed to Chris Cahill Jr. the contents of the Inspector's Third Report which dealt principally with allegations against Chris Cahill Jr.?

[52] I have concluded that, in the circumstances here, no finding of contempt should be made with respect to the distribution to Chris Cahill Jr. of the Inspector's Third Report.

[53] The hearsay information which constitutes the content of the Inspector's Third Report centers on Chris Cahill Jr. It appears that the individual who provided the information to the Inspector had had at the very least an emotional, as opposed to a purely professional, relationship with Chris Cahill Jr. Although the information provided to the Inspector relates in part to Margaret Cahill, the focus of the disclosure is on Chris Cahill Jr. and the allegations against him of assault and of other personal impropriety as well as of business impropriety. Clearly, Margaret Cahill provided her son with a copy of the Third Report; indeed, Chris Cahill Jr. - who is identified in the materials before the court as part of the management team of the CCS Group - has filed affidavits responding to the allegations made in the Third Report. The fact that a person affected by a sealing order would likely have obtained disclosure of the sealed document in the interests of fairness had an application been made to lift the order does not resolve the issue of whether a contempt of the order has occurred, although such a background may affect the sanction imposed for contempt. However, before getting to that issue, the court must begin by determining whether the circumstances here justify a contempt citation.

[54] The test for contempt has recently been articulated by Quinn J. in ***Cassels Brock & Blackwell LLP*** - a decision chosen only because of its recency - in a format which, in my view, represents the weight of the jurisprudence on the issue:

> 60 In *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27, a three-pronged test for contempt was articulated: (1) "the order that was breached must state clearly and unequivocally what should and should not be done"; (2) "the party who disobeys the order must do so deliberately and wilfully"; (3) "the evidence must show contempt beyond a reasonable doubt."
> . . .
>
> (c) is the Order for Assessment clear and unequivocal?
>
> 62 The following legal principles are two of the more obvious ones that apply when considering whether an order is clear and unequivocal:
>
> "It must be clear to a party exactly what must be done to be in compliance with the terms of an order": see Bell ExpressVu Limited Partnership v. Torroni (2009), 94 O.R. (3d) 614 (C.A.), at para. 22, citing Hobbs v. Hobbs (2008), 54 R.F.L. (6th) 1 (Ont. C.A.), at paras. 26-28.
>
> "The person who is alleged to be in contempt is entitled to the most favourable interpretation of the order": see Melville v. Beauregard, [1996] O.J. No. 1085 (Gen. Div.), at para. 13.

[55] In the circumstances of this case, I have concluded that the sealing order was not sufficiently clear and unequivocal so as to provide a basis for a contempt finding. As I understand it - in the absence of a transcript of the proceedings that led to the making of the

sealing order - the sealing clause of the order appointing the Inspector was not the subject of real discussion amongst the parties. No notice of the application to request a sealing order was brought pursuant to the provisions of R. 6.29 for a restricted court access order; therefore, there was no elucidation on the record of the intended objective of the sealing order. In those circumstances, the parties may understandably have been of the view that the obligation to prevent disclosure of the order and its terms rested essentially on the Inspector. Such an interpretation would have been reasonable, given the type of information which the Inspector was to uncover, relating for example to real estate appraisals; such information, if publicly disclosed, might have put the companies at a disadvantage in dealing with the properties and the corporate disadvantage would have had negative consequences for all the shareholders.

[56] Incidentally, the existence of the sealing order would also limit the Inspector's ability to approach outside sources for information. That reality is reflected in the Inspector's answer to the court's query about which, if any, of the allegations made in the Third Report could be effectively assessed by the Inspector: the Inspector could not, as suggested by Mr. Murphy, merely go to a lawyer and ask that lawyer if s/he is driving a vehicle leased to the companies, and, if so, under what authority.

4. What test applies to a request for the appointment of an interim receiver-manager?

[57] Mr. Murphy asserts that a strong *prima facie* case of oppression constitutes a sufficient basis for the appointment of an interim receiver- manager under the *Business Corporations Act* and that a test comparable to the tripartite test for interlocutory injunctive relief is the test that should be applied in relation to the *Judicature Act* application. Mr. Murphy adds that deadlock is sometimes mentioned as a justification for the appointment of a receiver-manager and that Lee J. has, in these very proceedings, made a finding of deadlock even though that finding did not result in Lee J.'s acquiescence to the request for the appointment of an interim receiver-manager.

[58] The respondents assert that the test for the appointment of an interim receiver-manager under the *Business Corporations Act* is akin to the test for the issuance of an interlocutory injunction, i.e. the tripartite test set out in ***RJR-MacDonald Inc.***

[59] In essence, the difference between the parties on this issue is whether proof of irreparable harm is a necessary hurdle for an applicant requesting the relief requested here.

[60] In my view, the respondents are more nearly correct on this issue than is the applicant: as the applicant himself recognizes, this court has, in ***MTM Commercial Trust***, noted with approval the decision in *Anderson v Hunking* which stated, among other things, that "the test for the appointment of a receiver is comparable to the test for injunctive relief". Indeed, it may be useful to quote from that decision more extensively:

> 15 Section 101 of the Courts of Justice Act provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:

(a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudges the conduct of a litigant, and should be granted sparingly: Fisher Investments Ltd. v. Nusbaum (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
(b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (Trustee of) (1987), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);
(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: 1468121 Ontario Limited v. 663789 Ontario Ltd., [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to Royal Bank v. Chongsim Investments Ltd. (1997), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);
(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: Bank of Nova Scotia v. Freure Village of Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);
(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
(ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude - evidence of irreparable harm must be clear and not speculative: Syntex Inc. v. Novopharm Ltd. (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);
(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See 1754765 Ontario Inc. v. 2069380 Ontario Inc. (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: Loblaw Brands Ltd. v. Thornton (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.).

(Emphasis added)

[61] However, I don't disagree with the applicant's overall position concerning the applicable test, assuming that that position includes acceptance that irreparable harm must usually be established. Nor would I disagree with the applicant's overall position assuming that the position recognized that the test under the *Judicature Act* is not markedly different from that which applies under the *Business Corporations Act*: in my view, since the specific provisions of

the *Business Corporations Act* overtake the general provisions of the *Judicature Act* where the request is for the appointment of an interim receiver of a corporation.

[62] I have concluded that requiring an applicant for the appointment of a receiver-manager of a business corporation to satisfy each of the requirements the tripartite test may, in some exceptional circumstances, be relaxed. Along with Clackson J., and recognizing that the application in the Ontario case related "only" to an interim order "prohibiting the respondents from proceeding with the proposed purchase transaction with Luna Tech without obtaining shareholder approvals as set out in the USA and an interim order prohibiting the respondents from continuing to operate the business and manufacturing facility of Luna Tech pending the closing of the Luna Tech transaction and requiring them to immediately cease all such activity and to remove any and all of their assets from the Luna Tech facility" rather than to the more comprehensive remedy of appointment of an interim receiver-manager, I endorse the view of Pepall J. in *Le Maitre Ltd. v Segeren:*

> 30 It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty in the law. As such, typically, a moving party should not expect to obtain interlocutory injunctive relief unless it is able to successfully address the factors to be considered on such a motion. That said, there may be some circumstances where interim relief pursuant to section 248(3) is merited absent all of the traditional considerations associated with an interlocutory injunction. The dictates of fairness may be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages. In my view, such an approach is consistent with the broad nature of the oppression remedy, the language of section 248(3), and with cases such as Deluce Holdings Inc. v. Air Canada,10 M. v. H.,11 UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.,12 Ellins v. Coventree13 and RV&S Ltd. v. Aiolos Inc.14
>
> (Emphasis added)

[63] I note that two relatively recent Quebec Court of Appeal decisions, ***Nicolas*** and ***176283 Canada Inc.***, have usefully emphasized that the situations in which the "dictates of fairness are so overwhelming" that the traditional tripartite test can be ignored will be few and far between.

[64] In order to provide as straightforward as possible an expression of the legal test applicable here, I would slightly reframe the test in this way: An interlocutory application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation, such as Alberta's *Business Corporations Act*, or the general equitable jurisdiction of a court, such as under Alberta's *Judicature Act,* brought by a person who is not a security holder who is the beneficiary of an instrument which authorizes the appointment of a receiver on the default of the creditor is an application for an extraordinary remedy which should only be granted cautiously and sparingly. Generally, the applicant for such a remedy must satisfy the tripartite test for obtaining an interlocutory injunction: it must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief

is not granted, and that the balance of convenience favours the granting of the relief. Exceptionally, the dictates of fairness may be so overwhelming that interim relief is justified even where one or more terms of the tripartite test have not been met.

[65] In coming to the above-noted formulation of the test, I begin with the view that the fact that what is requested in interlocutory relief, i.e. relief without hearing the substantive application on the merits, is a key factor which cannot be ignored.

[66] Next, I emphasize that the remedy requested by the applicant is an important component of the test which the applicant has to meet: what must be proved in order to obtain the appointment of an inspector can, in my view, differ from what is necessary to obtain the appointment of a receiver-manager. Indeed, because the role of an Inspector is so markedly different from that of a receiver-manager, the evidence required for the appointment of an Inspector can legitimately, as Lee J.'s decision in this very case has already demonstrated, be materially less than the evidence required for the appointment of a receiver-manager.

[67] Nor, in my view, should a court generally explore on its own whether a remedy set out in s. 242(3) other than the remedy requested by the applicant should be awarded: the parties opposite only have notice of, and can only be expected to respond to, a specific application. It would be unfair to the respondents to consider granting relief which had not, at least impliedly, been requested. Moreover, if a court were, for example, to appoint a Monitor where an applicant had requested the appointment of a receiver-manager, the court might only be imposing an onerous expense without any commensurate benefit on the applicant.

[68] It is true that, in ***HSBC Capital Canada Inc.***, the court described the test under then s. 234 of the Business Corporations Act as "a strong *prima facie* case": para. 44. There was no consideration in that case of irreparable harm or of the balance of convenience. However, to my mind a crucial difference between the situation in that case and the one here is that, in that case, the actual relief requested was "only" the appointment of an Inspector. In other words, the relief that was granted in that case was exactly the relief which has already been granted in this case prior to the bringing of this application. The decision in that case cannot, therefore, serve as justification for the appointment of an interim receiver-manager in this case. The difference is that the applicants now want additional relief - the appointment on an interim basis of a receiver-manager, and the question is whether the same test that applies to the appointment, on an interim basis, of an inspector also governs the appointment of an interim receiver-manager. In my view, the answer is no.

[69] In concluding that the nature of the relief requested is a factor in determining the test that must be met, I also take comfort in McDonald J.'s decision in ***Citibank Can.***, where the court again referred to *Bennett* as authoritative, but added the following at para. 31:

> In the present case, I think that, again bearing in mind that the limited order which I intend to make is only to preserve the rents and prevent the sale of the property by Burnco for taxes, the order will not irreparably harm the interests of the defendants.

(Emphasis added)

[70] Similarly, in ***Leggat***, a recent Ontario court decision, Coats J.outlined the varying circumstances which must be taken into account in determining what test the applicant must meet to justify the relief:

> 24 The Respondents have filed several cases with respect to the test to be applied for interim relief. In my view, none of these cases are of assistance in the determination of the issues before me. In 1384034 Alberta Ltd. v. 1180263 Alberta Ltd, 2011 ABQB 599, the Court granted some interim relief, including access to financial statements of the corporation consisting of weekly accounting reports and monthly financial statements. No test for interim relief was articulated. In Dee Ferraro Ltd. v. Pellizzari, 2010 ONSC 3013, again no test for interim access to financial records was set out. On a short motion list it was not possible to make such a determination. In Padda v. 2074874 Ontario Inc., 2010 ONSC 2872, the interim relief requested was the appointment of a receiver. This is completely different than a request for a declaration enforcing a statutory right to access to books and records. I do note that in Padda v. 2074874 at para. 20 it is clear that Justice Gray had ordered as a term of the previous adjournment that business records in the possession of either party were to be provided to the other party forthwith. In Le Maitre Ltd. v. Segeren, [2007] O.J. No. 2047 (SCJ) the interim relief sought was to restrain the Respondents from concluding a transaction. The relief sought before me is completely different. The Applicants are not seeking interim relief under the oppression remedy section at this stage of the proceeding. The Applicants are seeking a declaration permitting access to books and records, documents to which Mr. Leggat as a director has a statutory right to access. The relief is available under s. 247 of the CBCA and this issue easily lends itself to summary disposition. The primary issue before me is not in the nature of an injunction. In PADP Holdings Inc. v. Information Balance Inc., [2006] O.J. No. 5518 (O.S.C.), the primary interim relief sought was the reinstatement of employment and the standard test for injunctive relief was applied. Once again, the primary issue before me is not of an injunctive nature.

[71] In ***Paragon***, adopting a list established in *Bennett on Receiverships,* 2nd ed., the court approved some factors which a court may consider in determining whether it is appropriate to appoint a receiver. At least three points can be made in relation to that decision: first is that the reference to Bennett, which is undoubtedly useful, should be updated to the 3rd ed, 2011, where the comparable list is found starting at p. 156. There are a few additional comments made in the third edition which may be of interest here: the current edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder". From that perspective, the factor appears to be an example of what might not constitute irreparable damage. One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect

upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity". In reviewing the 18 factors currently mentioned in Bennett, I have concluded that each of those factors, other than factor 10 which emphasizes that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly and part of factor 18 which refers to the principles of equity, can be seen as a particularization of one of the three branches of the tripartite test; factor 10 and part of factor 18, while not part of the tripartite test constitute the often only implied basis for granting equitable relief such an the appointment of an interlocutory receiver. As to the remainder of the factors, irreparable harm is not only mentioned as the first factor, but is also explicitly addressed in factors 2 and 5. The balance of convenience is not only an explicit factor on its own, but also constitutes the substance of factors 11, 12, 14, 15, 16 and 17.

[72] Second, it must be noted that, in ***Paragon***, the application before Romaine J. was brought by a security holder in reliance on its explicit right in the security documents to have a receiver appointed, a situation which does not apply here. Bennett emphasizes that, where a security holder's instrument provides for the appointment of a receiver, the security holder is *prima facie* entitled to that relief on proof of the required default.

[73] Third, Bennett does address the type of situation which has arisen here, i.e. one where the applicant is not a security holder relying on an instrument. At page 159 of the third edition, the learned author states:

> If the creditor who applies for the appointment of a receiver is neither a judgment creditor nor a secured creditor, the court will be more cautious in reviewing the factors listed above as they may not readily apply. As has been pointed out in case law, the appointment of a receiver is intrusive and can have disastrous effects on the debtor. The creditor must show that there is a serious issue to be tried, that irreparable harm will occur if an appointment is not made, and that the balance of convenience must be in the creditor's favour. In effect, the court focuses on the test set out in *RJR-MacDonald Inc. v Canada (Attorney General).*

[74] The reference at p. 159 to "creditor" can, in light of the case law, for example *Segeren* which is discussed herein, apply to a person with Mr. Murphy's status. This conclusion does, however, raise another issue: the reference in the Bennett text at the locations indicated above refer essentially to the appointment of a receiver at the request of a security holder. Indeed, most of that text deals with the security holder situation. However, some comments about the appointment of a receiver under business corporations legislation can be found commencing at p. 823 of the text. In dealing with the grounds of appointment of a receiver under business corporations legislation, the text states: " The test . . . requires the applicant to have a strong *prima facie* case but not to the same degree as in the test for a *Mareva* injunction. Much of the case law relating to situations where a liquidator would be appointed can be considered in an

application under section 241 (of the *Canada business Corporations Act*). For example, 'deadlock companies' may be considered unfairly prejudicial to each side, such that a court may appoint a receiver for the protection of all parties." There is no mention at that point in the text of the ***BCE*** oppression decision of the Supreme Court; indeed, it might be fairly said that the Bennett text does not focus on receiverships under business corporations legislation.

[75] In ***Kumra***, a similar, albeit shortened, set of Bennett factors is set out at para. 61.

[76] The decision of our Court of Appeal in ***Chow*** merely confirms the appointment of a receiver-manager without analysis of the justification for that appointment because justification was not necessary in the appeal decision. Similarly, the decision in ***Alberta's B.E.S.T. Inc.*** is not of assistance in determining the appropriate test because that decision does not deal with the appointment of a receiver-manager and that decision relies on a decision of our court in a case management situation where the case manager ordered 5 representative claims to be tried - a situation which is in no way comparable to the situation here.

[77] The legal analysis in the ***Such*** decision on which the applicant relies heavily has been overtaken, so far as the legal content of oppression is concerned, by the Supreme Court of Canada decision in ***BCE***. Insofar as the interlocutory nature of the remedy is concerned, the judge in that case did not analyse the requirements for obtaining an interlocutory remedy; it seems likely, given the analysis that was made, that the judge merely came to the conclusion that, in contemporary terms, the dictates of fairness were overwhelming. In other words, that decision is important insofar as it is fact-driven, not for the legal analysis of the remedies available.

[78] In my view, in light of the evidence in this particular case which will be reviewed shortly, it is not necessary to determine whether or not the existence of deadlock is a sufficient basis for the appointment of an interim receiver-manager if the tripartite test cannot be satisfied.

[79] Finally, I note that - for reasons that are obvious - an undertaking in damages is typically required on applications for interlocutory injunctions in commercial matters. I agree with Romaine J's approach in ***MTM Commercial Trust*** that it is equally useful to establish such a standard with respect to the interim application for a receiver-manager in a corporate context.

5. How does the test apply in the circumstances here?

[80] Before commencing an analysis of each branch of the tripartite test and of the dictates of fairness in the situation here, I remind myself that the remedy requested is equitable relief, in other words that the court has a discretion to grant the relief requested - rather than an obligation to grant the relief upon proof of the underlying requirements - although that discretion must, of course, be exercised judicially. I also remind myself that the relief requested here is interlocutory in nature, i.e. it is requested prior to the trial of highly contested factual issues.

a) The tripartite test

(i) Is there a serious issue to be tried?

[81] There are two main issues that must be tried here: has Mr. Murphy been oppressed by the respondents in the way in which they have conducted the CCS business and has he been oppressed by the respondents in the way in which the share register and corporate documents have been executed..

[82] All parties agree that there are serious issues to be tried.

[83] The point of this branch of the test is to weed out applicants for interlocutory relief who don't have a serious claim to the final relief which they are seeking. This case is somewhat unusual in that, although it is clear that Mr. Murphy has serious grievances which must be explored relating to the way in which his multi-million dollar investment is being managed, it is equally clear that the respondents have serious grievances which must be explored relating to the way in which the corporate structure is being used. The application is ironic: Mr. Murphy complains, essentially, about the lack of record keeping by Margaret Cahill and her management, whereas Margaret Cahill complains that Mr. Murphy refuses to recognize the corporate records which are extant.

[84] What is also clear is that this is not a case like ***Seymour Resources Ltd.,*** cited by the applicant, where the court is able to make determinations on the basis of affidavit evidence. On the contrary, the affidavit evidence here is highly contested.

[85] As explained above, in my opinion contemporary Canadian corporate law does not suggest that an applicant who establishes a strong *prima facie* case of oppression can expect that a court will grant the request for the appointment of an interim receiver-manager. On the contrary, for the reasons given above, I am of the view that the real test is, on the one hand, a lesser one than the one advanced by the applicant: an applicant need only prove that there is a serious issue to be tried, not that the applicant need prove a strong *prima facie* case of oppression. On the other hand, however, the real test is more onerous than the one advocated by the applicant: in addition to the serious issue branch, an applicant must also prove irreparable harm and the balance of convenience.

[86] The applicant has greatly emphasized the evidence which he asserts constitutes a strong *prima facie* case of oppression. Because of the view which I have taken of the applicable law, I will not exhaustively review the applicant's argument in support of his strong *prima facie* case argument. As I have said, Mr. Murphy has amply established that there are serious oppression issues to be tried. Really, no more needs to be said with respect to the first branch of the tripartite test. Nevertheless, I will add that all of the evidence advanced by Mr. Murphy in relation to the establishment of oppression - the failing to hold formal shareholder meetings, the failure to provide information, the loss of money, the misuse of corporate assets, the way in which private residences were acquired, the payment of professional fees which may not relate to corporate business, incurring penalties for late payment of taxes, shoebox accounting generally, etc., etc. - does not constitute in the circumstances here, a strong *prima facie* case of oppression. Rather, in light not only of the affidavit evidence provided by the respondents but

also the comments of the Inspector with respect to the Inspector's assessment of the respondents' responses, the court is left with only the realization that the oppression issue must be tried because there are serious credibility issues on both sides. To take one small example: Mr. Murphy complains about his inability to get financial information about the companies. However, he does not acknowledge the fact that he originally was content to receive only the barest possible information about the operation of the companies and that when his change of attitude arose he often made it impossible for the shareholders to act and for there to be effective interaction between the directors. To take another small example: even if it were true that the companies initially paid for some expenses that were later properly characterized as personal rather than corporate expenses, the initial recording of expenses as corporate does not, by itself, constitute *prima facie* evidence of oppression. It only constitutes evidence of possible oppression which must be tried.

[87] In the end, however, having recognized that there are serious issues to be tried, Mr. Murphy cannot expect to receive the relief which he seeks unless he satisfies the remaining two branches of the tripartite test.

(ii) Will Mr. Murphy, or the Trust, suffer irreparable consequences if an interim receiver-manager is not appointed?

[88] Mr. Murphy argues that he and the trust are at risk of irreparable harm if an interim receiver-manager is not appointed.

[89] I cannot accept that argument.

[90] The first aspect of this issue is the risk of need for immediate corporate action. No such need is apparent on this application. The companies have neither initiated actions nor are being compelled to take action in the relatively near future, and certainly not before the triable issues could be fully heard on their merits.

[91] In this context, I note that the applicant has complained of the lease proposal authorized by Margaret Cahill in relation to some of the lands owned by the companies. The applicant strongly objected to the leasing initiative, even though he placed Margaret Cahill in charge of the day to day operation of the companies, even though the leasing of the property would presumably conform to the overall objective when the applicant first invested money in the Edmonton properties, and even though the applicant refuses to take the steps set out in the USA to resolve disputes between himself and Margaret because he denies the validity of the USA which he appears to have signed. At his request, this leasing initiative has now been abandoned. Nothing of importance is therefore on the horizon in terms of the need for corporate decision making.

[92] The second aspect of this issue is the risk of financial loss if the relief requested is not granted. Mr. Murphy has not established that he or the Trust will suffer irreparable financial harm unless an interim receiver-manager is appointed. In coming to that conclusion, I rely on the following:

- Mr. Murphy's objective in funding the Edmonton investment is disputed. As strange as it may appear, it may be that Mr. Murphy was not concerned with an operating profit from the salvage business but was, instead, intent upon making a profit as a result of the increase in the value of the real property in which he invested. The evidence available on this application is not overwhelming on one side or the other of the objective issue. On the one hand, Mr. Murphy put his older sister who had no experience in the management of an operating salvage business in charge of the day to day operations of the business and invested heavily in land, but did not invest heavily in operating capital. On the other hand, Mr. Murphy did invest in acquiring machinery presumably for the better operation of the business. In any event, however, the opinion of the Inspector is that the business outlook for the companies is at least as dependent on the actions of Mr. Murphy as on the actions of Ms. Cahill. For example, the problem identified at para. 22(b) of the Second Report is, as to the first half of the sentence, something which may be attributable in part to Ms. Cahill, but, as to the second half of the sentence, is attributable to Mr. Murphy;

- the various real property appraisals provided by the parties establish that, even using the lowest appraisals, the lands have appreciated considerably in value since the date of investment. Indeed, an unsolicited offer for the purchase of one of the three property groups establishes that the appraisals are, generally, reliable; had Mr. Murphy accepted the offer for the one property, the companies would have recovered a little over half of the original investment. There is no suggestion in any of the materials before me that the land values are likely to decrease in the foreseeable future;

- given the increase in the value of the property owned by the companies, and the apparent equity interest of Margaret Cahill as shown on the face of documents apparently executed by Mr. Murphy, Ms. Cahill's equity stake in the companies is high enough that, if it were eventually found that she has caused financial harm to the companies, the damages found against her could be offset from her equity interest. Mr. Murphy suggests that an analysis of this sort is tantamount to condoning theft from the company; with respect, I disagree. I don't disagree with the principle that theft should not be condoned merely because the thief has the financial resources to repay the theft; the whole of the criminal law relating to theft and fraud makes that abundantly clear. The point on which I disagree is whether theft has been proved here. The evidence available on this application does not establish theft by Ms. Cahill from the company. I accept that the salvage business is a cash business and that such a business must, therefore, have adequate cash management systems and that this group of companies did not have such adequate systems. Whether that was due to ineptitude or lack of operating capital is not yet clear. Whether the vulnerability of the system to material misappropriation in fact came to pass is one of the questions of fact which remains to be determined.

[93] In summary, therefore, I conclude that Mr. Murphy has not established that he and/or the Trust will suffer irreparable harm if an interim receiver-manager is not appointed.

(iii) Does the balance of convenience favour the appointment of an interim receiver-manager?

[94] The balance of convenience does not favour the appointment of an interim receiver-manager. In coming to this conclusion, I rely on the following:

- the appointment of a receiver-manager would deal only with the management concerns raised by Mr. Murphy; it would not deal with the corporate structure concerns of the Cahills. Moreover, the information before the court on this application is that Mr. Murphy has access to considerable financial resources as established not only by the size of his initial investment in the CCS Group, but also by the indemnity agreement which he has made with the former employee of the CCS Group. In comparison, although the evidence on this application is that Ms. Cahill has clear title to the home in which she resides, she has no source of income other than the full time work she has done for the CCS Group since 2006. If Mr. Murphy were to be successful in obtaining the appointment of a receiver-manager, that official might conceivably terminate both Ms. Cahill's employment and that of her son Chris Cahill Jr. While Mr. Murphy would then have unimpaired resources to deal with the corporate structure dispute, the Cahills would find themselves with minimal resources with which to advance their position. Even though the Cahills have executed documents in support of their position, without significant financial resources to maintain their position in legal proceedings, they might not be financially able to put forward their best position;

- at para. 36 of the Inspector's Third Report, there is a comment about the financial position of the CCS Group. The exact words used by the Inspector are not reproduced here for the privacy concerns alluded to earlier. I accept the Inspector's assessment of the financial position of the CCS Group with respect to its ongoing operations; indeed, I am of the view that all of the information provided to the Inspector amply supports the Inspector's conclusion. It is true that an interim receiver-manager could do many things the Inspector cannot do. However, the appointment of a receiver-manager would not solve the crucial problem of the CCS Group which is the resolution of the dispute about the corporate structure;

[95] In summary with respect to the tripartite test, although Mr. Murphy has satisfied the first branch of the test, he has failed to satisfy the remaining two branches.

b) The equitable issues

[96] As indicated above, I am of the view that, in addition to the tripartite test, a court which is asked to appoint an interim receiver-manager for a corporation must also consider the equities, and not only the narrow legalities, of the situation. However, in my view the case law establishes that, with the exception of the potential relief from compliance with the tripartite test arising out of the application of equitable principles, the general approach to the appointment of a receiver-manager of a corporation under the provisions of the *Judicature Act* are, generally, the same as those which apply to the granting of such relief under corporate legislation.

[97] I accept that another way of referring to the equitable issues would be to say that where the evidence of oppression is overwhelming, an applicant for relief in Mr. Murphy's position need not satisfy the tripartite test.

(i) Are the dictates of fairness so overwhelming that they require the appointment of a receiver-manager?

[98] In my view, the dictates of fairness are not so overwhelming in the circumstances here that they compensate for Mr. Murphy's inability to satisfy the last two branches of the tripartite test.

[99] In coming to that conclusion, I have taken the following into account:

- the reasonable expectations of the parties would not be served by the appointment of an interim receiver-manager. When Mr. Murphy appointed Ms. Cahill as the day to day manager of the CCS Group, he was aware of her lack of business experience. Since there is no evidence that, under Ms. Cahill's management, the CCS Group abandoned or modified the internal controls that were in place when Mr. Murphy acquired the businesses and there is no evidence that Mr. Murphy provided funding to improve the internal controls that were practicable given the operating structure at the time of the acquisition, it is not reasonable for Mr. Murphy to expect that Ms. Cahill would prove to be a sufficiently sophisticated manager to be able to deal adequately with an under-funded operation;

- the only deadlock which has arisen in the circumstances here has been created by Mr. Murphy. The executed documents relating to the corporate structure provide a mechanism for resolving deadlock - the decision of an arbitrator. It would be unfair for Mr. Murphy to both refuse to comply with executed documents which provide a mechanism for dealing with deadlock and at the same time to insist on receiving the benefit of a court order based on deadlock which he has created;

(ii) Timing

[100] Finally, I note that the applicant concedes that he could be ready for trial almost immediately. The respondents agree that they are also virtually ready for trial. This straightforward admission by Mr. Murphy attracts the application of the following commentary made by Sharpe J. in his authoritative text as reproduced in ***Connolly***:

> 2.110 Ideally, the problem could be avoided were it possible to devise procedures to provide for immediate final resolution of such cases on the merits. However, in the absence of immediate and final resolution, the task of the court is to balance the risk of harm to the defendant, inherent in granting remedial relief before the merits of the dispute can be fully explored, against the risk that the plaintiff's rights will be significantly impaired in the time awaiting the trial.

[101] Here, the fact that all parties agree that they can be ready for trial in very short order is a strong factor militating against the granting of interlocutory relief where there is no immediate danger to the applicant's interests and where the facts are so hotly contested that only a trial can safely resolve the contested issues.

[102] In summary, therefore, the dictates of fairness are not so overwhelming in the circumstances here that they relieve Mr. Murphy with the obligation to satisfy the second and third branches of the tripartite test.

6. Costs

[103] If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

Heard on the 4th, 5th and 6th days of June, the 22nd day of July and the 6th day of August, 2013.
Dated at the City of Edmonton, Alberta this 15th day of August, 2013.

J.B. Veit
J.C.Q.B.A.

Appearances:

Sandeep K. Dhir, and Lindsey E. Miller, Field LLP
for the Applicants, Gerald Murphy and
Gerald Murphy's Children's Parallel Life Interest Settlement Trust

Rostyk Sadownik, Wheatley Sadownik
for the Respondent, Margaret Cahill

Terrence Warner, and Lesley M. Akst, Miller Thomson LLP
for the Respondent, Christopher Cahill, Sr.

M.T. Coombs, and D.R. Peskett, Brownlee LLP
for the Inspector, BDO Canada Ltd.

Appendix A

Sections 242 and 243 of Alberta's *Business Corporations Act* read as follows:

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting leave to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

Court approval of stay, dismissal, discontinuance or settlement

243(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 215, 241 or 242.

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given on any terms the Court thinks fit and, if the Court determines that the interests of any complainant may be substantially affected by the stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

(4) In an application made or an action brought or intervened in under this Part, the Court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for the interim costs on final disposition of the application or action.

Section 13 of Alberta's *Judicature Act* reads as follows; Mr. Murphy relies on 13(2).:

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

TAB 2

COURT OF APPEAL FOR ONTARIO

CITATION: Akagi v. Synergy Group (2000) Inc., 2015 ONCA 368
DATE: 20150522
DOCKET: C57582, C59494, C59496, C59497, C59498, C59499, C59500, C59508, C59509, C59510, C59511

Simmons, Blair and Juriansz JJ.A.

BETWEEN

Trent Akagi

Applicant
(Respondent)

and

Synergy Group (2000) Inc. (aka Synergy Group Inc., Synergy Group 2000 Inc., The Synergy Group 2000 Inc., The Synergy Group, Inc., (2000), The Synergy Group Incorporated, The Synergy Group 2000 Incorporated) and Integrated Business Concepts Inc.

Respondents
(Appellants)

J. Lisus and J. Renihan, for the appellants, Student Housing Canada and R.V. Inc.

J. Spotswood and W. McDowell, for the appellants, Integrated Business Concepts Inc. and Vincent Villanti

D. Magisano and S. Puddister, for the appellant, Ravendra Chaudhary

M. Katzman, for the appellants, Synergy Group (2000) Inc., Shane Smith, Nadine Theresa Smith, David Prentice, and Jean Lucien Breau and 1893700 Ontario Limited.

J. Leon and R. Promislow, for the respondent, J.P. Graci & Associates (the court appointed receiver)

T. Corsianos, for the respondent, Trent Akagi

Heard: December 12, 2014

On appeal from the orders of Justice Colin Campbell of the Superior Court of Justice, dated June 14, 2013, June 24, 2013, June 28, 2013, August 2, 2013, and September 16, 2013.

R.A. Blair J.A.:

OVERVIEW

[1] The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course.

[2] Mr. Akagi contributed funds to a tax program, marketed and sold by the Synergy Group. It was supposed to generate tax loss allocations for him, but did not. He sued Synergy Group (2000) Inc. ("Synergy") and certain individuals associated with it for fraud and obtained default judgment in the amount of approximately $137,000. On June 14, 2013, Mr. Akagi applied for, and obtained, an *ex parte* order appointing a receiver over all assets, undertakings and property of Synergy and an additional company, Integrated Business Concepts Inc. ("IBC").

[3] The primary evidence in support of the application consisted of a three-page affidavit sworn by Mr. Akagi and copies of three affidavits from representatives of the Canadian Revenue Agency (the "CRA"). The representatives' affidavits

outlined the details of a CRA investigation into the tax loss allocation scheme and indicated that, besides Mr. Akagi, there may be as many as 3800 other investors who were defrauded. The materials did not disclose that the CRA investigation had been terminated in February 2013 – some four months before Mr. Agaki brought the *ex parte* application.

[4] Subsequently, through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities (including authorizing the registration of certificates of pending litigation against their properties). None of the additional targets was a party to the receivership proceeding, only three had any connection to the underlying Akagi action, and only two were actually judgment debtors.

[5] On September 16, 2013, the appellants moved before the application judge in a "come-back proceeding" to set aside the receivership orders. Their application was dismissed. They now appeal from the September 16 order and the previous *ex parte* orders.

[6] All of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Accordingly, the appeal does not involve issues that

may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor does the appeal concern a class proceeding or other form of representative action.

[7] Mr. Akagi is an unsecured judgment creditor. However, it is apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity. It was intended to empower the Receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond Mr. Akagi – although to what end is unclear, as there is no pending or intended proceeding on behalf of those investors.

[8] For the reasons that follow, I would allow the appeal and set aside all of the contested orders.

FACTUAL BACKGROUND

The Tax Loss Allocation Scheme

[9] Mr. Akagi invested more than $100,000 through Synergy in what he understood were small businesses managed by IBC that would generate legitimate business losses. Synergy's "Tax Reduction Strategy" program was misrepresented to him as a means of achieving substantial tax savings through the allocation to him of his proportionate share of those losses.

[10] Mr. Akagi made an initial investment of $20,000 in November 2006. He received documentary confirmation: that he and Synergy agreed "to explore alternative income tax strategies by purchasing units in small to medium businesses"; that Synergy, as Transfer Agent, was to act as liaison between Mr. Akagi and IBC "to facilitate the placement of capital into...small and medium sized, privately owned businesses"; and that "IBC agree[ed] to execute the purchase on behalf of the Purchaser, provide complete documentation to support the purchase and any related tax benefit and provide all necessary follow-up documentation and service in the event that [the CRA] requests substantiating proof of Purchaser's Participation and any resulting Income Tax Deduction Claims."

[11] In March 2007, Mr. Akagi received a documentary package from Synergy for the purposes of preparing his 2006 tax returns. The business entity in which he had purportedly invested was said to have suffered a total loss of $164,500, of which his proportionate share was $104,000. Mr. Akagi deducted that amount and received a tax credit of $27,262.10.

[12] Having received that benefit, Mr. Akagi invested a further $90,000 with Synergy for the purposes of his 2007 taxation year. He received the same type of documentary confirmation. At the end of February 2008, he received a letter from an entity known as the International Business Consultants Association

("IBCA") enclosing a cheque in the amount of $248.78, purportedly representing his share of IBCA's profits for the 2007 year.

[13] The honeymoon was short-lived, however. On March 19, 2008, Mr. Akagi received a letter from the CRA stating that an audit was being conducted on IBC with respect to the 2006 taxation year. A few days later, Synergy sent a letter advising Mr. Akagi that the CRA did not "approve of [Synergy's] Profit and Loss Business Development Program", and that Synergy would not be issuing tax forms for the 2007 tax year until it had cleared matters with the CRA. Mr. Akagi was given the option of filling in and returning a form to obtain a refund of his investment for 2007. Although he did so, his $90,000 investment was not returned.

[14] In December 2008, the CRA advised Mr. Akagi that it was questioning his loss claim for 2006 and that it was the position of CRA that the IBCA loss arrangement "constitutes a sham or sham transactions." In May 2009, Mr. Agaki received a Notice of Re-Assessment for the 2006 taxation year, completely disallowing his claimed business losses of $104,000. In the end, the CRA waived some penalties and interest, and Mr. Akagi repaid $54,842.58.

The Underlying Proceedings: The Akagi Action

[15] In August 2009, Mr. Akagi commenced an action against Synergy and four individuals connected with it – Shane Smith, David Prentice, Sandra Delahaye,

and Jean Lucien Breau (the "Akagi action"). Smith acted and held himself out as the president of Synergy. Prentice acted and held himself out as its vice-president. Delahaye, a chartered accountant, was the salesperson who sold the investment to Mr. Akagi. Breau, according to the corporate records, was the sole shareholder and director of Synergy.

[16] In the action, Mr. Akagi claimed $116,575.98 in damages, representing the monetary losses he had sustained as a result of what he alleged to be an unlawful conspiracy to defraud him. He also claimed punitive damages. The defendants were noted in default (except for Breau, who was never served), and Mr. Akagi moved, without further notice, for default judgment. In May 2010, Cullity J. granted default judgment, awarding Mr. Akagi the claimed compensatory damages plus $25,000 in punitive damages. He dismissed Mr. Agaki's claim for equitable tracing because he had failed to identify any fund or property in the pleadings to which the funds could be traced.

[17] Immediately upon learning of the default judgment, the defendants moved to set it aside. Justice Whitaker did so on September 3, 2010. His order was upheld on appeal, subject to the following conditions: (i) the defendants were to pay Mr. Akagi $15,000 in costs thrown away, plus $7,000 for his costs on appeal; and (ii) the defendants were to pay $60,000 to the credit of the action pending the outcome of the proceedings.

[18] The defendants complied with these conditions.

[19] Mr. Akagi subsequently moved for summary judgment against Synergy and the defendants Smith and Prentice.[1] On May 14, 2012, McEwen J. granted summary judgment in the amount of $90,000, representing Mr. Akagi's outstanding 2007 investment. However, McEwen J. declined to grant summary judgment on the claims for fraud and conspiracy to defraud on the basis that the defendants' materials raised triable issues on those claims. By agreement of the parties, the $60,000 earlier paid into court to the credit of the action remained in court and was not be applied to the $90,000 judgment.

[20] The saga continued, however. Mr. Akagi moved once again to strike the statements of defence of Synergy, Smith and Prentice, and for an order directing that the $60,000 be paid out to him in partial satisfaction of his $90,000 partial summary judgment. On October 5, 2012, Roberts J. granted that relief. On January 18, 2013, Roberts J. made a further order: (i) directing the Registrar to note Synergy, Smith and Prentice in default; and (ii) directing Mr. Akagi to proceed to trial to determine the issues left to be tried by McEwen J.

[21] Justice Chiappetta heard the undefended trial of the remaining issues and, on April 24, 2013 – on the basis of the fraud and conspiracy to defraud claims in the Akagi action – awarded Mr. Akagi $116,575.98 in compensatory damages,

[1] The defendant Breau was never served with the proceedings, and by the time of the summary judgment motion, the defendant Delahaye had made an assignment in bankruptcy.

$30,000 in punitive damages, and $17,000 in costs. On January 23, 2015, a different panel of this court dismissed the appeal from this judgment.

[22] I note here that the $90,000 sum awarded by McEwen J. is a component of the $116,575.98 compensatory damages awarded by Chiappeta J. In the end, Mr. Akagi's outstanding claim against Synergy, Smith and Prentice is approximately $182,000, consisting of: (i) $116,575.98 in compensatory damages; (ii) $30,000 in punitive damages; and (iii) $36,000 in costs. From this must be subtracted the $60,000 already paid, leaving a balance of approximately $122,000.

[23] It is this claim that spawned the sprawling receivership outlined below.

The Initial *Ex Parte* Receivership Application

[24] No steps appear to have been taken to effect recovery on the judgment. Nevertheless, on June 14, 2013 – less than two months after the judgment was granted – Mr. Akagi brought an *ex parte* application before the Commercial List in Toronto, seeking the appointment of J.P. Graci & Associates as Receiver of the assets, property and undertakings of Synergy and IBC (IBC had not been made a defendant in the Akagi action).

[25] In support of the initial application, Mr. Akagi filed a three-page affidavit characterizing himself as a victim of fraud perpetrated by Synergy, Smith and Prentice (as set out in the summary judgment materials before McEwen J.), and

as a judgment creditor of Synergy, Smith and Prentice (the "Debtors") as a result of Chiappetta J.'s judgment awarding him compensatory and punitive damages.

[26] In addition, without swearing as to his belief in the truth of their contents, Mr. Akagi attached three documents relating to an investigation by the CRA into the affairs of Synergy and IBC: (i) a copy of an Information to Obtain Production Order, presented by a CRA officer, Andrew Suga, to a judge five years earlier (in July 2008); (ii) a copy of an affidavit sworn three years earlier (on June 25, 2010) by a CRA officer, Sophie Carswell; and (iii) a copy of a second affidavit sworn by Ms. Carswell on March 2, 2012. Also attached, again without swearing as to his belief in the truth of their contents, were copies of three newspaper articles regarding the execution of search warrants by the RCMP on June 6, 2013 (in a matter unrelated to Mr. Akagi, but purporting to relate to Synergy and Smith).

[27] The thrust of the information contained in the CRA documents was that, at the time the documents were executed, the CRA was conducting a criminal investigation relating to Synergy and IBC's tax allocation program. In particular, CRA officials were investigating the affairs of Synergy, IBC, Smith, Prentice and Breau, as well as those of the appellants Vincent Villanti (the president of IBC) and Ravendra Chaudhary (a chartered accountant working with IBC and Villanti) and various other persons. The tax scheme (defined by Ms. Carswell as the "Tax Plan") was described as follows:

In the Tax Plan, arm's length individuals who purchased "units" as part of the Tax Plan have deducted certain losses in their 2004, 2005 and 2006 T1 individual income Tax Returns ("T1 Returns"), which they were led to believe were partnership losses validly deductible against other income. These losses purportedly originated from the operations of struggling small and medium sized enterprises ("Joint Venture Partners" or "JVPs" hereinafter) who contributed them to a pool of losses by way of signing Joint Venture Partnership Agreements with the Independent Business Consulting Association (hereinafter "IBCA"). No such losses are deductible in the T1 Returns of the Unit Purchasers.

The net result of the Alleged Offenders' activities is that:

a) Purchasers of units in the Tax Plan (hereinafter "Unit Purchasers") were defrauded of the money they had paid to the Allege Offenders, because what they received for the money paid was not deductible in their Income Tax Returns, contrary to what they were led to believe.

b) The Unit Purchasers claimed losses in their respective T1 Returns for the calendar years 2004, 2005 and 2006, resulting in the understatement of their income taxes payable to the Crown, and

c) The Alleged Offenders understated their income from their participation in the promotion and sale of the Tax Plan, thus understating the taxable income and consequent income tax thereon in their own respective income tax returns (corporate and individual) for the taxation years 2004, 2005 and 2006.

As a result of its findings in the investigation to date, the essence of the CRA's theory of the offences currently is that the individuals cited above as Alleged Offenders ... acting personally or through corporations or entities which they controlled, participated in the promotion and sale of the Tax Plan which the Affiant believes to be fraudulent because the overwhelming majority of JVPs' losses as shown on their financial statements were

> fraudulently inflated in arriving at the loss figures shown on the T2124 Statements of Business Activities issued by the Alleged Offenders to the Unit Purchases as part of the Tax Plan.

[28] The Suga Information to Obtain, referred to above, described a similar tax scheme, although in much greater detail.

[29] As noted, Mr. Akagi did not say what, if any, knowledge he had of the information contained in the Carswell and Suga material or that he believed in the truth of their contents. Nor did he or the Receiver – then or at any time during the subsequent *ex parte* applications discussed below – disclose that the CRA had terminated its investigation in February 2013, four months before the receivership application (albeit, as it later turned out, the RCMP was, at the same time, conducting a continuing investigation into the same alleged scheme).

[30] On the basis of this record, on June 14, 2013, the application judge granted the receivership order sought, stating in a brief four-line endorsement that he was "satisfied that the grounds for relief sought have been made out and that a Receiving Order [should] issue in the form filed." The Order was made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I shall refer to this Order as the "Initial Order".

[31] Mr. Akagi submits that "the application judge appointed the receiver for the purpose of investigating the Synergy Alternative Tax Investment Program *on behalf of all investors therein*, and not just on behalf of Mr. Akagi" (emphasis

added). However, the Initial Order makes no mention of the Synergy Alternative Tax Investment Program, much less of the power to investigate any such program. That said, the Receiver appears to have treated the Initial Order as entitling it to embark on such an inquiry, and at some point in the evolution of the receivership the application judge appears to have accepted that he had put an "investigative receivership" into place.

[32] What follows is a brief description of how the receivership evolved.

The Subsequent *Ex Parte* Expansions of the Receiver's Powers

June 24, 2013

[33] Just ten days after the Initial Order, the Receiver applied *ex parte* for expanded powers. It sought authorization to direct financial institutions to disclose information and documentation regarding payments and transfers of funds not only by Synergy and IBC (the only entities subject to the Initial Order), but also by or at the direction of an expanded list of targets: Independent Business Consulting Association, Independent Business Consultants Association, Integrated Business Consultants Association, 565819 Ontario Ltd., Vincent Villanti, Jean Breau, Larry Haliday, Joe Loshiavo, Shane Smith, David Prentice, Ravendra Kumar Chaudhary and Nadine Smith.

[34] The Receiver did not file a notice of motion, notice of application or a factum. The only additional material filed beyond that which informed the Initial Order

was the Receiver's First Report. In another brief endorsement, the application judge granted the order sought.

[35] As I shall explain later, it is at this point that the receivership truly began to embark on its impermissible voyage. The expanded order was sought on the premise that "[t]he Receivership concerns a tax scheme...described by Canada Revenue Agency", as set out in the excerpt from Ms. Carswell's affidavit, set out above. Based on CRA's documents, the "scheme" was described as involving 3,815 "victims", and the list of "Alleged Offenders" in Ms. Carswell's affidavit became the expanded target list outlined above.

June 28, 2013

[36] Still, the Receiver was not content.

[37] Four days later, on June 28, the matter was back before the application judge, again *ex parte* with no notice of motion or application, no further evidence and no factum. This time, there was not even an additional Receiver's Report. The Receiver sought a further expansion of its powers, authorizing it, amongst other things, to examine the financial account statements and related records in the hands of any financial institutions of the Debtors and IBC, as well as the others on the expanded target list. The enlarged authority was granted. In another brief endorsement the application judge stated that "[h]aving heard from

counsel [he was] satisfied the relief sought is in the circumstances [was] appropriate and so approved in terms of the draft order signed."

August 2, 2013

[38] On August 2, 2013 the Receiver obtained what can only be described as a breathtakingly broad extension of the Initial Order. Recall that the only judgment debtors of Mr. Akagi were – and are – Synergy, Smith and Prentice. The only respondents on the initial application – and the only entities made subject to the Initial Order – were Synergy and IBC. IBC is not, and never has been, a debtor of Mr. Akagi.

[39] Here is what happened leading up to August 2.

[40] On July 30, 2013, the Receiver e-mailed the application judge with a copy of its Second Report, dated that same date. On July 31, counsel for the Receiver appeared before the application judge, but there is nothing in the court file to indicate what submissions were made. On August 1, counsel for the Receiver e-mailed the application judge again, attaching a draft order that would become the August 2 Order. In the e-mail, counsel offered to make themselves available if the judge "would like a call to discuss the draft order." There is no record of any such discussion. On August 2, the application judge sent an e-mail to counsel for the Receiver, stating: "I hereby authorize the attached order to issue." No reasons were provided.

[41] Again, this order was sought and obtained *ex parte*, without any formal notice of motion or application, and without any evidence other than the filing of the Receiver's Second Report.

[42] The Second Report summarized the results of the Receiver's investigations after serving the June 24 and June 28 "Disclosure Orders" on various financial institutions. The information received included bank statements of a large number of individuals and corporations named in the earlier orders or in some way associated or affiliated with them. The Receiver's conclusion was "that the alleged offenders have set up a complex matrix of companies and bank accounts". It also identified certain properties said to be associated with the appellant Chaudhary and others, and certain information obtained from the appellants Smith and Prentice at their examinations in aid of execution held on July 26, 2013.

[43] What makes the reach of the August 2 Order breathtakingly broad is the following:

- It extended the Receiver's powers to include and apply to: a list of 43 additional individuals and entities identified in Schedule "A" to the Order; any affiliates of those individuals or entities (as defined in the *Ontario Business Corporations Act* ("OBCA")); any corporations or other entities directly or indirectly controlled by the individuals listed or of which they

were directors or officers; any corporation in respect of which the listed individuals were entitled to conduct financial transactions; and finally, any entity with a registered head office at the premises occupied by Synergy and IBC.

- The Schedule "A" list was inaccurately defined as comprising "Additional Debtors". Of those on the list, only Synergy, Smith and Prentice were debtors to Mr. Akagi.
- The Order contained sweeping injunctive provisions – operating on a worldwide scale – enjoining all of the 45 listed individuals and entities from dealing with their assets, property or undertakings, wherever located, in any way, and freezing their accounts by enjoining any financial institution served with the order from "disbursing, transferring or dealing with any funds or assets deposited in all [their] accounts".
- The Order authorized the Receiver to register certificates of pending litigation against the properties of not only the Debtors and IBC, but the 41 "Additional Debtors" listed in Schedule "A", despite no action or application having been commenced seeking such relief.[2] The Court's attention was not drawn to s. 103 of the *Courts of Justice Act*, which requires the

[2] The Receiver now concedes that an error was made in granting this authorization, but argues that the lands should remain encumbered in some other fashion.

commencement of an action claiming an interest in land as a condition to issuing a certificate of pending litigation.

- Not only did the Order freeze the accounts of the Debtors and the "Additional Debtors", it granted the Receiver a $500,000 borrowing charge against the frozen funds to fund the Receiver's activities.

[44] All of this evolved out of a receivership that could only have been granted in aid of execution of Mr. Akagi's outstanding judgment of, at most, approximately $122,000, against the three judgment Debtors – Synergy, Smith and Prentice. As noted above, Smith and Prentice were not even subject to the Initial Order, nor were they examined in aid of execution until July 26, 2013, more than a month *after* the Initial Order was made. Nor was there any evidence before the application judge on the initial application – or thereafter for that matter – indicating that Mr. Akagi had taken any steps to enforce his judgment or that his recovery was likely to be in any jeopardy. As far as the record shows, none of the Debtors or "Additional Debtors" is insolvent.

[45] I shall refer to the *ex parte* Orders of June 24, June 28 and August 2, 2013, as the "Subsequent Orders".

The September 16, 2013 "Come-back Hearing"

[46] Sometime after the August 2 Order was granted, the various appellants were notified of the Initial and Subsequent Orders. On August 14, 2013, they

applied to the application judge to have the orders set aside. On September 16, 2013, their requests were dealt with by way of a "come-back hearing", and dismissed for written reasons delivered that day. I shall refer to this Order as the "Come-Back Hearing Order".

[47] At the come-back hearing, the Receiver filed its Third, Fourth and Fifth Reports dated August 15, September 8 and September 16, 2013. Mr. Akagi filed a responding motion record, as did the appellants.

[48] The application judge dismissed the complaint that the Receiver had breached its obligations to the court and to the parties to make full disclosure, by failing to disclose the fact that the CRA had terminated its investigation several months before the application for the initial order. He was satisfied there was no lack of full disclosure. There was evidence on the June 14 application that the RCMP was investigating the matter and, while there was no specific evidence that the CRA had referred the matter to the RCMP, this was implicit in the reference to recent search warrant executions by the RCMP. The application judge concluded that there was "no suggestion that CRA [had] discontinued to pursue what is its concern, namely fraudulent activity in the sale of tax losses to investors which lacked reality."

[49] Secondly, the application judge rejected the appellants' argument that the materials filed did not satisfy the test for injunctive relief (as applied to interim

receivers) set out in *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, at paras. 47-48. He concluded:

> The second ground for setting aside namely, that the *RJR MacDonald* test was not met, does not in my view succeed on this material. It is conceded that there is a serious issue of fraud alleged and given the large number of investors (over 3800) of relatively small sums ($10-15,000) I conclude it was appropriate that there be an investigative Receiving Order issued. Otherwise many investors would not know of the potential fraud. The irreparable harm on the material clearly extends beyond Mr. Akagi and does extend to a great number of other investors who have not the resources to pursue to judgment as has Mr. Akagi who remains an unsatisfied judgment debtor.

[50] Thirdly, the application judge rejected the argument that the Initial and Subsequent Orders constituted execution before judgment, analogous to a *Mareva* injunction. In his view, the relief sought was simply a "freezing subject to further order in support of an ongoing investigation."

[51] Finally, after recognizing the "powerful and important intrusion" of a receivership order under s. 101 of the *Courts of Justice Act*, and acknowledging that the test for the appointment of a receiver was "comparable" to the test for interlocutory injunctive relief, the application judge concluded:

> Comparable does not mean precisely. This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands*

> *Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer the legitimate concerns of investors.

FINAL OR INTERLOCUTORY ORDER

[52] Counsel for Mr. Akagi advanced two arguments that he submits undermine this Court's jurisdiction to hear the current appeal.

[53] First, he argued that the orders under attack are interlocutory and therefore this Court does not have jurisdiction to deal with them. In the circumstances here, I disagree.

[54] The Initial Order was obtained on application. No relief was claimed other than the appointment of a receiver. There was nothing more to be disposed of once that relief was granted. In the context of the proceedings, it was not intended to be interim or interlocutory in nature pending the outcome of a proceeding involving Mr. Akagi or anyone else.

[55] Although Mr. Akagi's counsel refers to the orders as "separate receivership orders", the character of the Subsequent Orders is unclear because the Receiver did not file a notice of motion, notice of application or any formal record on any of the subsequent *ex parte* proceedings.

[56] In any event, they are subsumed in the September 16, 2013 Come-Back Hearing Order, which is a final order. It finally disposes of the receivership

issues between the parties to the Initial Order and between the Receiver and the numerous non-parties caught by the Subsequent Orders. There is no action or application in which any further rights will be determined. There will be no pleadings defining the issues and giving the appellants the opportunity to defend. This conclusion is consistent with decisions of this court, faced with similar circumstances, holding that a receivership order obtained by way of application is a final order from which an appeal lies directly to this Court: see e.g., *Illidge (Trustee of) v. St. James Securities* (2002), 60 O.R. (3d) 155 (C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267, 85 O.R. (3d) 81.

[57] Secondly, counsel for Mr. Akagi argued that a direct appeal to this court from the Initial and Subsequent Orders is inappropriate because the *Rules of Civil Procedure* provide for the steps to be taken to set aside an *ex parte* order. Again, I disagree. This argument overlooks the fact that the come-back hearing effectively provided that very procedure.

[58] For these reasons, an appeal lies to this Court from the Come-Back Hearing Order.

DISCUSSION AND ANALYSIS

[59] It will be apparent from the foregoing narration that, in my view, the receivership orders must be set aside. They stand on a fundamentally flawed premise and are unjustifiably overreaching in the powers they grant.

Procedurally, they call for at least a word of caution as well, although it is not necessary to dispose of the appeal on this basis in view of the more substantive issues raised by the orders. The procedural concerns arise out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure.

[60] I will return momentarily to these issues, and to the particulars of this case. First, however, it may be useful (i) to revisit the framework of this proceeding, and (ii) to comment briefly on the relatively new notion of an "investigative receiver" – so named for the powers the receiver is granted – as it begins to stride across the commercial law landscape.

The Framework of This Proceeding

[61] The Initial Order and Subsequent Orders were sought and obtained by relying on s. 101 of the *Courts of Justice Act.* Mr. Akagi is an unsecured judgment creditor with a judgment based on fraud.

[62] This is not the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order rather than by private appointment. Nor is it a case involving the appointment of a receiver under insolvency legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), or under the *Securities Act*, R.S.O. 1990, c. S.5 (where the court has the power to appoint a receiver to protect investors in certain circumstances).

As noted earlier, it is not a class proceeding or other form of representative action.

[63] This is a case where a judgment creditor seeks to use an unsatisfied judgment as an entrée to obtain a receivership in order to freeze the assets and investigate the affairs of not only the debtors, but also of a complex mix of related and not-so related entities and individuals. And to do so not to protect his own interests, but those of some 3800 other investors who may have been victims of a similar fraud, but who have not sought to assert a similar claim.

[64] This is made clear in the initial notice of application, both in the outline of the factual grounds for the receivership and in the summary of why Mr. Akagi said it was in the interests of justice that the Receiver be appointed. Ground 10 in the notice of application states:

> It is in the interests of justice that a Receiver be appointed over Synergy and IBC:
>
> (a) Judicial process will ensure that an independent court officer will control the process and address competing claims.
>
> (b) The Court appointed Receiver can investigate and work with authorities to locate and realize upon assets for the benefit of all creditors.
>
> (c) The complex business structure would make litigation by individuals untenable. The Court appointed Receiver can deal with such complexities on behalf of all victims.

> (d) The Court appointed Receiver can prevent further wasting of assets and help to preserve assets for the benefit of all victims/creditors.

"Investigative" or "Investigatory" Receiverships

[65] The idea of appointing a receiver or monitor with investigative powers – and sometimes, with only those powers – has emerged in recent years. This Court has not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. For the purposes of this appeal, it is not necessary that the contours of such an appointment be traced in a detailed manner. Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

[66] Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view – when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions – including even, in proper circumstances, the affairs of and transactions concerning related non-parties – will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*. See, for example, *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Gen. Div.), aff'd [1995] O.J. No. 1949

(Div.Ct.); *Udayan Pandya v. Courtney Wallis Simpson* (17 November 2005), Toronto, 05-CL-6159 (S.C.); *Century Services Inc. v. New World Engineering Corp.* (28 July 2006), Toronto, 06-CL-6558 (S.C.); *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (S.C.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living*, 2011 ONSC 4136 (S.C.), aff'd 2011 ONSC 4704 (Div. Ct.); *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101; *East Guardian SPC v. Mazur*, 2014 ONSC 6403; *236523 Ontario Inc. v. Nowack*, 2013 ONSC 7479 (relief denied); *Romspen Investment Corp. Hargate Properties Inc.*, 2011 ABQB 759.

[67] It goes without saying that the root principles governing the appointment of any receiver remain in play in this context, however, and in this respect, two "bookend" considerations, are particularly germane. On the one hand, the authority of the court to appoint a receiver under s. 101 of the *Courts of Justice Act* "where it appears...just or convenient to do so" is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, however, the appointment of a receiver is an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the

tension between these two considerations that defines the parameters of receivership orders in aid of execution.

[68] A review of some of the authorities referred to above will illustrate how these tensions have been resolved in the particular context of a receivership clothed with investigative powers.

Stroh v. Millers Cove Resources Inc.

[69] The first is *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Gen. Div.), aff'd [1995] O.J. No. 1949 (Div.Ct.). Because it involved an oppression remedy claim, the appointment of an inspector under the *OBCA* was an available option.[3] Justice Farley appointed a receiver to take control of the assets of a company and to investigate and conduct an independent review of certain self-dealing transactions by the company's majority shareholder, of which the company's directors were unaware. In affirming his decision, the Divisional Court

---

[3] Legislation governing the affairs of corporations provides for the appointment of an "an inspector" to carry out "an investigation" into the business and affairs of a corporation or its affiliates: see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), ss. 229-230; the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), s. 161. In general, this relief is available at the instance of a shareholder where it is apparent that the corporation's books and records are not properly kept or are inaccurate, or where there has been some deceit or oppressive conduct practiced against the shareholders: *Re Baker and Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38 (H.C.), at p. 39. Its purpose is to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position: *Pandora Select Partners, LP. v. Strategy Real Estate Investments*, [2007] O.J. No. 993 (S.C.), at para. 13. The court has broad powers to make any order it thinks fit, but, in particular, is empowered to appoint an inspector to conduct an investigation and to authorize the inspector to enter any premises in which the court is satisfied there might be relevant information, to examine anything and to make copies of any document or record found on the premises, and to require any persons to produce documents or records to the inspector. While this case does not concern this corporate statutory framework, the notion of a receiver with investigative powers appears to have been born in that context. Nothing in these reasons is meant to suggest that an investigative receiver is intended to supplant the appointment of an inspector under the relevant legislation.

underlined that "the main thrust" of the order was to ensure that the company's assets and arrangements "[could] be fully examined and considered so that future actions [could] then be planned": para. 7.

[70] It is important to note that in *Stroh* the defendant corporation was not an operating company and that Farley J. only granted the receivership remedy after giving counsel the opportunity to re-attend before him and make further submissions about whether the officer to be appointed should be a receiver/manager, a monitor, an inspector or something else. He ultimately concluded that the only way the investigation stood any chance of success (because of the secrecy of the majority shareholder and the power it exercised) was to appoint a receiver with the authority he granted.

[71] In other words, Farley J. carefully fashioned the remedy to meet the needs of the oppression remedy claimants in the proceeding.

Udayan Pandya v. Courtney Wallis Simpson and Century Services v. New World Engineering Corporation

[72] A decade later, Ground J. made a similar order in *Udayan Pandya v. Courtney Wallis Simpson* (17 November 2005), Toronto, 05-CL-6159 (S.C.), as did Morawetz J. in *Century Services Inc. v. New World Engineering Corporation* (28 July 2006), Toronto, 06-CL-6558 (S.C.). Both cases involved the appointment of a receiver for the primary purpose of monitoring and investigating the assets and affairs of defendants.

[73] As Morawetz J. reasoned in *Century Services,* the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation [could] be undertaken." No power was given to seize or freeze assets and the order was very specific that the receiver "shall not operate or unduly interfere with the business of the corporate defendants."

[74] In short, the focus was on investigating the affairs of *the defendants* in order to protect the rights of *the plaintiff*. That is, the relief granted was carefully designed to meet the needs of the particular proceeding itself (unlike here, where the investigative receivership reached numerous non-party "alleged offenders" unrelated to the underlying proceedings to protect the interests of thousands of unrelated, non-party "victims").

Loblaw Brands Ltd. v. Thornton and General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living

[75] It appears to have been D.M. Brown J. (as he then was) who adopted the terminology of an "investigative" or, as he called it, an "investigatory" receiver. As far as I can determine from the Canadian, American, British and other common law jurisprudence, his decisions in *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (S.C.), and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living*, 2011 ONSC 4136 (S.C.), aff'd 2011 ONSC 4704 (Div. Ct.), are the first to have recognized such a receiver as, in effect, a

specific class of receiver. Neither of these authorities assists the respondent in justifying the receivership as it evolved here, however.

[76] *Loblaw Brands* – a decision upon which the application judge relied – is not this case at all. It involved a fraud perpetrated against Loblaw by an employee (Thornton) who diverted about $4.2 million in supplier rebate payments from Loblaw to his own company (IBL).

[77] Prior to the appointment of the "investigatory receiver", Brown J. had granted a *Norwich Pharmacal*[4] order followed by a *Mareva* injunction against the assets of Thornton and IBL. Based on the investigation following those orders, Loblaw learned that IBL's bank account contained less than $44,000 and Thornton's less than $6,000. On the other hand, the accounts revealed outgoing transfers of over $900,000 for payments to various car dealerships, the purchase of a cottage, mortgage payments, home improvements and cash transfers to Thornton's son.

[78] Based on these facts, Brown J. appointed a receiver "to locate, investigate, and monitor" the property of Thornton and IBL and "to secure access for the Receiver to such books, record, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from

[4] That is, an order providing for discovery of a non-party prior to trial.

Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons": para. 17.

[79] In one sense, this was quite a broad order. However, *Loblaw Brands* is markedly different from the present case in a number of ways.

[80] First, the *Loblaw* receivership was grounded in necessity in relation to the collection of the defrauded funds by the claimant Loblaw: given the huge disparity between the amount of money diverted from Loblaw to IBL ($4.2 million) and the value of Thornton and IBL's known assets (approximately $50,000), Brown J. concluded that "without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized": para. 16. These circumstances do not apply here. Mr. Akagi is owed approximately $122,000. There is no evidence of any dramatic disparity between the assets of Synergy, Smith and Prentice (much less IBC) and the amount of the outstanding judgment. Nor is there any evidence that Mr. Akagi's right to recover on the judgment is in jeopardy.

[81] Secondly, the *Loblaw* receivership was very carefully tailored to preserve Loblaw's right to recover without providing the Receiver with overreaching powers to interfere with the rights of others. The *Loblaw* Receiver's mandate was "to locate, investigate and monitor" (para. 17); it was not empowered to seize and freeze, as was the Receiver here. Nor were the targeted individuals and entities whose assets were encumbered and affairs interfered with anywhere

nearly as wide-spread or tangentially associated with the parties to the proceeding as is the case here.

[82] Finally, the *Loblaw* receivership was also very carefully crafted to protect the interests of Loblaw alone. Here, however, the receivership is more concerned – if not entirely concerned – with protecting the interests of the 3800 other investors who are said to have been defrauded in the tax allocation scheme. The assets being chased in this receivership are not those needed to protect Mr. Akagi's interests at all; they relate to the interests of those 3800 unrelated, non-party individuals who may or may not find themselves in the same situation as Mr. Akagi.

[83] Nor does Brown J.'s decision in *General Electric* – a bankruptcy proceeding – provide a basis for justifying the orders here.

[84] *General Electric* involved four bankrupt companies and two related non-bankrupt companies that were part of a group of companies called the Liberty Group. The Liberty Group owned and operated a number of retirement homes. Prior to their bankruptcies, the four bankrupt companies defaulted on their secured obligations to General Electric. The Receiver subsequently assigned the companies into bankruptcy and became the trustee in bankruptcy under the BIA.

[85] In the course of the bankruptcy proceeding, it became apparent that, during the bankrupt companies' period of insolvency, there had been a series of

intercompany payments from them to the two related but solvent corporations under the Liberty Group umbrella: Liberty Assisted Living Inc. ("Liberty") and 729285 Ontario Limited ("729285"). Liberty had been the manager of the retirement homes and 729285 was a shareholder of the company that held all of the shares of the bankrupt companies. In addition, three retirement residences had been sold in the face of court orders prohibiting such sales.

[86] The trustee tried to obtain financial information regarding these transactions from the bankrupt companies and from Liberty and 729285. In spite of court orders requiring disclosure of the information and requiring the companies' officers to attend for examinations under s. 163 of the BIA, the information was either not provided or, if provided, was inconsistent, unreliable and misleading. Faced with this stonewalling, the trustee sought the appointment of an "investigative receiver" to investigate the affairs of Liberty and 729285.

[87] Justice Brown granted the order with respect to 729285, but declined to do so with respect to Liberty. He concluded there was a strong case that the bankrupt companies had made preference payments to 729285 while insolvent. Because the companies had provided unreliable and inconsistent information on their s. 163 examinations and had compounded that problem by making misrepresentations to the court about the true state of the transferred proceeds, he was satisfied, at para. 103, that:

> Those factors point[ed] to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729185's interest in any of the [funds] – whether they were in trust for others or whether the company enjoyed a beneficial interest in them – and, (c) to figure out the true state of the affairs regarding those to whom the [funds] were paid.

[88] With respect to Liberty, however, Brown declined to grant such an order. Since Liberty had managed the bankrupt companies, there were contract-based reasons for payments to and from the companies and there was no evidence that the proffered explanations were unreliable.

[89] Again, then, *General Electric* is a case where the investigative powers granted to the Receiver were carefully weighed and carefully tailored to protect the rights of the applicant in relation to the affairs of companies closely related to the bankrupt companies.

[90] Some consistent themes emerge from these authorities:

- The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.
- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric* (Div. Ct.), at para. 15. One authority

characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, 2014 ONSC 6403, at para. 75.

- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see e.g., *Loblaw Brands*, at para. 17; *Century Services*.
- Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

[91] An additional theme that is reflected in the authorities relates to the application of the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald*, at paras. 47-48. The *RJR-MacDonald* test requires the applicant to demonstrate: (i) that there is a serious issue to be tried;[5] (ii) that the creditor will suffer irreparable harm if the relief is not granted; and (iii) that the balance of convenience favours the creditor. The test is often applied where the receivership

[5] It is not necessary to comment here on the debate in the authorities as to whether it is necessary for a creditor seeking the appointment of an investigative receiver to demonstrate fraud. It is accepted in this case that there has been fraud; Mr. Akagi's judgment is based on that finding.

order is purely interlocutory and ancillary to the pursuit of other relief claimed – where it is, in effect, execution before judgment.

[92] Although the application judge applied the test at the time of the Comeback Hearing – concluding that it had been met here – I need not dwell on whether that was so, or on the role of *RJR-MacDonald* in the receivership context generally, for the purposes of this appeal. The Initial Order, Subsequent Orders, and Come-Back Hearing Order must be set aside in any event, in my view, for the reasons that follow.

The Investigative Receivership in This Case

[93] In spite of the positive features of investigative receivers, as set out above, there are risks as well. This appeal provides a case in point. The Receiver, in particular, took a useful concept and ran too far with it. In addition, a number of procedural safeguards were at least obscured in the dust of the chase.

The Procedural Issues

[94] Because of the substantive frailties undermining the receivership, it is not necessary to determine this appeal based on the procedural issues raised.[6] It bears noting, however, that if the matter had not proceeded through the numerous steps on an *ex parte* basis, as it did, it would have been less likely to have gone astray, as it did. The same may be said of the somewhat relaxed

---

[6] I will deal with the issues surrounding the authorization of certificates of pending litigation separately.

procedural approach taken to the proceedings. Had the normally salutary processes of the Commercial List – carefully designed to permit the parties to get to the merits of a dispute and resolve them in "real time" without trampling their procedural rights – not been permitted to become overly casual, as they did, the galloping nature of the receivership may well have been reined in.

[95] *Ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. As Penny J. noted recently in *Re CanaSea PetroGas Group Holdings Ltd.*, 2014 ONSC 6116, at para. 28, applicants are under "high obligations of candor and disclosure on an *ex parte* application."

[96] At best, the steps taken in pursuit of the orders here sailed very close to this line. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons: it is otherwise impossible to determine subsequently what was at issue and the basis for the order made. This is particularly so where the relief sought involves the extraordinary, *Mareva*-like nature of a receivership order, much less a receivership order of the sweep that emerged from these proceedings.

[97] Beyond the Receiver's failure to prepare any of the above-listed documents, the appellants place considerable emphasis on the Receiver's failure to disclose, during the *ex parte* steps in the proceeding, that the CRA had discontinued its investigation – on the particulars of which the applicant relied – in February 2013, several months before the initial receivership application was made. It was not until almost two weeks *after* the August 2 Order that the termination of the CRA investigation was first brought to the Court's attention, and even then, it was raised indirectly: in its Third Report, dated August 15, 2013, the Receiver confirmed that the CRA had referred its investigation to the RCMP.

[98] There was some indication in the materials filed when the Initial Order was sought, however, that the RCMP was also investigating the matter. Based on this – despite the absence of evidence that the CRA had referred the matter to the RCMP or that the CRA had itself discontinued its investigation – the application judge "was satisfied there was no lack of full disclosure."

[99] The application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard is entitled to deference. That said, in my view, the failure to disclose that the very investigation upon which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure.

The Substantive Issues

The "Roving Receivership"

[100] The fundamental flaw underlying the Initial and Subsequent Orders is the faulty premise that the Receiver could be appointed in these circumstances to carry out a broad, stand-alone, investigative inquiry – the civil equivalent of a criminal investigation or public inquiry – for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor. This flawed premise is compounded by the overreaching nature of the relief granted, namely, the authority to both: (i) investigate, without notice, the private financial affairs of a myriad of targets only indirectly, if at all, related to the defendants, as well as further potential targets far beyond the actual debtors and the need to protect Mr. Akagi's interests; and (ii) tie up and freeze the assets and property of those targets, again without notice, pending the termination of the receivership.

[101] Mr. Akagi sought the appointment of a receiver because he had an unsatisfied judgment against Synergy, Smith and Prentice for approximately $122,000. The purpose of appointing a receiver in aid of execution under s. 101 of the *Courts of Justice Act* is to protect the interests of the claimant seeking the

order where there is a real risk that its recovery would otherwise be in "serious jeopardy": *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd (Trustee of)*, [1987] O.J. No. 2315 (H.C.), at para 6.

[102] Put simply, the reach of the Subsequent Orders granting the Receiver enhanced powers is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps $122,000. To the extent the Initial Order was granted for the same roving purpose – as the Receiver submits it was – that Order must also be vacated.

[103] That the receivership was intended from the beginning to be – and certainly became – an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3800 non-party investors is apparent from both the position taken by the Receiver and the application judge's following comment from his September 16 reasons:

> This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaw Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer legitimate concerns of investors.

[104] As explained above, *Loblaw Brands* is distinguishable from the present case. While I agree that s. 101 provides an equitable remedy for the appointment of an investigative receiver in appropriate circumstances, the type of

receivership envisaged and put into place by the application judge goes beyond what is authorized by that provision.

The Initial Order of June 14, 2013

[105] Even if the Initial Order was not granted for the "roving" purpose discussed above, but only to aid the execution of Mr. Akagi's judgment (the only legal or equitable basis upon which it could have been granted pursuant to s. 101 of the *Courts of Justice Act*), it must still be set aside.

[106] It is true that the judgment against Synergy, Smith and Prentice was based on fraud. However, this is insufficient, by itself, to support such an order, in my view. In this context, Mr. Akagi is a judgment creditor. He was required to show that a receivership order freezing and otherwise interfering with the debtors' assets – and, in this case, not only the debtors' assets but the assets of others as well – was needed to protect his ability to recover on the debt.

[107] However, the record reflects no evidence of any attempt by Mr. Akagi to collect on the judgment in any fashion other than to apply for the appointment of the Receiver. Nor was there any evidence that Synergy or the other defendants had insufficient assets to satisfy the judgment, much less that it was necessary to reach the assets of IBC (which was not a party to the Akagi action) in order to protect Mr. Akagi's interests. Finally, with respect to the *ex parte* nature of the application, there was no evidence of urgency or of any reason to believe that, if

given notice, Synergy or IBC (or Smith or Prentice, for that matter) would take steps to frustrate the legal process or undermine Mr. Akagi's prospects of recovery.

[108] The Initial Order must be set aside on this basis as well.

The Certificates of Pending Litigation

[109] The final Subsequent Order, granted *ex parte* on August 2, 2013, authorized the Receiver to register certificates of pending litigation not only against the property of Synergy and IBC (the original targets of the receivership application) but also against the property of the 43 "Additional Debtors" sought to be added to the receivership, only two of which were debtors to the underlying Akagi action.

[110] There are at least two problems with this aspect of the Order.

[111] First, no action or application has been commenced by Mr. Akagi, or anyone else, asserting a claim to an interest in land or requesting a certificate of pending litigation. Pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01(2), these requirements are mandatory before an order authorizing the issuance of a certificate of pending litigation can be made: *Chilian v. Augdome Corp.* (1991), 78 D.L.R. (4th) 129, 2 O.R. (3d) 696 (C.A.), at p. 714; *Re Erdman*, 2012 ONSC 3268, at para. 65. Nor was it asserted before this Court that Mr. Akagi, or anyone else, intended to commence such an action.

[112] Secondly, there is no indication that either Mr. Akagi's claim or the claims sought to be protected on behalf of the 3800 unnamed investors give rise to any claims to an interest in land. The thrust of the claim is that they were all victims of a fraudulent tax allocation scheme, not a fraudulent land investment scheme. While there may be other ways of immobilizing the lands of targeted entities – such as the "freezing" orders otherwise attacked in these proceedings – a certificate of pending litigation cannot be issued in the air against unknown and undescribed lands regarding which no claim is, or could be, asserted.

[113] For these reasons, the August 12 Order authorizing the issuance of certificates of pending litigation must be set aside.

DISPOSITION

[114] For the foregoing reasons, I would set aside the Initial Order dated June 24, 2013, the Subsequent Orders dated June 24, 2013, June 28, 2013 and August 2, 2013, and the Come-Back Hearing Order dated September 16, 2013.

[115] If the parties cannot agree on costs, they may make brief written submissions, not to exceed 8 pages in length, within 30 days of the release of these reasons.

Released: "R.A.B." May 22, 2015

"R.A. Blair J.A."
"I agree Janet Simmons J.A."
"I agree R.G. Juriansz J.A."

TAB 3

Munro v. Nopper, 2002 ABQB 810

Date: 20020916
Action No. 0201 11563

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

JIM MUNRO

Plaintiff

- and -

TOM NOPPER, 705589 ALBERTA LTD. AND TRILLIUM HOMES LTD.

Defendants

MEMORANDUM OF DECISION
of the
HONOURABLE MADAM JUSTICE J.B. VEIT

APPEARANCES:

Ronald W. Mahlberg
Checkland & Company
for the Plaintiff

Adam R. Singer
Zenith Hookenson LLP
for the Defendants Tom Nopper & Trillium Homes Ltd.

Summary

[1] Jim Munro agreed to sell his shares in 705589 to the defendant Nopper's wife, Heather. Each of the parties was represented by a lawyer. The written contract of sale included no deadline for the completion of the sale and no clause that time was of the essence of the

agreement. Because 705589 was in the new home construction business, a substitute guarantor, acceptable to those who had the benefit of Mr. Munro guarantees, had to be found before the sale could be completed. Efforts commenced to find replacement guarantors prior to the execution of the sale agreement. The agreement for the sale of the shares was signed on April 4, 2002. On the same date, or on April 5, 2002, Mr. Nopper created a new company, Trillium Homes Ltd., to carry on the business in which 705589 had been engaged. Mr. Nopper found two new investors for Trillium; by June 4, 2002, the new investors were eventually accepted by the Bank of Nova Scotia, the Alberta New Home Warranty Program and CIBC Mortgages Inc. as replacements for Mr. Munro. However, on May 10, 2002, Mr. Munro purported to cancel the agreement to sell his shares in 705589.

[2] Mr. Munro now asks the court to declare that the business of 705589 has been carried on since May 10, 2002, in a manner that is oppressive to him. He asks the court for consequential relief: the title to a show home, previously owned by 705589 and subsequently transferred to Trillium Homes Ltd., should be restored to the numbered company, Nopper should provide him with a full financial accounting of all transactions in 705589 and between 705589 and Trillium Homes Ltd. from February 2002 to date, and similar relief.

[3] The application for a declaration that the business of 705589 is being carried on in an oppressive and unfair manner to Mr. Munro is denied.

[4] For the purposes of this application, Jim Munro is a "complainant" within the meaning of s. 239 of the *Business Corporations Act*.

[5] Oppressive conduct is different from conduct which is merely contested. In the circumstances here, the conduct of the Noppers has not been oppressive; this is merely a dispute between Mr. Munro and the Noppers. The determination of the claim for specific performance of the agreement to sell shares will determine who has the right to make decisions for 705589 Alberta Limited. Until that determination can be made, the *status quo* which existed between the parties at the point of the last agreed connection between them should be maintained. Mr. Munro is not entitled to any relief or remedy which suggests that he will be successful in the specific performance proceedings.

[6] The court joins with the parties in recommending that a case manager be appointed to speed the resolution of the outstanding specific performance proceedings.

Cases and authority cited

[7] By the applicant: ***Wright v Donald S. Montgomery Holdings Ltd.*** (1998) 39 B.L.R. 266 (Ont. Gen. Div.); ***400280 Alberta Ltd. v Franko's Heating & Air Conditioning (1992) Ltd.*** (1995) 26 Alta. L.R. (3d) 421 (Q.B.); ***Stech v Davies*** (1987) 53 Alta. L.R. (2d) 373 (Q.B.); *Business Corporations Act* R.S.A. 2000, c. B-9, Part 19

[8] **By the respondent:** ***Vedova v Garden House Inn Ltd.*** [1985] O.J. No. 408 (H.C.J.); S.M. Waddams, *The Law of Contracts*, 4th ed., 1999, Canada Law Book Inc. Toronto, para. 681

[9] **By the court:** ***First Edmonton Place Ltd. v 315888 Alberta Ltd.*** [1988] A.J. No. 511 (Q.B.); ***Richardson Greenshields of Canada Ltd. v Kamacoff*** [1994] O.J. No. 1447 (Gen. Div.); ***Tobin v De Lanauze*** [2000] Q.J. No. 4017 (S.C.)

1. Background

[10] 705589 Alberta Ltd. was incorporated in September 1996 for the purpose of carrying on business as a new home builder. The original shareholders in the company were Tom Nopper's wife Heather and four other investors.

[11] In April 2000, Jim Munro purchased 50% of the shares of 705589; Heather Nopper became the other 50% owner. The shareholding was structured through the creation of another company, 8713222 Alberta Inc. Jim Munro became the owner of 62.5% of the shares of 871322 and Heather Nopper became the owner of the remaining 37.5% shares of that compnay. 8713222, in turn, became the owner of 80% of the shares of 705589 and Heather Nopper became the owner of 20% of the shares of 705589. Although each of Jim Munro and Heather Nopper own a 50% interest in 705589, Jim Munro has control of that company because he owns the majority of shares of 871322 which is the majority shareholder of 705589.

[12] Jim Munro and Tom Nopper are the sole directors of 871322 and 705589.

[13] In January 2002, the Bank of Nova Scotia informed Tom Nopper and Jim Munro that it would not renew its draw mortgage credit facility with 705589.

[14] On February 21, 2002, Jim Munro gave Tom Nopper a letter proposing that Tom Nopper purchase Jim Munro's interest in 705589. The essential terms of the proposal were that Jim Munro would be paid $50,000 for his shares in 871322 and that he would be released from all financial liabilities and obligations with regard to 705589. On April 4, 2002, Jim Munro signed a document entitled "Offer to Purchase Shares" which was also signed by Heather Nopper and which incorporated these terms.

[15] The April 4 contract did not specify a date or deadline for completion of the purchase of the shares. On April 9, 2002, a lawyer representing Heather Nopper delivered to a lawyer representing Jim Munro the sum of $50,000, subject to the express trust condition that, if closing had not occurred by April 17, 2002, the $50,000 would be returned without set off or deduction, "upon demand". This date was subsequently extended by the purchaser to allow Jim Munro to be released from personal guarantees given to the Bank of Nova Scotia, CIBC Mortgages Inc., and the Alberta New Home Warranty Program; the last of these "extensions" was to May 8, 2002.

[16] On April 5, 2002, Tom Nopper caused a new company, Trillium Homes Ltd., to be incorporated. Trillium thereupon commenced operations as a new home builder, effectively continuing the business that had previously been carried out by 705589.

[17] By June 4, 2002, each of the Bank of Nova Scotia, the Alberta New Home Warranty Program and CIBC Mortgages Inc. confirmed that Jim Munro was released from all guarantees.

[18] However, on May 10, 2002, Jim Munro advised the Noppers that he had decided not to complete the sale of shares; he relied, in part, on the fact that the purchaser had not completed the purchase of the shares by the purchaser's own deadline of May 8, 2002. Mr. Munro's lawyer returned the $50,000 and the closing documents.

[19] The money and closing documents were re-tendered by the Noppers on May 29, 2002 and June 6, 2002, but on both occasions the money and documents were returned.

[20] On June 13, 2002, Heather Nopper commenced action in the Court of Queen's Bench seeking specific performance of Jim Munro's agreement to sell all of his shares in 871322 to her.

[21] On May 30, 2002, Jim Munro signed and issued a Notice of Special Meeting of Shareholders of 871322 Alberta ltd. to be held on June 21, 2002 and a Notice of Special Meeting of Shareholders of 705589 Alberta Ltd. to be held on June 22, 2002. Both Notices stated that the special meetings were to be held for the purpose of removing the current Board of Directors and appointing a new Board. On June 21, 2002, at the request of the Noppers, MacLeod J. of this court enjoined Jim Munro from dealing with the shares of 871322, calling any meetings of that company, passing resolutions for that company, appointing directors for that company, and transacting any other business for that company.

2. Does Jim Munro have status as a "complainant" as defined in section 239 of the *Business Corporations Act*?

[22] For the purposes of this application, it is accepted by the respondents that Jim Munro has status as a "complainant".

3. Are the actions of the respondents "oppressive" or "unfair"?

[23] The actions of the respondents are neither oppressive nor unfair.

[24] Mr. Munro is not a minority shareholder; on the face of it, therefore, he is not entitled to statutory oppression remedies. However, even if those remedies are not limited to minority

shareholders, warring partners cannot necessarily obtain relief under the oppression provisions of corporate legislation.

[25] In ***Vedova***, after quoting from dictionary definitions of "oppress" and "fair", Anderson J. made the following comments about the nature of oppression relief corporate legislation:

> In my view, the application, in so far as it pertains to oppression or unfairness, is misconceived. Section 247 is a further protection, to those holding minority interests, from adverse treatment by the majority. The relief available is to be determined by tests less stringent than those which traditionally had to be met in order to procure an order for winding up. But in my view they continue to be confined to protection of minorities. Specifically, they are not intended as a method of mediating between opposing groups of shareholders acting from a position of equality. On the material before me, the latter is the situation with which I am faced. In the context of s. 247, "oppressive" connotes an inequality of power or authority. There is none in the instant case. "Unfair" connotes an obligation to act equitably or impartially in the exercise of power or authority. I find no such obligation here. I find no such obligation where, as here, power and authority, in the legal sense, are equally divided, and are so divided by pre-existing arrangement. The conduct of the respondents may, in the view of the applicants, be obstinate, perverse and recalcitrant. It may be so in fact; I express no view. It is not "oppressive" or "unfair" within the meaning of s. 247.
>
> In the course of argument, I was referred to a number of cases in which s. 247 was considered. I was also referred to cases involving consideration of s. 234 of the Canada Business Corporations Act, S.C. 1954-5, c. 33. I do not propose to deal specifically with each of those cases, a list of which will be appended as Schedule "A" to these reasons for judgment. I think it sufficient to say that, in each case in which the machinery of either section was successfully invoked, it was in aid of an applicant in a minority position.
>
> In my view, the remedies under s. 247 are simply not available in the circumstances of the case at bar.

[26] In ***First Edmonton Place***, McDonald J., of this court, reviewed the history of the new oppression remedy and made the following comments about the ***Vedova*** test:*:*

> Section 234 provides a broad basis for liability with enormous potential for controlling corporate behaviour. As Professor Waldron said at p. 152, this new spirit of flexibility and fairness may be welcomed but some definition of its scope is vital.
>
> . . .

In ***Re Gandalman Investments & Fogle*** (1985) 22 D.L.R. (4th) 638 (Ontario H.C.). at p. 640, Callon, J. interpreted the above quotation, not as stating that only minority shareholders can apply for an oppression remedy, but rather, that the relief is not available where power and authority are equally divided and that "oppressive" connotes an inequality of power or authority. In ***H.J. Rai Ltd. v. Reid Point Marina Ltd.***, May 26, 1981, B.C.S.C., cited in ***Brant Investments Ltd. v. Keeprite Inc.***, (1987) 37 B.L.R. 65 at p. 108, Skipp, J. stated that the legislation "was not intended to diminish but to temper the ordinary presumption of majority rule". In ***Brant Investments v. Keeprite***, Anderson J. expressed the following concern (at p. 99):

The jurisdiction is one which must be exercised with care. On the one hand the minority shareholder must be protected from unfair treatment; that is the clearly expressed intent of the section. On the other hand the court ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority.

He went on to state (at p. 100):

Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.

[27] In ***Tobin***, Zerbizias J. added the following definition to that set out in ***Vedova***::

[para72] In Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1958] 3 All E.R. 66 at 71 (H.L.), Viscount Simonds indicated that "oppressive" meant "burdensome, harsh and wrongful". In the same decision, Lord Keith, at page 86, held that "oppression" meant a "lack of probity and fair dealing in the affairs of the company and to the prejudice of some portion of its members".

[28] In ***Richardson Greenshields***, Farley J. made the following comments:

[para12] I must say that I am left with the definite suspicion that what is involved in this litigation is a power play between RG and SH. In that regard, the court should not lend its assistance to one side or the other so that either may obtain mere tactical advantage. See Vedova et al. v. Gordon House Inn Ltd. et al. (1985), 29 B.L.R. 3 (Ont. H.C.J.) at p. 241. I must say that I am astounded by the proposal that there be an injunction which required that SH strip itself of all "advisory management function" and require it to seek an outside contract (with whom?). The latter part would require at least the higher test of Ticketnet Corp. v. Air Canada (1987), 21 C.P.C. (2d) 38 (Ont. H.C.J.). It is very peculiar that RG would offer no undertaking and resist same on further enquiry.

[29] A situation similar to that in ***Vedova*** and ***Richardson Greenshields*** arises here. There is a dispute between Mr. Munro and the Noppers. I express no opinion on the merits of that dispute. However, Mr. Munro is not entitled to rely on the oppression remedies provided in the business corporation legislation to give himself, in advance of the judgment in the specific performance case, remedies of the type which he would enjoy should he be successful in that lawsuit. Until a judgment is delivered on the claim for specific performance, fairness requires that, to the extent possible, the *status quo* be maintained between the warring - equal - groups of shareholders.

[30] The *status quo* in this case is the last agreed transaction between the now warring parties. That transaction was the agreement whereby Mr. Munro agreed to sell his shares to the Noppers. Virtually everything that was done by the Noppers after that point - with the possible exception of the dividend paid to Ms. Nopper - was done with the apparent purpose of continuing the business with new guarantors.

[31] As it happens, it will be relatively easy for the parties to trace the assets from the numbered company into Trillium if the judgment in the specific performance action requires tracing.

[32] Specifically, Mr. Munro should not acquire rights of oversight relative to the decisions of Trillium. Mr. Munro should not be able to require the Noppers to produce an expensive accounting of transactions until a court decides that Mr. Munro is entitled to that relief.

[33] The only order which the court could properly make here is an order preventing Trillium from making any transactions outside the ordinary course of business until the specific performance judgment has been delivered. The purpose of such an order would be to ensure that, should Mr. Munro be successful in the specific performance litigation, it would be easy for him to trace his interest in 705589 into Trillium. Mr. Munro did not wish such an order.

[34] Until the specific performance proceedings have been decided, Mr. Munro can continue to make use of the statutory rights to information he enjoys as a shareholder of 705589.

4. Appointment of a case manager

[35] The parties are agreed that it would be useful to appoint a case manager. I support their agreement to that effect, and recommend to the Associate Chief Justice that a case manager be appointed here.

[36] The purpose of the case manager here is to ensure that the specific performance proceedings are brought on as soon as that can fairly be done and to make determinations about whether other proceedings should parallel, precede or otherwise combine with the specific performance.

5. Costs

[37] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

HEARD on the 13th day of September, 2002.
DATED at Calgary, Alberta this 16th day of September, 2002.

J.C.Q.B.A.

TAB 4

Court of Queen's Bench of Alberta

Citation: Shefsky v. California Gold Mining Inc, 2014 ABQB 730

Date: 20141128
Docket: 1303 17979
Registry: Edmonton

Between:

Martin Shefsky and 2350183 Ontario Inc.

Applicants

- and -

California Gold Mining Inc., Michael Churchill, Kevin Cinq-Mars, Patrick Cronin, R.W. Tomlinson Limited, John Doe #1-50 and ABC Corporation #1-50

Respondents

Memorandum of Decision of the Honourable Mr. Justice D.R.G. Thomas

---

Table of Contents

I. Introduction and summary

[1] The Applicants, Martin Shefsky and his solely owned holding company, 2350183 Ontario Inc (235 Inc), (referred to collectively as Shefsky), bring an oppression application against the Respondents, California Gold Mining Inc (CGMI), its directors and some shareholders. Shefsky alleges that the Respondents breached his reasonable expectations that in return for raising at least $5 million in investment he would control CGMI. In particular, he would be entitled to name three of five directors on the board (the Board) and would retain control through the shares owned by him and the investors he introduced to CGMI. He asserts that some of the Respondents engaged in oppressive conduct, including a secret placement of shares which diluted his voting powers.

[2] The Respondents argue Shefsky did not raise the agreed upon $5 million within the agreed upon deadline. Further, they argue that he could not rely on an agreement with them (ultimately described as the Term Sheet) to evade shareholder democracy by determining who would be elected to the Board. As to control, the Respondents assert that Shefsky never had control of CGMI before the additional share issue, and therefore their actions could not have deprived him of control.

[3] The oppression remedy is directed at ensuring that the reasonable expectations of any security holder, creditor, director, or officer are not violated by oppressive conduct. For the reasons which follow I find that, while Shefsky had a reasonable expectation that the Term Sheet would be complied with and that he could name a third candidate to the management slate of directors, those expectations were not breached. He did not name a third candidate and the Respondents, therefore, never refused to add his nominee to the management slate. Further, there is no evidence, beyond Shefsky's belief, that he had sufficient votes to control CGMI before the alleged secret placement. In the result, the application is dismissed.

II. Background and approach

[4] The Applicants and Respondents filed numerous affidavits, supplementary affidavits, and examinations on affidavits. Several of the affidavits contain many exhibits, some of which are lengthy. There are numerous disputed facts in these affidavits. I canvassed with counsel whether this was an appropriate matter to be heard in Chambers and whether the parties, if determined to proceed in this venue, would be prepared to agree not to appeal any decision I arrived at, given these evidentiary concerns. The Applicants were unwilling to agree to that proposal.

[5] However, there were some matters removed from the table, including the Applicants' request to unwind the secret placement and the alleged wrongful terminations of Shefsky and Eric Moeller (Moeller) which are questions of contract. Any findings of fact on these allegations can only be made in a suit for wrongful termination and not through an application for an oppression remedy. To the extent that the terminations form part of the contextual facts surrounding the question of whether there was oppression, I will take into account the fact that the employment of Shefsky and Moeller was terminated, but will not consider whether that was for cause or was wrongful.

[6] I agreed to hear the application, but in light of the Alberta Court of Appeal's admonition that it would be an error to decide matters "on the basis of conflicting affidavits and documents that would support either party's position" (***Charles v Young***, 2014 ABCA 200 (at para 4 and 5 and cases cited therein)), I have reviewed the extensive materials to ensure that I make findings

based on uncontested facts or, where there are contested facts, on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties. I have identified these facts, inferences, and many of the instances where the affidavit evidence conflicts.

[7] I add that I do not express any disagreement with the desire of the parties to avoid the expense and complication of trial if possible, in light of the fact that most, if not all, of the witnesses are in Ontario, some of the lawyers are from Ontario, and the matter is relatively time sensitive. The Supreme Court of Canada in ***Hryniak v. Mauldin***, 2014 SCC 7 at para 2) noted recently that a culture shift is required to ensure timely and affordable access to civil justice:

> This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour **of proportional procedures tailored to the needs of the particular case**. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just. (Emphasis added)

[8] The Alberta Court of Appeal has adopted this approach in ***Windsor v. Canadian Pacific Railway Ltd***, 2014 ABCA 108, at para 15:

> In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication.

[9] In this case, the parties chose a chambers procedure, knowing the limitations of affidavit evidence and aware of the implications of such a decision. It is appropriate, then, to decide the issues that I can, based on the best available evidence before me.

III. Uncontested facts or facts that can be inferred from the affidavit evidence and documents

1. Cast of characters

[10] It is necessary to get to know the *dramatis personae* before embarking on a review of the facts.

1. Michael Churchill (Churchill) was the President and CEO of CGMI.
2. Patrick Cronin (Cronin) was a director and chairman of the Board.
3. Kevin Cinq-Mars (Cinq-Mars) was a director and the nominee of RW Tomlinson Ltd. (Tomlinson Ltd) the largest shareholder in CGMI.
4. Nuno Brandolini (Brandolini) was a director recruited by Shefsky and later voted off the Board.
5. Pierre Caland (Caland) was an investor recruited by Shefsky and was the second largest shareholder after Tomlinson Ltd.
6. Moeller was a geologist, at one point the COO of CGMI and was fired by Churchill.
7. Thomas Sills (Sills) was also a geologist and was the COO before Moeller.
8. Gregory McKenzie (McKenzie) was the managing director of Haywood Securities Inc. (Haywood)

9. R. W. Tomlinson (Tomlinson) – CEO of Tomlinson Ltd.

[11] All of the above, except Cinq-Mars and Tomlinson, swore at least one affidavit in the application and there were also affidavits made by:

1. Behn Conroy (Conroy), the Secretary and CFO of CGMI;
2. Eric Szustak (Szustak), an investor and shareholder in CGMI;
3. Kevin McAllister (McAllister), an investor and shareholder in CGMI.

2. CGMI tries to raise money to buy a California property

[12] CGMI is a public junior mining company, listed on the Toronto Stock Exchange. In 2011, CGMI entered into an agreement to purchase a property in California (the Property), but did not raise the necessary funds to close that deal. In January 2012, it entered into another agreement to purchase the Property, and in April 2012 it contracted with Haywood to act as its financial advisor to raise the necessary money to complete the purchase.

[13] Neither CGMI nor Haywood could raise all of the money needed to close the new deal. Haywood was paid in shares of CGMI for its participation in securing the funding which it did raise.

3. Shefsky and CGMI enter into an agreement with Shefsky to assist in the financing

[14] In September 2012 McKenzie, as managing director of Haywood, introduced Shefsky to CGMI. On October 19, 2012 Shefsky and CGMI entered into an indicative term sheet (the "October Term Sheet") under which Shefsky would arrange financing of $5 to $8 million for a private share placement by November 30, 2012 (the "Initial Private Placement") and, if that condition was met, there would then be a change in the management and the Board. Those changes would be that:

a. two existing board members resign in favour of Shefsky and his nominee, Charlie Cohen (Cohen);
b. if Bandolini invested at least $100,000.00, the Board would be increased to five members and he would be appointed to the Board;
c. Churchill would resign as CEO but remain as President, and Shefsky would be appointed as CEO in his place; and
d. Sills would resign as COO, be retained as a consultant and Moeller would be appointed COO.

[15] As to the election to the Board, it was the evidence of Churchill that the CGMI shareholders had never voted against the slate of directors proposed by management.

4. Attempts to raise $5 million by December 31, 2012 fail

[16] As of November 30, 2012 Shefsky had not raised the $5 million in subscriptions, but he continued to work on raising the funds and CGMI did not take any actions to indicate it considered the arrangement represented by the October Term Sheet to have terminated. In fact, on November 30, 2012, Conroy wrote Shefsky and Moeller indicating that they were to be appointed as officers, the CEO and the COO respectively, with the proviso that if the transaction in the October Term Sheet was not completed they would resign. In keeping with that, Conroy asked both to provide undated signed resignations that he would delete or destroy if the

transaction proceeded. They did so, and on December 21, 2012 CGMI announced that Shefsky and Moeller were appointed as CEO and COO. Neither were paid any salary for these positions until February 15, 2013 when the Initial Private Placement closed.

[17] On December 13, 2012 the October Term Sheet was replaced with another agreement (Term Sheet) which provided for essentially the same terms as the October Term Sheet. The changes included a deadline date of December 30, some adjustments to the salaries of the officers, and some adjustment to the warrant provision.

[18] Conroy's evidence in cross-examination was that the December 30, 2012 deadline was not firm, saying:

> At some point, we reserved the right to put an end to it. I suppose in the term sheet, we put the December 30 endpoint on it, but in discussing Shefsky's appointment as CEO, I guess you could say that implicit in that was some acknowledgement that we would do what was in the best interests of the company, if we were missing a little bit of money on December 30, we wouldn't necessarily shut it down.

[19] On December 19, 2012, Shefsky learned that Cohen preferred not to serve on the Board, and Shefsky advised Churchill that he would have to nominate someone else.

[20] As of December 30, 2012, Shefsky had not arranged the full amount of the required financing. However, the parties continued towards completing the Initial Private Placement and Shefsky and Moeller continued in their roles as CEO and COO. On January 7, 2013 CGMI issued a press release regarding the initial placement, and on January 9, 2013, Conroy destroyed the signed and undated resignation letters of Shefsky and Moeller.

5. Restructuring of the Board as set out in the Term Sheet does not proceed

[21] In a series of emails on January 11 and 12, 2013, Churchill told Tomlinson that the structure of the Board needed to be reconfigured. Under the Term Sheet two members were required to resign to make room for a fifth director. Churchill noted that neither Cinq-Mars nor Cronin were prepared to resign, and that the "new money", presumably a reference to Shefsky, would not agree to a six member board, but "did agree to a 2 and 2 with a mutually agreed upon 5th." In cross-examination on his affidavit, Churchill testified that to give effect to the Term Sheet, he would have resigned if neither Cinq-Mars nor Cronin agreed to do so.

[22] The email from Churchill to Tomlinson reads, in part:

> As you are aware, the original deal with the new money was they would represent $6 M of $8 M total and would grant them 3 of 5 board seats with 2 seats remaining for the original shareholders.
>
> Kevin [Cinq-Mars] has made it clear to me that he expects to remain on the board as a condition of the Tomlinson investment. The issue that come up over the last two weeks, is Pat Cronin has elected to invest much more ... in this round than he originally indicated.

> ...Pat has now indicated that he'd like to remain on the board as he will represent the largest single shareholder on our side (original shareholders) after we close the California transaction...

[23] In his affidavit, Shefsky agrees that he rejected the 6 member board, but expressly denies agreeing to the mutually agreed upon 5th member, saying that he did not reject it outright, but neither did he agree to it. As a result, I take no notice of the assertion that there was an agreement on this point.

[24] During the week of January 14, McKenzie asked Shefsky how much money he needed to get the deal done and he responded that he needed another $300,000.00, and McKenzie said he would get it.

[25] A meeting of the Board was held on January 18, 2013 and the draft minutes of that meeting reflect:

> Mr. Churchill confirmed that, as per the TSX-Venture's approvals, closing of the private placement must occur on or before February 11. At this time, Martin Shefsky had arranged for $4.3 million of subscription agreements with another $500 thousand firmly committed and a further $500 thousand softly committed. Churchill had arranged for $2,435,000 committed which included a $500,000 commitment from Tomlinson. Mr. Churchill confirmed that he had soft commitments for a further $1 million.

[26] On January 24, 2013, according to Conroy's examination on affidavit, Conroy prepared a draft circular for the upcoming meeting of shareholders listing a slate of prospective members of the Board that conformed to the Term Sheet: Churchill, Shefsky, Brandolini, Cohen and either Cronin or Cinq-Mars. Conroy was unsure of which. On January 26, 2013, according to his affidavit, Conroy reviewed a later version of the circular which listed Churchill, Shefsky, Brandolini, Cronin, and Cinq-Mars. He asserted that this is evidence supporting his hearsay statement that Churchill told him that Shefsky agreed that Cohen would not join the Board because Shefsky had not reached the $5 million goal (see discussion of this point in section on 'Contested Facts').

[27] On January 29, 2013, Churchill in an email to Moeller notes that Shefsky was 90 days past raising the money agreed to. He continues:

> I think we will be able to close but **the deal has morphed significantly** from the original term sheet with a [*sic*] your side also being made up of much smaller investors than we had originally discussed. Originally, Martins investors were going to be larger and fewer, but as time has marched on this simply has not been the case. I'm not complaining mind you, but pointing out **some realities we are experiencing as the deal has progressed**.
>
> **I've been actively working with Martin** and I realize that this is a team effort but I think your comments do not reflect the original term sheet for a number of reasons most importantly the current lack of funds from your group. Martin and I have tried to balance everything **out within the context of the deal as it has evolved**...
> (Emphasis added)

[28] Notably, nothing in this email suggests that the deal is terminated, only that it has "morphed" and that he and Martin are trying to balance things "within the context of the deal".

6. $5 million is raised by February 2013, but there are disagreements about who should get credit for raising the funds

[29] On February 5, 2013, Conroy and Shefsky had an email exchange in which Shefsky indicated:

> "My subs are in at 5.5"

[30] Conroy replied:

> Yes Martin – subs received from you are at $5,515,000.00.

[31] The evidence of Conroy in his affidavit was that he was merely confirming the information Shefsky had provided to him.

[32] The private placement closed in two tranches on February 8 and February 15, 2013, and Shefsky and Moeller began to be paid as the CEO and COO respectively.

[33] The parties disagree on whether Shefsky reached the $5 million threshold; the evidence on this point will be discussed in the next section dealing with 'Contested Facts'.

7. The April 2013 annual meeting

[34] On March 1, 2013, the management information circular for the April 4, 2013 meeting of the shareholders was sent out. The list of nominees for the Board had changed from the earlier draft with the removal of Cohen and the inclusion of both Cronin and Cinq-Mars.

[35] Shefsky's evidence was that Churchill assured him on several occasions that he could nominate a new candidate once a suitable replacement for Cohen was found and so he voted for the slate as presented. Churchill's evidence was that he did not have that discussion or discussions with Shefsky.

[36] This is a question of credibility, and in keeping with the decision in ***Charles v Young***, *supra*, it would be an error for me to determine if these conversations occurred on the basis of conflicting affidavits. I conclude that the evidence of whether these conversations took place is not necessary to resolve the issues as stake here, and I will not take it into account. There is evidence, however, that Churchill was trying to accommodate the wish of Shefsky to nominate a third director, see the January 11 and 12 emails referred to earlier between Churchill and Tomlinson.

[37] None of Cinq-Mars, Cronin or Churchill agreed to resign, and the slate of directors proposed by management were elected. Shefsky voted his shares in favour of the slate.

8. Moeller is terminated as COO

[38] Moeller was terminated as COO by Churchill on July 30, 2013. The parties take differing positions on whether the termination was for cause or was in retaliation for the attempts by Shefsky to enforce the Term Sheet.

[39] This is not a question that can be answered in this proceeding.

9. The "Secret Private Placement"

[40] The minutes of the Board meeting of August 2, 2013 (unanimously approved to by the Board including Shefsky, at the August 21, 2013 meeting) record that Shefsky expressed concerns over the termination of Moeller and over breaches of contracts between his corporation and CGMI. No details appear in the minutes of whether the contracts in issue were the Term Sheet or the consulting agreements, although in argument Shefsky asserts that the latter was the case. Conroy's notes (exhibits in both his affidavit and the affidavit of Shefsky) do not specify what breaches Shefsky was concerned about. Notations to Conroy's notes by Shefsky suggest that his concerns related to inconsistent notice periods between his and Churchill's employment agreements and the failure to observe the contract requirement that both he and Churchill agree on terminations of employees. Shefsky deposed that he expressed a wish to call a meeting of shareholders to replace certain members of the Board. That does not appear in the minutes, but is in Conroy's notes.

[41] On August 12, 2013 CGMI's lawyers filed a price reservation with the TSX-V for a private placement with a share price of $0.05. This was approved by the TSX. That information was not provided to Shefsky.

[42] The next board meeting was held on August 21, 2013. Those minutes mention that there was a discussion about the financial position of CGMI, and Churchill is reported to have stated that he would seek financing of at least $500,000.00 "in the short term".

[43] At the same meeting, Shefsky again expressed that he wanted to call a shareholders meeting. Cinq-Mars comment in the minutes was that was not in the best interests of the company. Conroy's affidavit states that Churchill expressed support for calling such a meeting, while Shefsky deposed that Churchill, Cinq-Mars and Cronin opposed a meeting of shareholders being called by Shefsky.

[44] Churchill approached investors to invest in the new private placement from within the original investors group and persons related to them. He did not approach Shefsky, Caland, or any of the investors brought in by Shefsky.

[45] On September 9, 2013, a notice was sent to the Board members that there would be a vote the next day on a new private placement (the secret placement) to raise $793,000 by issuing 15,860,000 units at $0.05 a share. This was the first time that Shefsky and Brandolini learned of this financing.

[46] By the next day, Shefsky had put together an alternative deal (the Bought Deal) under which Caland would purchase up to $1 million of shares at $0.07 a share for resale by Caland to a number of investors he knew to be interested in investing in CGMI.

[47] At the meeting of the Board on September 10, Churchill, Cinq-Mars, and Cronin refused to consider the Bought Deal, declined a 48 hour adjournment to address concerns about the Bought Deal, and approved the secret placement instead. Shefsky told them that the Bought Deal was an either/or; i.e. CGMI had to agree to either the Bought Deal or the secret placement because Caland was not interested in investing if the secret placement went ahead.

[48] When Shefsky expressed concern about the effect the secret placement would have on the dilution of existing shares, he says that Cinq-Mars initially offered him an additional private placement (the Fall placement) of the same number of shares to neutralize the dilution effect on Shefsky's shareholdings. Shefsky then alleges that Churchill refused to allow the Fall placement

at the same number of shares and only allowed Shefsky's shareholders to invest a further $304,454.00. Churchill's affidavit confirms that he agreed to the Fall placement to address the concerns of Shefsky and some of his principal investors about the dilutive effect, and at the September 18, 2013 meeting of the Board the Fall placement of up to 6,089,000 units was approved. These shares were sold at a slightly higher price than the secret placement price of $0.565, but less than the $0.07 contained in Caland's Bought Deal. The Fall placement was never fully subscribed, and neither Shefsky nor Caland participated.

10. The termination of Shefsky

[49] Shefsky was terminated on October 7, 2013; he alleges that the termination was wrongful and that he was not paid the appropriate amount for termination upon change in control of CGMI. Churchill says that Shefsky was terminated for cause, including the fact that he was no longer acting in CGMI's best interests. This is not an issue that can be resolved on this application.

IV. Contested Facts

1. Was CGMI unable to raise the funds on its own?

[50] Shefsky deposed that CGMI and the Haywood Group failed to raise the money required to purchase the Property. Churchill deposed that CGMI could have raised the necessary funding internally, but chose to seek outside investors. This is a distinction without a difference; CGMI and Haywood had not raised the funds at the time that Shefsky was introduced to CGMI.

2. Did Churchill agree that Shefsky could name a third member to the Board when Cohen indicated unwillingness to join the Board?

[51] Shefsky indicates that he had several discussions with Churchill about eventually appointing a third member of his choice to the five-member Board (para 14 of Shefsky's affidavit). Churchill deposed that those conversations never occurred. Conroy's affidavit states that on January 26, 2013 Churchill told him that he and Shefsky had agreed that since Shefsky had not reached the $5 million goal, Cohen would not be nominated for election. However, Churchill's affidavit on this point is consistent with Shefsky's assertion that Cohen indicated he was unwilling to sit on the Board:

> In mid-December 2012, I was informed by Shefsky that Mr. Cohen was now unwilling to sit on the board of directors.

3. Did Shefsky agree to a five member board with the fifth nominee to be mutually agreed on as set out in Churchill's email to Tomlinson?

[52] Shefsky denies Churchill's assertion that he agreed to a fifth board member to be mutually agreed upon (para 20 of Shefsky's affidavit). Churchill's affidavit, while denying Shefsky's allegations at para 14 of his affidavit, does not address para 20 of Shefsky's affidavit.

4. How much investment did Shefsky secure?

[53] Churchill deposed that he was directly responsible for securing the following investors:

K2 Principal Fund LP ("K2 Fund") purchased	1.2 million shares @.10 per share = $120,000.00
Robocheyne Consulting (Bob Rose) (Rose) purchased	1 million shares @ 10 per share = $120,000.00
Rodney Dir (Dir) purchased	1 million shares @.10 per share = $120,000.00
McAllister purchased	1 million shares @.10 per share = $100,000.00
Haywood Group in financing services	$805,000.00 for financing services paid in shares
Total	**$1,225,000.00**

[54] Shefsky contested these assertions, filing his own affidavit of January 22, 2014 and by affidavits made by McAllister (January 23, 2014), Szustak (January 22, 2014), and Moeller (January 20, 2014). Szustak swore that K2 was introduced to the CGMI investment opportunity by Shefsky, who had a pre-existing relationship with the K2 Fund. He indicated that while Churchill attended the meeting with Mr. Schultz of K2, it was at Shefsky's invitation and Churchill was neither responsible for introducing K2 to CGMI nor involved in the pitch to K2 at that meeting. It was Szustak who followed up with K2.

[55] Rose of Robocheyne did not file an affidavit, but a letter from him was attached to Shefsky's affidavit as an exhibit and in it he states that he would not have invested in CGMI but for Shefsky's involvement. Shefsky swears that Rose was unable to swear an affidavit because of serious illness.

[56] Dir did not swear an affidavit. Shefsky swears that Dir met Churchill on site in November, 2012 before he invested, and therefore Churchill's assertion that Dir said he would not invest if Shefsky was in control makes no sense, since he did, in fact, invest in CGMI. Moeller's affidavit attaches a series of email conversations, dated between November 29, 2012 and January 2, 2013, between Moeller and Dir discussing Dir's investment subscription in CGMI. The emails mention that Shefsky and Moeller are investing, discuss technical questions regarding the project, address the question of the funds being solicited in Canadian dollars, and seek timely return of the subscription documents. There is no mention of Churchill in the emails.

[57] Churchill's affidavit also asserted that McAllister told him that he would not invest if Shefsky was in control. McAllister's affidavit denies that conversation, and he swears that he would not have invested in CGMI unless there was a change in management and control of the Board. He states that he invested because he understood Shefsky would be in control.

[58] McKenzie, with Haywood, swore that he drafted the October Term Sheet which called for a transfer of management to Shefsky, that he would not have invested in CGMI or recommended the investment if it were not for Shefsky's involvement, and that neither he nor any of the Haywood investors signed any subscription agreements before Shefsky became

involved. This is significant since it was Haywood that was first retained to secure funds for CGMI.

[59] The Respondents argue that since Haywood was paid in shares for the investors it brought in, none of these investments should be counted towards Shefsky's total.

[60] On this evidence alone, it is difficult to make findings of fact. The evidence of the investors ranges from hearsay to personal knowledge and are directly contradictory of statements by Churchill. There is some documentary support for Shefsky's position because none of the investors in question subscribed until after he became involved.

5. Moeller's termination

[61] Moeller was terminated as COO by Churchill on July 30, 2013. Shefsky alleges that this firing was in retaliation for the continuing disputes over the composition of the Board. The Respondents allege he was terminated for cause, saying that his shoddy work in preparing a drill program which needed to comply with National Instrument 43-101, meant that much of the work had to be redone at a cost of about $900,000.00.

[62] To support his allegations, Shefsky notes that Moeller sent Shefsky an email outlining his belief that Churchill was not changing the structure of the Board because Churchill believed that Shefsky's money raised in the February placement was "not real".

[63] The Respondents rely on the reports of Vishal Gupta and Mark Payne that Moeller's work was substandard and would cost $900,000.00 to rectify.

[64] This is not a question that can be answered on this application.

6. Shefsky's termination

[65] Shefsky alleges that his termination was wrongful and that he was not given the appropriate notice for termination upon change in control of CGMI. Churchill says that Shefsky was terminated for cause, including the fact that he was no longer acting in CGMI's best interests. As with Moeller's termination, this is not a question that can be answered on this application.

V. Issues

[66] The following issues will not be addressed:

1. The alleged wrongful termination of Moeller. The termination may be relevant within the factual context to determine whether there was oppressive conduct, but the determination of whether he was wrongfully terminated is a question of contract, not an oppression action.
2. Whether the alleged secret placement should be unwound as it appears there is agreement that this need not happen in the context of this litigation.
3. The alleged wrongful termination of Shefsky's consulting services agreement is relevant to the factual context of whether there was oppressive conduct, but determining a breach is a matter of contract, not an oppression action.

[67] The following issues raised in this application which are capable of being decided:

1. What reasonable expectations are alleged by Shefsky?

2. Were these expectations reasonable?

   a. The Term Sheet

      i. Did Shefsky meet the deadline? If not, was there conduct that could have lead Shefsky to a reasonable expectation that the deadline in the Term Sheet was extended?

      ii. Did Shefsky reach the goal of $5 million in subscriptions?

   b. Appointment of a director to replace Cohen

      i. Did Shefsky have a reasonable expectation that he could nominate a third director when Cohen refused a nomination?

      ii. Were Shefsky's reasonable expectations regarding Board nominations breached?

   c. Control

3. If any reasonable expectations were breached, did any actions of the Respondents constitute oppressive conduct?
4. If oppressive conduct is found, what is the appropriate remedy?

VI. Analysis

1. The law

[68] Oppression is an equitable remedy and has been partly codified in s. 242 of the Alberta *Business Corporations Act*, RSA 2000, c B-9. Section 242 provides that an oppression remedy is available to "any security holder, creditor, director, or officer" to rectify conduct that is oppressive or unfairly prejudicial to their interests or unfairly disregards their interests. The section sets out a broad range of available remedies, including an order directing an issue or exchange of securities (s. 242(3)(e)), an order appointing directors in place of, or in addition to, all or any of the directors then in office (s. 242(3)(f)), and an order requiring the trial of any issue (s. 242(3)(p)).

[69] The basic principles underlying oppression actions and available oppression remedies are set out in ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69. As an equitable remedy, oppression seeks to ensure fairness, not just what is legal (at para 58). Moreover, oppression is context and fact specific. At para 59, the Court noted:

> What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

[70] Reasonableness implies that the analysis is objective and contextual. As the Supreme Court noted in ***BCE*** the stakeholder's actual expectations are not conclusive. The Court noted (at para 62):

> In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[71] Further the Court noted that the oppression remedy is addressed to upholding stakeholders' understandings and expectations and is not limited to a determination of the parties' legal rights (at para 69).

[72] The Supreme Court went on to indicate that there is a two-step inquiry in an oppression claim (at para 68):

1. Does the evidence support the reasonable expectation asserted by the claimant?
2. Does the evidence establish that the reasonable expectation was
   a) violated by conduct that
   b) falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[73] Moreover, it is essential that the claimant establish wrongful conduct, causation and compensable injury (at para 91).

[74] The Court (at para 72) summarized some of the useful factors the courts may consider in determining whether a reasonable expectation exists:

1. general commercial practice,
2. the nature of the corporation,
3. the relationship between the parties,
4. past practice,
5. steps the claimant could have taken to protect itself,
6. any representations and agreements, and
7. the fair resolution of conflicts between corporate stakeholders.

[75] Once it is determined what an applicants' reasonable expectations were, and that those expectations were not met, the Court must go on to determine whether the failure to meet the expectation was unfair. Not all failures to meet a reasonable expectation "will give rise to the equitable considerations that ground actions for oppression." The conduct must be oppressive or demonstrate unfair prejudice, or unfair disregard of the claimants' interests (at para 89). Often the proof required to establish reasonable expectation will also be relevant to the proof of oppression, unfair prejudice or unfair disregard of interests (para 90).

[76] Oppression has been described as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" related to the conduct of the corporations affairs: "a wrong of the most serious sort" (at para 92). Unfair prejudice is conduct that is less serious than oppression, and includes such things as:

> ... squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm... (at para 93).

[77] The Supreme Court went on to describe unfair disregard as the least serious of the three, and noted that it included favouring a director by failing to properly prosecute claims, improperly reducing dividends, or failing to deliver a claimant's property.

2. What reasonable expectations are alleged by Shefsky?

[78] The Applicants argue that Shefsky's reasonable expectation was that CGMI and its directors would honour the Term Sheet. The Respondents suggest that the Applicants have actually argued for two reasonable expectations: that the Term Sheet be honoured and that he retain control of CGMI.

[79] In reviewing the Applicants' written and oral submissions, I conclude that the Applicants are alleging three related expectations as reasonable, namely that:

1. the Term Sheet be honoured;
2. Shefsky be permitted to appoint a director to replace Cohen; and
3. Shefsky retain control of CGMI.

[80] I have added the second expectation because there is nothing in the express terms of the Term Sheet that provide a right to appoint a replacement director if one of the directors who Shefsky wanted to appoint chose not to accept the appointment.

3. Were these expectations reasonable?

a. The Term Sheet

[81] There is little doubt that there is a reasonable expectation that the terms of a negotiated agreement will be honoured. The issue here is whether Shefsky could reasonably expect that the Term Sheet deadline would be extended.

i. Did Shefsky meet the deadline? If not, was there conduct that could have lead Shefsky to a reasonable expectation that the deadline in the Term Sheet was extended?

[82] There is no argument that by December 30, Shefsky had not raised the necessary $5 million. The Respondents argue that the question should end there as Shefsky had not met the goal, and therefore there was no further legal obligation on CGMI to complete its terms.

[83] However, the oppression remedy is not focussed solely on legal rights, but looks to what is fair in the circumstances. The October Term Sheet set a November 30 deadline, but that deadline passed, and the parties continued on without comment. Shefsky continued to solicit investment. Further, on November 30, 2012 Conroy wrote Shefsky and Moeller about being appointed as CEO and COO respectively, and asking them to sign undated resignations, which would be used if the transaction was not completed. They were appointed as CEO and COO, and the resignations were never used.

[84] On December 13, two weeks after the November 30 deadline, the new Term Sheet was signed. It provided for a December 30 deadline. The December 30 deadline passed and again no action was taken. The resignations were not used and were deleted on January 9. Shefsky continued to recruit investors, and Churchill continued to try to change the structure of the Board to that set out in the Term Sheet. His emails of January 11 and 12 do not mention the passing of the December 30 deadline, and he refers to the reconfiguration of the Board sought by the "new money".

[85] Conroy's evidence was that the December 30 deadline was not firm, and he indicated that if some money was still missing on December 30, they wouldn't "necessarily shut it down." His evidence also confirmed that he prepared a draft circular for the upcoming shareholders' meeting on or about January 24, 2013 which listed a slate of Board members conforming to the new Term Sheet.

[86] Further, the minutes of the January 18 board meeting reported that the Initial Private Placement needed to be completed by February 11, and that Shefsky had arranged for $4.3 million, with another $1 million firmly or softly committed.

[87] Shefsky confirmed with Conroy, via email, that he had reached the $5 million goal in subscriptions on February 5.

[88] Keeping in mind the Supreme Court's comments that a court determining whether there is a reasonable expectation must have regard to the facts of the specific case, the relationships at issue, and the entire context The relevant facts include:

1. The November 30 deadline passed and no steps were taken to suggest that the October Term Sheet would not be honoured, and in fact, the parties entered into the new Term Sheet two weeks later with a deadline of December 30;
2. After December 30, the parties continued to act as though the Term Sheet was still in place:
    a. the resignations were not implemented and were eventually deleted,
    b. Shefsky and Moeller continued as CEO and COO;
    c. Shefsky continued to raise funds;
    d. Churchill attempted to negotiate a way to re-structure the Board that would meet the requirements for the so called "new money";
    e. Conroy's evidence was that the deadline was not a hard deadline;
    f. Conroy gave evidence that he had drafted a circular for the meeting of shareholders which set out the management slate of directors as per the Term Sheet.
3. The Initial Private Placement closed in February and Shefsky and Moeller continued in their roles and began to be paid for their roles as CEO and COO until Moeller's employment was terminated in July and that of Shefsky's in October following the "secret private placement" dispute.

[89] There is some disagreement on the facts about whether Churchill and Shefsky discussed the fact that the deadline had passed and they were now operating outside of the Term Sheet. However, I find that the context, including the preponderance of objective evidence, is that the parties continued to act as though the Term Sheet would be implemented once the $5 million goal was reached. There is no documentary evidence that the parties were not going to honour the agreement represented by the Term Sheet because of the missed deadline, and considerable evidence of conduct of the parties from which it can be inferred that the parties were operating as though the terms of the new Term Sheet were to be implemented.

[90] I conclude that the failure to raise the $5 million by December 30 is not fatal to Shefsky's assertion that he had a reasonable expectation that CGMI would honour the Term Sheet.

ii. Did Shefsky reach the goal of $5 million?

[91] The Respondents also argue that Shefsky raised less than $5 million, and that some of the investors he claims as having invested with him were in fact investors solicited by the original subscribers/shareholders.

[92] The Term Sheet states:

> Provided the **Investors** subscribe for at least $5,000,000 of Units, the following provisions shall apply...

[93] "Investors" is a defined term in the Term Sheet:

Investors	Martin Shefsky and other accredited investors based in Ontario, Alberta, British Columbia, the United States or offshore (the **"Investors"**), subject to participation right below.
Participation Right	Management of the Company reserves the right, but not the obligation, to arrange for participation in up to $2,000,000 of the Offering by existing shareholders of the Company (the **"Participation Right"**).

[94] Based on this definition, Shefsky argues that all the "new money" investors who participated in the share placement were "Investors" for the purposes of the Term Sheet, no matter who solicited their investment. The Respondents argue that the Applicants cannot have it both ways: insisting on a contextual interpretation of the deadline and a strict interpretation of the term "Investor".

[95] I do not agree with the Respondents on this point. Shefsky seeks equitable relief, not a legal enforcement of the terms of the agreement. He may have a reasonable expectation about whether the strict terms of the deadline will be relied upon, without having to eschew the express language of other terms. The Respondents are not similarly entitled.

[96] However, the principles of contract interpretation suggest that Shefsky's interpretation is questionable. The Alberta Court of Appeal has set out the general principles of contract interpretation in many cases. Among those principles are:

1. "... a contract must be read and interpreted as whole, fitting all its parts together and trying to bring them into harmony...": ***Humphries v Lufkin Industries Canada Ltd***, 2011 ABCA 366 at para 13:

   > "In this search the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context": ***Tercon Contractors Ltd v. British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64, [2010] 1 SCR 69": ***Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc***, at para 176;

2. "A contract must be interpreted in a positive and purposive manner, trying to make it work... Therefore, where one possible interpretation will allow the contract to function and meet the commercial objective in view, and the other scarcely will, the former is to be chosen" ***Humphries*** at para 15;

3. "The objective of contract interpretation is to discover and give effect to the real intention of the parties." ***550 Capital Corp v David S Cheetham Architect Ltd***, 2009 ABCA 219 at para 26:

> "Interpretation of a contract is a search for intent: ***Eli Lilly & Co v. Novopharm Ltd; Eli Lilly & Co v. Apotex Inc***, [1998] 2 SCR 129 at paras 52-56, citing ***Consolidated-Bathurst Export Ltd v. Mutual Boiler and Machinery Insurance Co,*** [1980] 1 SCR 888 at 901": ***Benfield***, at para 175;

4. "...words are to be given their ordinary and grammatical meaning." ***550 Capital Corp*** at para 27.

[97] The interpretation of the Term Sheet suggested by Shefsky does not give effect to the parties' intentions which are clear, namely, Shefsky was to solicit at least $5 million in additional investment, in return for which he would be appointed to the board, with two others he chose, and that he and Moeller would be appointed CEO and COO. To read the definition of "Investor" in isolation from the purpose and intention of the entire agreement, would be to ignore its commercial objective – retaining Shefsky to get more investors than the original investors had signed up.

[98] The question then becomes how much investment did Shefsky secure?

[99] The Respondents point to Shefsky's cross-examination on affidavit, in which he took the position that he had raised $5,491,250. He admitted that $56,200 worth of shares were included in error, leaving $5,435,050. This total also included the $805,000 worth of shares sold to the Haywood investors. The Respondents argue that this amount should not be credited to Shefsky since Haywood was paid a fee for securing these investors. As noted previously, this leads to the affidavits by the Haywood investors. These investors say they invested because of Shefsky's involvement; the Respondents assert that they were brought in by Haywood and Haywood was paid for raising those investments.

[100] It is possible that both are correct, as Haywood recruited Shefsky; none of these Haywood investors signed subscription agreements until Shefsky became involved;

[101] It is therefore necessary to determine if there is any objective evidence by which it can be inferred that the $5 million goal was reached.

[102] There were a number of documents in which one or more of the Respondents appeared to accept that the $5 million goal was close to being reached or had been reached. On January 14, McKenzie asked Shefsky how much more money was needed to get the deal done and he responded he needed another $300,000.00. The minutes of the January 18 board meeting reported that the Initial Private Placement needed to be completed by February 11, and that Shefsky had arranged for $4.3 million, with another $1 million firmly or softly committed. On February 5, Conroy confirmed that Shefsky had $5,515,000 in subscriptions.

[103] Moreover, the Respondents' actions in attempting to implement the board structure set out in the Term Sheet, and the payment of CEO and COO salaries to Shefsky and Moeller once the private placement was accomplished as provided for in the Term Sheet, suggest that the Respondents themselves had concluded that Shefsky had reached the $5 million goal. As a result, I conclude that Shefsky's expectation that the Term Sheet be honoured was reasonable. That is, having regard to the particular facts, the parties' relationships, and the entire context,

including the conflicting claims and expectations, it was objectively reasonable for Shefsky to conclude that his obligations under the Term Sheet had been met and that his expectations of the Respondents would also be met.

b. Appointment of a director to replace Cohen

i. Did Shefsky have a reasonable expectation that he could nominate a third director when Cohen refused a nomination

[104] There is nothing in the Term Sheet that expressly provides Shefsky with the option of choosing another person to replace Cohen. Further, the affidavits of Shefsky and Churchill contradict one another about what was agreed to if Cohen was unavailable.

[105] Cohen chose not to accept the nomination on December 19, 2013. On January 11 and 12, which is after the December 30 deadline, Churchill and Tomlinson exchanged emails in which Churchill says:

> As you are aware, the original deal with the new money was they would represent $6 of $8 million total and we would grant them 3 of 5 board seats with 2 seats remaining for the original shareholders.

[106] He then goes on to note that neither Cronin nor Cinq-Mars are prepared to resign from the Board, particularly as they or the group they represent are investing more than originally planned. He then says:

> I've gone back to the new money and indicated that our existing shareholder base will be investing somewhere between $2M and $3.5 M (which is more than we originally committed to) and **asked that we revisit the board structure.** (Emphasis added)

[107] This appears to suggest that firstly, Churchill did not consider Cohen to be the only possible board member to be put up by Shefsky since he indicated the general proposition that three out of five board seats would go to the "new money", and secondly, that it was necessary to renegotiate the terms of the agreement and he was seeking Shefsky's agreement to change the structure. From this it is a reasonable inference that the parties intended that Shefsky be able to appoint a third member to the Board when Cohen was unwilling to take the position.

[108] I conclude that Shefsky had a reasonable expectation arising from both the Term Sheet and the Board's actions that he would be permitted to appoint a third member to the Board once he selected someone.

ii. Were Shefsky's reasonable expectations regarding Board nominations breached?

[109] At the April 4, 2013 annual general meeting of shareholders, Shefsky voted his shares for the nominees proposed by management, despite not having named his third nominee. Shefsky deposed that he did so because Churchill said that once Shefsky found a suitable replacement candidate for Cohen, one of the board members would resign so that the replacement could be appointed. Churchill denies agreeing to this. Again I can make no finding on this express contradiction in the affidavit evidence.

[110] The Respondents note that in cross-examination on his affidavit, Shefsky agreed that nothing in the circular for the April 4, 2013 meeting mentioned that he could force the

replacement of one of the board members to resign in favour of his nominee; he never asked that such a disclosure be made; and that this alleged right was never disclosed to shareholders, who the Respondents argue have a right to have adequate information on which to vote. The Respondents rely on s. 122(1)(b) of the *Ontario Securities Act*, RSO 1999, c. S-5 to argue that such a statement was statutorily required. Section 122(1)(b) provides for penalties if a person or company makes a misleading or untrue statement, or does not state a necessary fact.

[111] As a result, the Respondents argue, any rights under the Term Sheet were spent at the point the information circular was distributed to the shareholders without the relevant information that the Board members could change at Shefsky's discretion.

[112] The Respondents further argue that the subscription agreements signed by Shefsky ended any rights under the Term Sheet. Each subscription agreement provides the following representations:

> (a) That the investor is not a Control Person (as defined under securities law) and would not become a Control Person by purchasing the number of Units subscribed for; and
> (b) That the investor **does not intend to act jointly or in concert** with any other person to form a Control Person. (See Ex. XX of Conroy Affidavit) (Emphasis added)

[113] Nothing in the subscription agreements contain any information about the composition of the Board or of management. Further, each subscription agreement contains an entire agreement clause that expressly disclaims reliance on any other agreements. The Respondents ask that I conclude that Shefsky and 235 Inc., by entering into the subscription agreements, terminated any rights or interests they had in controlling CGMI by placing a majority of supporters on the Board.

[114] More relevant, however, is the fact that Shefsky never proposed a replacement for Cohen. Shefsky's argument that the Term Sheet was breached because no one on the Board volunteered to resign is a red herring and moot. Between the April 2013 shareholders meeting in which Shefsky voted for the management slate of directors and the January 2014 shareholders meeting, when a different management slate of directors was elected, Shefsky did not name a replacement, seek to call, or actually call a shareholders meeting himself, or propose a different slate of directors.

[115] Admittedly, by the time of the secret placement Shefsky was convinced he would not have sufficient votes to have his nominees elected. The secret placement closed on September 10, 2013, and, according to Shefsky, the dilution of shares caused by the newly issued shares meant that he could not hope to win in a meeting of shareholders.

[116] However, there is not sufficient evidence to prove that any of the Respondents refused to name a board member of Shefsky's choosing. In cross-examination on his affidavit, Churchill said that he would have resigned from the Board if necessary for Shefsky's nominee.

[117] Shefsky's argument lists the following as evidence of the breach:

1. Cinq- Mars was not willing to resign;
2. Churchill's evidence on cross-examination was that Cronin would have been asked to resign, and Cronin's evidence was that he was never asked to resign;

3. Churchill, agreed that he would have resigned if neither Cronin or Cinq-Mars would agree.

[118] Nothing here speaks to a refusal to name a nominee.

[119] Further Shefsky led no evidence to support his assertion that the investors which he brought in would vote with him. In cross-examination on his affidavit, he said that he did not contact any of them to ascertain their voting intentions. The affidavits from investors voicing support for Shefsky, state only that they invested because of his involvement, but make no representations as to how they would have voted their shares in a shareholders meeting at which Shefsky proposed a Board nominee (or slate).

[120] I find that these two factors are determinative of the issue. Shefsky asserts a purely hypothetical breach of his expectations – **if** he had proposed a replacement nominee, the Board would have refused to name the nominee, and **if** he had proposed a dissident slate before the secret placement all the investors he brought into CGMI would have voted for his nominee.

[121] I conclude that while the actions of the Board suggest that its members agreed that Shefsky could nominate a third person to the Board, thus giving rise to both a subjective and objective expectation, Shefsky never tried to act on that expectation and therefore it was never breached.

c. Control

[122] Shefsky asserts that he had a reasonable expectation of control of CGMI and that the Respondents' conduct defeated that expectation. In particular he asserts that the secret placement so diluted the proportion of shares controlled by him that he lost control. To make this argument, Shefsky claims that the shareholders he brought in would have voted with him. Had the secret placement not occurred, he would have had enough votes to secure control at the annual general meeting of shareholders.

[123] The Respondents say that Shefsky never had any control to lose by virtue of the fact that he did not have control before the secret placement. Shefsky's evidence on cross-examination on his affidavit was that he believed that the shareholders identified in Ex NN of his affidavit would have voted with him. As noted previously, I find he has insufficient evidence to support this belief. He did not contact the shareholders and ask how they would vote.

[124] The Respondents suggest that the best evidence of the voting intentions of the shareholders is the result of the January 30, 2014 annual meeting at which, once again, the management slate of directors, this time Churchill, Cronin, Cinq-Mars, Berkenshaw, Stephens, and Le Clair, were elected by a majority of all CGMI shares issued and outstanding. The Respondents further note that mathematically, even if you assume that all the shares created in the secret placement voted in favour of the management slate and then deducted all those shares from the proxy count in favour, there would still be a 51% majority in favour of the management slate.

[125] The problem with this scenario, of course, is that much had happened between April and January and shareholders that may have been supportive of Shefsky before, were less so after the turmoil of his termination and this litigation. This scenario does not answer whether Shefsky had control before the secret placement, and any exercise to answer that question must be purely hypothetical since no shareholder votes were held between the April shareholder meeting and the secret placement.

[126] I find the fact that there is no evidence that Shefsky had control of all the shares he brought into CGMI is determinative of the issue. The investors who swore affidavits indicated they invested because of Shefsky, but not that they would have voted their shares to support him. There are no agreements in evidence that Shefsky's investors would vote together to support him, and in fact, the subscription agreements specifically deny such agreements. Shefsky could not form a reasonable expectation that he would have control of the corporation based on the number of shares held by himself and the investors he brought into CGMI. It follows and I find that none of the actions that allegedly deprived him of control can be said to be oppressive.

VII. Conclusion

[127] Since I have concluded there were no breaches of Shefsky's reasonable expectation that the Term Sheet be honoured and that he be permitted to name a third member to the five member Board and that he had no reasonable expectation of controlling the corporation through the votes of the investors he brought to it, it is not necessary to address whether the Respondents' conduct was oppressive or appropriate remedies.

[128] The application is dismissed.

[129] The parties may speak to costs, if necessary, within 30 day of this decision.

Heard on the 2nd day of April, 2014.
Dated at the City of Edmonton, Alberta this 28th day of November, 2014.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Mr. Jeremiah J. Kowalchuk
(Field Law – Alberta)
Ms. Krista. R. Chaytor, and
Mr. Albert G. Formosa
(WeirFoulds LLP - Ontario)
for the Applicants – Shefsky and 235

Mr. Samuel M. Robinson,
(Stockwoods LLP - Ontario)
Ms. Charlotte Conlin,
(McMillan LLP - Ontario)
Mr. Matthew J. Diskin
(Gilbert's LLP - Ontario)
for the Respondents – CGMI, Churchill, Cinq-Mars, Cronin and Tomlinson Ltd.

Ms. Annemarie Clarke
(Witten LLP - Alberta)
For the Respondents Joe Doe 1-50 and ABC Corporation #1-50