This is Affidavit #1 of
Susan Danielisz in this case and
was made on July 12, 2018

NO. S-186120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36

- AND -

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57
AND THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9

- AND -

IN THE MATTER OF
PURCELL BASIN MINERALS INC.,
BUL RIVER MINERAL CORPORATION,
GALLOWAI METAL MINING CORPORATION,
JAO MINE DEVELOPERS LTD., and
STANFIELD MINING GROUP OF CANADA LTD.

PETITIONERS

AFFIDAVIT

I, **Susan Danielisz**, of 2200 – 885 West Georgia Street, Vancouver, British Columbia, SWEAR THAT:

1. I am a paralegal at Cassels Brock and Blackwell LLP, counsel for Highlands Pacific LLC, and as such I have personal knowledge of the matters hereinafter deposed to except where stated to be on information and belief, in which case I verily believe them to be true.

2. Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a copy of the Reasons for Judgment of Mr. Justice Masuhara in Supreme Court of British Columbia Action No. S1610280, *Reg Radford and Peter Lacey v. Brendan McMillan, Highlands Pacific LLC, Highlands Pacific Partners LLP and Purcell Basin Minerals Inc.*, dated July 10, 2017.

3. Attached hereto and marked as **"Exhibits "B" through "E"** to this my Affidavit are copies of the following:

(a) **Exhibit "B"** – Appellants' Factum filed in British Columbia Court of Appeal File No. CA44587 on October 16, 2007;

(b) **Exhibit "C"** – Factum of the Respondents, Reg Radford and Peter Lacey, filed in British Columbia Court of Appeal File No. CA44587 on November 24, 2017;

(c) **Exhibit "D"** – Factum of the Respondent, Purcell Basin Minerals Inc., filed in British Columbia Court of Appeal File No. CA44587 on November 24, 2017; and

(d) **Exhibit "E"** – Appellants' Reply to the Factum of the Respondents, Reg Radford and Peter Lacey, filed in British Columbia Court of Appeal File No. CA44587 on December 8, 2017.

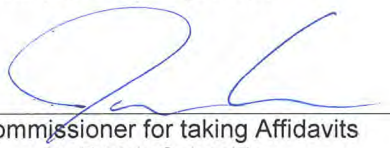
SWORN BEFORE ME at Vancouver, British Columbia, on July 12, 2018

A Commissioner for taking Affidavits for British Columbia

SUSAN DANIELISZ

JARED ENNS
Barrister & Solicitor
Cassels Brock and Blackwell LLP
#2200 - 885 West Georgia Street
Vancouver, B.C. V6C 3E8
Phone: (778) 372-6787
BC Law Society No. 513968

This is **Exhibit "A"** referred to in Affidavit #1 of **Susan Danielisz**, sworn before me at Vancouver, British Columbia, on July 12, 2018.



A Commissioner for taking Affidavits
for British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Radford v. MacMillan,* 2017 BCSC 1168

Date: 20170710
Docket: S1610280
Registry: Vancouver

Between:

Reg Radford and Peter Lacey

Petitioners

And:

Brendan MacMillan, Highlands Pacific LLC, Highlands Pacific Partners LLP and Purcell Basin Minerals Inc.

Respondents

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment
In Chambers

Counsel for the Petitioners:	J. Groia D. Sischy
Counsel for the Respondents Brendan MacMillan, Highlands Pacific LLC, and Highlands Pacific Partners LLP:	A.I. Nathanson J. Francis
Counsel for the Respondent Purcell Basin Minerals Inc.:	P.J. Sullivan
Place and Date of Hearing:	Vancouver, B.C. November 28-29, 2016
Place and Date of Judgment:	Vancouver, B.C. July 10, 2017

I. INTRODUCTION

[1] These Reasons deal with the claims brought by Peter Lacey and Reg Radford of oppressive and/or unfairly prejudicial conduct by Brendan MacMillan, the president and sole director and officer of Purcell Basin Minerals Inc. ("Purcell").

(j) a declaration that Mr. MacMillan has breached his fiduciary duties owed to Purcell and its shareholders;

(k) damages in an amount to be determined resulting from Mr. MacMillan's misconduct;

(l) repayment of any monies paid to Mr. MacMillan or companies under his control or direction as a result of his misconduct;

(m) an order setting aside, rectifying, or otherwise correcting any other oppressive act or omission as may be discovered as this matter proceeds; and

(n) costs on a full indemnity basis.

[5] In its application response the respondents consented to the following orders:

Except with consent of the parties or further order of the court, pending a hearing on the merits:

(a) Purcell shall not dispose of any assets;

(b) Purcell shall not engage in any transactions outside the ordinary course of business;

(c) other than in the ordinary course of Purcell's business, Purcell and MacMillan may not, directly or indirectly, encumber the assets of Purcell, or alter in any way any security held by any party unrelated to MacMillan over the assets of Purell;

(d) MacMillan, Highlands Pacific LLC or Highlands Pacific Partners LLP (together, the "MacMillan Parties") or any of their affiliates may not, directly or indirectly, enforce any security they have over the assets of Purcell which is the subject of challenge in this proceeding.

[6] Prior to delving into the details of this case, I note that the parties have proceeded on a summary basis. The parties are represented by experienced counsel and I have assumed that since I did not receive objections to this summary approach, the parties acknowledge that the necessary findings can be made based on the affidavits which appear to have been carefully drafted and then shaped by counsel. The savings in legal costs are no doubt significant, given that a full trial of a case like this, would be prolonged. I was left to review in detail significant volume of materials in this fact-intensive examination.

II. BACKGROUND

A. The Parties

[7] Purcell is a private British Columbia company engaged in mineral exploration and development. It owns, among other things, the Gallowai Bul River Mine located near Cranbrook, BC (the "Mine"). The Mine is not in production and has been shut down for some time. Purcell has no income or revenue of significance.

[8] The company was established on December 9, 2014 as a result of the insolvency proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*], involving the

[2] These petitioners, who are shareholders in Purcell, seek to have Mr. MacMillan removed as the sole director and to have the various contracts made by Purcell with Mr. MacMillan in respect to his compensation, the issuance of Purcell shares to him, and other related agreements nullified along with other orders set out below. The relief sought is founded upon the assertion the transactions were a form of egregious self-dealing to secure control of Purcell and in total were oppressive as defined under s. 227 of the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. **4**

[3] Mr. MacMillan disputes the characterization and says that the steps taken were fair and in the best interests of the company. A key argument is that the transactions were in the context of injecting much needed funding into Purcell. Further, the respondents argue that the complaints of the petitioners are not specifically personal and therefore relief should have been brought as a derivative action.

[4] The specific relief sought by the petitioners are as follows:

(a) a declaration that Mr. MacMillan has engaged in conduct that is oppressive or unfairly prejudicial to the shareholders of Purcell, including the petitioners, within the meaning of s. 227 of the *BCA*;

(b) an order removing Mr. MacMillan as a director and officer of Purcell;

(c) an order setting aside the issuance of the three million shares Mr. MacMillan, either directly or indirectly, caused Purcell to issue to himself, Highlands Pacific LLC or any other corporation under his control or direction;

(d) an order setting aside the compensation package Mr. MacMillan gave himself as improper and oppressive;

(e) an order setting aside the employment agreement Mr. MacMillan entered into with Purcell on November 7, 2016;

(f) a declaration that the compensation package, the issuance of three million shares and the employment agreement were invalid and improper as they were done without shareholder approval;

(g) an order setting aside any security or priority of security Mr. MacMillan caused Purcell to grant to him, to Highlands or any corporation under his control or direction, and particularly any agreement, resolution or other instrument which purportedly gave priority to Mr. MacMillan, Highlands or any company under his control or direction over any already existing secured debt or other secured instrument;

(h) an accounting and repayment with respect to any monies improperly paid to Mr. MacMillan, Highlands or companies under his control or direction by Purcell, including any salary paid to MacMillan;

(i) an order appointing Mr. Radford and Elwood Thompson as directors of Purcell;

Stanfield Group of Companies ("Stanfield Group"). The background to these proceedings is set out in more detail below. 5

[9] Purcell has about 3,500 shareholders. Prior to the impugned share issuance of three million shares to Mr. MacMillan there were approximately 2.4 million outstanding shares in the company.

[10] At the time this petition was heard, Purcell had outstanding liabilities of approximately $18 million, including approximately $17 million in senior debt owed to three lenders: CuVeras LLP ("CuVeras"), a Delaware corporation; and two of the respondents, Highlands Pacific Partners LLP ("HPP") and Highlands Pacific LLC ("Highlands").

[11] The respondent Mr. MacMillan is Purcell's president, sole director and officer. He is a businessperson who has founded and been the operator or director of public and private corporations and partnerships in the United States. He is also the principal of HPP and Highlands.

[12] Highlands is a Delaware corporation and a shareholder of Purcell. Highlands also has an interest in CuVeras and therefore holds an indirect interest in Purcell's debt through CuVeras. Highlands and others, including Mr. Lacey, contributed funds to CuVeras ("CuVeras DIP Investors") which were then used to provide debtor in possession financing to the Stanfield Group during the *CCAA* proceedings. Highlands' portion of the investment was $690,000. When the Stanfield Group Plan of Arrangement was completed, Highlands was issued 69,000 common shares in Purcell, also known as "bonus" shares. Highlands still holds all or substantially all of these shares. Highlands has also served as the manager of CuVeras.

[13] HPP is also a significant shareholder of Purcell and has a direct interest in Purcell's debt, represented by the HPP Note with a principal of $2.33 million plus interest. It received 95,257 "success fee" shares pursuant to the Plan of Arrangement in exchange for its contribution toward the restructuring of the Stanfield Group into Purcell. HPP continues to hold all or substantially all of these shares.

[14] The petitioner Mr. Lacey is a businessman and shareholder in Purcell. Mr. Lacey and his holding company 1656993 Alberta Ltd. were also CuVeras DIP Investors. They invested approximately $600,000 in Purcell and received "bonus" and "success fee shares" for their involvement in the restructuring process. Mr. Lacey and his holding company own approximately 251,000 common shares in Purcell, with 241,000 of these shares being held personally and 10,000 through the holding company. Mr. MacMillan deposes that Mr. Lacey is the single largest shareholder in Purcell prior to the more recent impugned issuance of shares to him.

[15] Mr. Lacey and his holding company also have an indirect interest in the Purcell debt held by CuVeras, as represented by the CuVeras Note.

[16] The petitioner Mr. Radford is a businessman and shareholder in Purcell. He was a shareholder of the Stanfield Group and holds and holds directly and indirectly approximately 20,000 shares of

Purcell according to the Purcell shareholder list and Mr. Radford. 6

B. Creation of Purcell

[17] The insolvency proceedings pertaining to the Stanfield Group were before Madam Justice Fitzpatrick. Her judgments provide background as to how Purcell came to be: see *Bul River Mineral Corporation (Re)*, 2015 BCSC 113 at paras. 4–8; and *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732 at paras. 8–19.

[18] The Stanfield Group, effectively controlled by Ross Stanfield, was the predecessor company to Purcell and in the business of developing the Mine property. In the mid-1990s, Mr. Stanfield began raising funds to develop the Mine by selling preferred, non-voting shares and sometimes common shares in the Stanfield Group companies. In one sense, the sales were successful as over $220 million were raised over that period until 2010 from approximately 3,500 individual investors.

[19] In the process, Mr. Stanfield made representations to investors as to the Mine's ore content, including calling it an "elephant" mine in reference to its apparently vast resources. Provincial securities regulators eventually got involved and certain shareholders took legal action against the Stanfield Group. Subsequent technical reports prepared in 2011 and 2013 proved that the representations as to the quantity of ore in the Mine were false.

[20] On May 26, 2011, the Stanfield Group sought and obtained creditor protection under the *CCAA* and an initial order was granted. In Reasons indexed as 2015 BCSC 113, Fitzpatrick J. described the issues facing the Stanfield Group at that time:

> [8] ... The stay of proceedings granted in the Initial Order has been extended by this Court from time to time. The course of the restructuring has not been, at times, without difficulty. The fundamental problem faced by the Group at the outset was whether it could be shown that there were proven resources at the Mine that would support the conclusion that the Mine was viable. In order to continue minimal operations at the Mine and also proceed with this development work, interim financing was necessary. Ultimately, that financing was provided by CuVeras LLC ("CuVeras") and CuVeras continues to financially support the Group to this time.
>
> [9] CuVeras' involvement went beyond interim financing. In November 2011, CuVeras and the original petitioners signed a letter of intent. That document was replaced by a further letter of intent in March 2012 which addressed a possible restructuring. Following the resolution of a dispute concerning these arrangements, a letter of agreement was signed between the parties on May 23, 2014 (the "Letter of Agreement").

[21] In these same Reasons at para. 20, Fitzpatrick J. described the entitlements of CuVeras, HPP and the Lacey Group as set out in the Letter of Agreement:

> a) CuVeras
>
> As interim lender in the *CCAA* proceedings and sponsor of the Plan, CuVeras is entitled to notes payable by Purcell, defined as "Purcell Notes", in payment of the financing amounts (principal, interest and fees). This avoids the need to raise cash on the closing, whether by new investment or otherwise. Accordingly, the interim financing will be paid out and discharged as a result of the issuance of these Purcell Notes. CuVeras is also entitled to additional compensation pursuant to the Letter of Agreement by way of Purcell Shares equal to the principal value of the interim financing loans outstanding as at closing of the Plan (presently anticipated to be approximately $9.5 million which will represent 48.7% of the equity).

b) Highlands

Highlands, the manager of CuVeras, as interim financier in the *CCAA* proceedings, is entitled to Purcell Notes representing 7% of the enterprise value of Purcell and 2% of the Purcell Shares (reduced from 7% as discussed below). Those entitlements are a fee to compensate Highlands for its administration of the interim financing loan, its sponsorship of the Plan, its role in raising the exit financing and for the services it has provided to the Group over the course of its involvement in these proceedings.

c) The Lacey Group

The Lacey Group has been involved in the proceedings since the fall of 2011 when it advanced funds to the Group to repay the first interim lender. In addition, the Lacey Group has organized the CuVeras investor group, retained Highlands and was instrumental in funding CuVeras' sponsorship of the Plan. The Lacey Group was also involved in negotiating the Letter of Agreement, negotiating the Plan with CuVeras and the petitioners and raising the exit financing. Pursuant to the Letter of Agreement, the Lacey Group is to receive 15% of the Purcell Shares.

[22] The court approved the Letter of Agreement on May 28, 2014 and the Stanfield Group and Purcell presented a plan of compromise and arrangement, dated September 25, 2014 and subsequently amended (the "Plan of Arrangement").

[23] Purcell was the restructuring vehicle under the Plan of Arrangement. The two main Stanfield Group operating companies, Fort Steele Mineral Corporation and Zeus Mineral Corporation were amalgamated with Purcell and continued under the "Purcell Basin Minerals Inc." name and with Purcell's articles (the "Amalgamation"). Mr. MacMillan had been the sole director and officer of Purcell and continued in that capacity after the Amalgamation.

[24] The shareholders who had invested and held preferred shares in the companies comprising the Stanfield Group and the Stanfield Group's trade creditors exchanged the shares or debt respectively for common shares of Purcell. The CuVeras DIP Investors, Highlands, Mr. Lacey and Mr. Moretti also received shares of Purcell.

[25] Mr. Radford deposes in his affidavit made August 19, 2016, that at the time the Plan of Arrangement was approved, a group of Purcell's shareholders along with Mr. MacMillan invested approximately $11 million in CuVeras. As consideration, they received unsecured notes of CuVeras. This was done to "create a financial facility and secure the appointment of [CuVeras] as DIP Lender." Mr. Radford also deposes that Mr. MacMillan, indirectly through his private holding company Highlands, was made manager of CuVeras.

[26] CuVeras agreed to compensate Highlands (Mr. MacMillan) for its role as manager. This included a "base fee" of $40,000 and a weekly payment of $8,000. Mr. Lacey approved the agreement as sole member of CuVeras.

[27] CuVeras does not have any business other than managing its investment in Purcell.

[28] Justice Fitzpatrick approved the Plan of Arrangement by an order dated November 18, 2014. The Amalgamation was effective December 9, 2014.

[29] Subsequently, Mr. MacMillan has taken various actions in respect to Purcell which the petitioners take issue and form the basis of their complaint under s. 227 of the *BCA*. The impugned steps are outlined below.

[30] By director's resolutions dated December 9, 2014 but made in early 2015 (the "December 9, 2014 Resolutions") Mr. MacMillan approved the terms of a compensation package for his service as president of Purcell (the "Initial Compensation Package"). Pursuant to the Initial Compensation Package, Mr. MacMillan was to receive a base fee of US$40,000 and an additional US$8,000 per week for each week after December 9, 2014 that he held the position of President. For all amounts not paid to him immediately, Mr. MacMillan caused Purcell to agree to pay him interest at the rate of 18% per annum or the highest amount allowable by law. Mr. MacMillan deposes his justification is that these are the same amounts for his compensation under his agreement with CuVeras. Any compensation not paid to Mr. MacMillan was to accrue interest at a rate of 18% per annum or the highest amount allowed by law. Regardless of the length of his service, the minimum amount he would receive under the Initial Compensation Package was US$800,000. The December 9, 2014 Resolutions also provided that any unpaid compensation would become a secured obligation of Purcell with priority over all other payables, to be paid immediately upon the appointment of any other officers or directors, or on the discontinuance of Mr. MacMillan's tenure with Purcell.

[31] On June 2, 2015, Mr. MacMillan sent out an email to shareholders attaching a Purcell newsletter. The newsletter includes the statement:

> The plan to appoint a full Board of directors and an operational CEO is still in place, but as this comes with a cost, it has been delayed until we have a major part of the money for production raised.

[32] The newsletter also states an equity valuation for Purcell as $20 million. There is no mention of the December 9, 2014 Resolutions in the newsletter.

[33] In September 2015, Mr. Radford on behalf of shareholders approached Bruce Reid and Jennifer Boyle, mining executives based out of Toronto for help in providing financial and organizational support for Purcell. The two accepted the invitation and have provide assistance when needed, including advancing funds for certain expenses. Mr. Reid and Ms. Boyle made further proposals for financing; however, it appears that the proposal did not advance because Purcell did not provide necessary financial information.

[34] In October 30, 2015, Purcell issued shares to investors at a price between $5/share and $5.50/share.

[35] On April 25, 2016, the Ministry of Energy advised that Purcell's *Mine Act* permit application had been suspended. The permit is necessary to mine and produce ore at the Mine. By this date, Mr. MacMillan knew that Mr. Lacey and Mr. Radford were trying to bring about a change in Purcell's leadership.

[36] Mr. MacMillan made further director's resolutions dated April 25, 2016 (the "April 25, 2016 Resolutions"). He deposes the terms were settled on "approximately May 27, 2016". The meeting minutes describe these resolutions as having two purposes: to provide Purcell with a means of funding the company's operations and to pay Mr. MacMillan part of the compensation he is owed for his service as the officer of Purcell.

[37] The April 25, 2016 Resolutions approved a series of transactions including an agreement by Highlands to make available a credit facility of up to $15 million to Purcell on a senior and secured basis (the "Highlands Loan"). In connection with the Highlands Loan, Mr. MacMillan as sole director approved Purcell's execution of a promissory note in Highlands' favour providing that the Highlands Loan ranks senior to any other debt of the company, except for the compensation payments discussed below (the "Highlands Senior Note"). The Highlands Loan has an annual interest rate of 10% and is repayable on December 8, 2016.

[38] Purcell also issued three million common shares to Mr. MacMillan at $0.10 per share as (the "Share Issuance") and approved execution of a promissory note evidencing Purcell's indebtedness to Mr. MacMillan for past compensation (the "Compensatory Note") in the amount of US$1,453,802.

[39] With the Share Issuance, Mr. MacMillan became the majority and controlling shareholder of Purcell. Prior to this issuance, there was approximately 2.4 million shares issued and outstanding.

[40] The Highlands Senior Note and Compensatory Note owed by Purcell to Highlands and Mr. MacMillan respectively, were secured pursuant to the April 25, 2016 Resolutions by a first priority security interest over the assets of Purcell (the "Priority Agreement"). Mr. MacMillan also amended the CuVeras and HPP Notes, which were due in 2016. The maturity date of the CuVeras Note of $12,009,795 (at 10% interest) issued pursuant to the Plan of Arrangement, was delayed thirteen years to December 2029; as well, the debt was subordinated to the obligations in the Compensatory and Highlands Senior Notes.

[41] Mr. MacMillan deposes that he issued the shares as partial payment for the accrued and unpaid amounts he claimed were due to him under the Initial Compensation Package.

[42] He also deposes that by late May 2016 Purcell had urgent expenses. Mr. MacMillan says that this combined with the suspension of the permit application that indicated a considerably longer timeline and higher costs than had been anticipated, led to his conclusion that the most reasonable and only timely alternative he could see was for Highlands to extend a loan to enable Purcell to operate and pursue the permitting process.

[43] He further deposes that the Share Issuance was an integral part of an overall agreement in which Highlands agreed make available a credit facility of up to C$15 million to Purcell (the "Highlands Loan"). He wanted secure protection for the new money, wanted some satisfaction for the service he had provided to Purcell as President, since December 2014 without compensation. Since Purcell had no money, he determined that converting some of his accrued and unpaid compensation in exchange

for shares was the only realistic option. He further deposes that Highlands would not have agreed to advance the Highlands Loan without the share issuance. 10

[44] To date, Highlands apparently has advanced approximately $400,000.

[45] In arriving at the Share Issuance price of $0.10 purchase, Mr. MacMillan says that he took into account Purcell's financial position, its ongoing capital requirements, Purcell's inability to raise needed funds through issuing equity, and the values attributed to Purcell in third party offers, including from the dissident director nominees Bruce Reid and Jennifer Doyle. Those third party offers valued Purcell at substantially less than its existing senior debt, making the shares worth little or nothing.

[46] In late June 2016, Mr. Lacey as the sole member of CuVeras signed a written consent to remove Highlands as the manager for CuVeras. This follows Mr. Radford learning that "Mr. MacMillan as its de facto manager allowed CuVeras to be struck-off the registrar for failure to make its regulatory filings and to pay associated sustaining fees". As a result, 1974315 Alberta Ltd. ("197") was appointed manager of CuVeras. Subsequently, 197 paid the fees and penalties to reinstate CuVeras. The company was revived effective August 15, 2016.

[47] Deficiencies in Mr. MacMillan's management of Purcell are outlined by Mr. Hewison, mine administrator; Mr. Henderson, mine manager and Mr. Radford. They include the non-payment of bills, a lien against the Mine site for lack of payment, the non-payment of employees, the failure to file tax returns, and the failure to pay for the renewal of certain mineral claims.

[48] In July 2016, a group of Purcell shareholders including Mr. Radford and Mr. Lacey delivered a requisition to the Purcell board for a general meeting of shareholders to increase the number of directors to seven and elect a slate of directors. The seven nominees proposed were Bruce Reid, James Gray, Reg Radford, Jennifer Boyle, Grant Fulton, Roger Berdusco and Ellwood Thompson. The meeting date sought was for mid-August 2016.

[49] Mr. Radford filed a petition, on August 23, 2016 and sought an order requiring that the shareholders' meeting be held sooner than November 2016 and at a location different than that proposed. Justice Morellato declined to change the date or location of the Annual General Meeting.

[50] On or about September 28, 2016, Mr. MacMillan issued a notice of general meeting of shareholders for November 10, 2016 to be held in Richmond, B.C. Previously, he had refused to call a meeting of Purcell. The purposes set out in the meeting notice are stated as:

1. To determine the number of directors of the Companies;
2. To elect the directors of the Corporation for the ensuing year;
3. To approve the appointment of Johnson, Archer LLP, as auditors for the Corporation for the ensuing financial year and to authorize the directors to fix their remuneration; and
4. To transact such further or other business as may properly come before the Meeting or any adjournment or adjournments thereof.

Accompanying this Notice you will receive a Management Letter and a Form of Proxy. The accompanying Management Letter will provide additional information relating to the matters to

be dealt with at the Meeting. **11**

[51] Accompanying the notice was a letter to shareholders from Purcell, which I assume was written by Mr. MacMillan (the "Shareholder Letter").

[52] On October 13, 2016, Mr. MacMillan advised counsel for Purcell that he did not intend to rely on or seek to enforce the terms of the Compensatory Note and rather took the position he was owed $871,982.40 plus interest at that time.

[53] The petitioners learned of the December 9, 2014 Resolutions and April 25, 2016 Resolutions for the first time on or about October 21, 2016 through counsel for Purcell. The Shareholder Letter had not referred to them.

[54] Mr. Radford's former lawyer had made an application to Purcell on September 23, 2016 requesting a list of shareholders. On October 6, 2016, counsel for Purcell shared an undated copy of a shareholders' list. On October 21, 2016, counsel for Purcell advised counsel for Mr. Radford that the undated list did not reflect the Share Issuance to Mr. MacMillan and provided a new list, current as of October 6, 2016.

[55] On October 24, 2016, pursuant to an order for Justice Morellato dated September 16, 2016 and granted in the proceedings of the Radford Petition, Purcell disclosed financial information prepared by management online including a preliminary income statement, cash flow statement and accompanying notes for Purcell for the financial year ending December 31, 2015 (the "October 2016 Disclosure"). A balance sheet was not provided. Prior to the order, Mr. MacMillan had refused to disclose the company's financial information.

[56] On October 24, 2016, Mr. MacMillan also caused Purcell to disclose to its shareholders a communication regarding compensation and the engagement of Mr. Moretti. The communication states:

> Mr. Brendan MacMillan ("MacMillan") has served as the Company's President and sole director and officer since the Company was amalgamated on December 9, 2014 pursuant to the *CCAA* proceeding. The Company has entered into contracts with Mr. MacMillan to remunerate him for his services and with his affiliate Highlands Pacific LLC ("Highlands") to obtain the necessary working capital to fund the Company's operations. Some of the relevant transactions below occurred subsequent to the Company's 2015 year end but are disclosed here for the sake of completeness. As noted below, Mr. MacMillan has not received any cash payments from the Company in connection the services he has provided in his capacity as President of the Company, and, as noted under the Subsequent Events section, he has agreed to renegotiate the terms of some of the arrangements described below, including his compensation arrangements.
>
> ...
>
> Subsequent Events
>
> As noted above, on October 13, 2016, Mr. MacMillan advised the Company in writing that he would not be relying on the Compensatory Note. He also advised that it was his intention to seek to renegotiate the terms of the Compensation payments with the Company at arm's length.
>
> By a director's resolution dated October 21, 2016 and pursuant to the authority contained in the Company's articles, the Board appointed Michael Moretti of San Antonio, Texas to act as an attorney (the "Attorney") for the Company to exercise the authority to re-negotiate and approve

> the terms of Mr. MacMillan's compensation for serving as President of the Company and the Highlands Loan. Mr. Moretti is a significant shareholder of the Company, and an arm's length party to Mr. MacMillan. The Company has entered into an indemnity agreement with Mr. Moretti with respect to his role as the Attorney of the Company. Mr. MacMillan has proposed a compensation package to the Company that provides for a reduced level of compensation from that approved in the December 9, 2014 Resolutions. Any revision of the compensation payable to Mr. MacMillan will be subject to the final approval of the Company, as directed by Mr. Moretti in his capacity as Attorney for the Company, and Mr. MacMillan.

[57] Mr. MacMillan in his fourth affidavit concedes that the compensation that he negotiated with himself was "based on my mistaken view of my compensation entitlement."

[58] On October 27, 2016, Mr. MacMillan filed an action on behalf of Highlands, HPP and himself in the Supreme Court of the State of New York claiming against CuVeras and Mr. Lacey. The relief sought includes: $690,000 related to the Highlands – CuVeras Note; damages for unpaid management fees; a declaration that the removal of Highlands, i.e. Mr. MacMillan, was unlawful, null and void and that Highlands remains the manager of CuVeras; and a declaration that the Priority Agreement is valid and enforceable.

[59] Mr. Moretti is one of the largest shareholders in Purcell, holding 163,061 shares. The parties' dispute whether Mr. Moretti is at arm's length from Mr. MacMillan. Mr. Moretti also holds an interest in Purcell's debt through CuVeras. He is a businessperson who lives in Texas. He operates a jewellery business and is an investor in commercial real estate, medical science, and agricultural technology ventures. Mr. Moretti acknowledges that prior to his appointment as attorney; he had conversations with Mr. Lacey and Mr. Radford regarding Mr. MacMillan. Mr. Lacey deposes that:

> To my direct knowledge, based on discussions with Moretti, I am aware that MacMillan and Moretti have been invested in and involved in the operation of other companies such that Moretti felt he was stuck and had to go along with MacMillan's requests regarding Purcell. If Moretti did not go along with MacMillan, then he would have potentially jeopardized his other investments with MacMillan.

[60] Mr. Moretti does not deny this conversation. He explains now that:

> During the conversation with Mr. Radford and Mr. Lacey, I told them words to the effect that I did not want to get in the middle of things because I had other investments with Mr. MacMillan. I used this as an excuse to avoid their request that I join their team.
>
> Mr. Lacey appears to have misinterpreted the excuse. I can say categorically that:
>
> (a) The decisions I made as Attorney for Purcell were made independently and on the basis of what I believed to be in the best interests of Purcell;
>
> (b) I am at arms length from Mr. MacMillan;
>
> (c) At no time did I feel "stuck";
>
> (d) At no time did I feel I had to go along with Mr. MacMillan's requests regarding Purcell; and
>
> (e) At no time did I feel I was jeopardizing any other investments I had with Mr. MacMillan.

[61] Mr. Moretti deposes that at the time of his appointment he understood the following:

> (a) My over-riding obligation was to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances and to act honestly and in

good faith with a view to the best interests of Purcell;

(b) In my capacity as an "Attorney", I was subject to the duties and responsibilities of a director of a corporation under the British *Columbia Business Corporations Act* (the "Act");

(c) I was charged with using my professional business experience to assist me in renegotiating Mr. MacMillan's compensation and the terms of an operating loan Mr. MacMillan had provided to Purcell;

(d) During the process I could consult my own personal lawyer and corporate counsel for Purcell;

(e) Purcell was formed in December 2014 as result of an amalgamation of three predecessor companies at the end of lengthy *Companies' Creditors Arrangement Act* proceedings;

(f) The mineral resource market had been in a long slump;

(g) Copper ore prices were depressed;

(h) It was very difficult for mineral resource companies to raise funds;

(i) Purcell had no money and over $17 million in debt;

(j) Purcell had no revenue sources and was reliant on capital infusions to maintain itself;

(k) Any capital infusion would invariably result in the dilution of Purcell's shareholders;

(l) The day to day operations of Purcell were being funded by Mr. MacMillan or companies associated with Mr. MacMillan;

(m) No one else was putting money into Purcell and given the economic environment that was unlikely to change except at significant cost to Purcell and its shareholders;

(n) Mr. Reid had made an offer that would have resulted in the shareholders in Purcell receiving next to nothing;

(o) Mr. Lacey and Mr. Radford and the dissident group were not prepared to detail their plans for financing Purcell;

(p) Mr. Macmillan has served as the President and sole director and officer of Purcell since it was incorporated;

(q) Purcell owed Mr. MacMillan a significant amount of money. In this respect, when Purcell was incorporated, Purcell passed resolutions authorizing payment to Mr. MacMillan for his services as the President of Purcell at the US$40,000 per annum in addition to US$8,000 per week (the "MacMillan Compensation");

(r) All of Mr. MacMillan's compensation had accrued and he had not received any cash compensation from Purcell;

(s) In April 2016, Purcell authorized and issued 3,000,000 common shares of Purcell to Mr. MacMillan at a deemed price of $0.10 per share in payment of $300,000 for a portion of the accrued compensation;

(t) A compensation report was being prepared by Mercer LLC ("Mercer") to assist me in making decisions on compensation;

(u) In April 2016, Highlands Pacific LLC ("Highlands") agreed to loan Purcell of up to CAD$15,000,000 (the "Operating Loan") in consideration for Purcell signing a promissory note with an interest rate of 10% per annum;

(v) As at October 21, 2016, Purcell was indebted to Highlands in the amount of CAD$332,809 as a result of advances made by Highlands to Purcell pursuant to the Operating Loan;

(w) Mr. MacMillan had advised Purcell that he wanted to renegotiate his remuneration and the terms of the Operating Loan.

[62] The compensation report prepared by Mercer, dated November 1, 2016 and provided to Mr. Moretti is stated to be a "draft" and is entitled "President Compensation Review".

[63] Mr. Moretti was also provided with documents from Mr. McMillan's counsel on October 21, 2016, which proposed revised compensation terms. The documents are said to have included:

(a) A term sheet regarding Mr. MacMillan's employment agreement;

(b) A term sheet regarding the Operating Loans;

(c) A draft form of employment agreement between Mr. MacMillan and Purcell;

(d) A draft form of director and officer indemnity agreement between Mr. MacMillan and Purcell;

(e) A draft form of senior secured convertible promissory note for the Operating Loan.

[64] It is notable that the letter states that in relation to the existing agreement Mr. MacMillan has a disclosable interest in at least the Highlands Loan.

[65] On November 7, 2016, the same day the subject petition was issued, Mr. MacMillan entered into an executive employment agreement ("EEA"), an amended and restated senior promissory note and a new form of indemnity agreement with Purcell which reflected input from Mr. Moretti (together, the "Moretti Agreements"). The respondents' describe the outcome of the Moretti Agreements as follows:

(a) As noted, the 3 million shares issued at $0.10 per share were reduced to 1.975 million shares issued at $0.20 per share;

(b) MacMillan's base salary was reduced from approximately US$416,000 per annum to C$265,000 per annum, C$20,000 on account of benefits and some incentive compensation that he may or may not earn. These terms applied retroactively;

(c) The interest rate on MacMillan's accrued and unpaid compensation was reduced from at least 18% to 10%, also retroactively; and

(d) As a result of Moretti and the Company's renegotiation of the terms of the issuance of the 3 million shares, both as to amount and issue price, the Company's debt owed to MacMillan was reduced by a further C$95,000, that is, by C$395,000 rather than the C$300,000 as originally agreed to for three million shares;

(e) Overall, the amount of accrued and unpaid compensation owed to MacMillan by Purcell was reduced from approximately C$870,000 plus accrued interest to C$238,916; and

(f) The maturity date of the Highlands Loan was extended to July 31, 2017, provided that MacMillan remains President of Purcell.

[66] The EEA also included a change of control provision.

[67] The evidence of two shareholders Mr. Stewart and Mr. Roualt is that they had discussions with Mr. MacMillan as described below.

[68] Mr. Stewart deposes that Mr. MacMillan called him on October 22, 2016 seeking support in relation to votes at the shareholder meeting. Mr. Stewart states that Mr. MacMillan made no mention of the three million shares he had self-issued. Three days later Mr. Stewart states that he learned of the three million shares, Mr. Stewart send a text to Mr. MacMillan on October 25, 2016 which states:

Ouch you didn't mention you gave yourself 3,000,000 shares I guess we all get screwed with that one. Hope you know what you're [sic] doing? **15**

[69] Mr. Stewart deposes that following his text he received a telephone call from Mr. MacMillan. He described the call as follows:

> MacMillan attempted to assure me that he had to self-assign the 3 million shares to stop the dissidents from winning the vote at the shareholders meeting, and that, "man to man", he would never exercise the shares. He stated that he absolutely needed "to win the vote to save the company for all the shareholders". As such a shareholder, I found such statements difficult to believe in light of the fact that he had hidden the existence of the shares from me in the first place. It is common sense that he would not just give them back. Further, MacMillan's claim that he had issued himself the shares for the good of the shareholders made no sense to me in light of the fact that he was expressly using them to maintain his own personal control over the Company.
>
> I also questioned MacMillan about claims I had heard regarding him willfully sabotaging Purcell by allowing the Company's claims to come due and refusing to renew them. MacMillan stated that he absolutely tried to prevent the claims from being renewed, and that these claims, including the Feldspar claim, were useless, and that this was a "perfect example of why he needs to win this vote", calling Radford and Lacey "idiots" and "stupid". I was shocked that MacMillan would purport to be acting in the interests of shareholders while admittedly actively sabotaging the business of the Company. This was the opposite of what I had expected when I invested in the Company. This conduct made it extremely difficult to believe that the Company's survival depended on MacMillan; on the contrary, it seemed that MacMillan was causing harm to Purcell, and that the shareholders ought to be the ones who determine the Company's future.
>
> Moreover, I was never aware that MacMillan was being paid any kind of a salary from Purcell. MacMillan himself has told me that his work at the Mine has cost him immensely and that he was not being compensated for it. I have always been under the impression that he was going above and beyond and not being paid for it. He also declared this to prospective investors when he was attempting to raise funds for CuVeras. At no point did MacMillan disclose to me that he was receiving any kind of compensation, other than a success fee from the *CCAA* proceedings. It was yet another shock for me to discover that MacMillan had unilaterally been paying himself a salary of $8,000 per week from the Company.

[70] Mr. Roualt describes a conversation he had with Mr. MacMillan as follows:

> On Monday, November 7, 2016, I telephoned MacMillan to ask for the exact listing of the number of shares I held, as this information was not included in the proxy sent to shareholders by MacMillan. During our discussion, I said to MacMillan that I understood that he had approximately 180,000 shares. In the course of this phone conversation, I remarked that MacMillan had told me that he had invested $600,000 of his money into Purcell, and at the value of $10 per share used for everyone, this only amounted to 60,000 shares. I wanted to know where the remaining 120,000 shares came from. MacMillan stated that he received 90,000 shares from his work with the *CCAA* proceedings. When I asked him where the still remaining 30,000 shares came from, MacMillan was elusive and told me that he would have to look it up because he was not sure.
>
> During this same conversation, when I later told MacMillan that I had heard of the 3 million shares that he had given himself from the Company, MacMillan told me, "man to man" that he only issued those shares to himself so he could win the vote against Lacey and Radford. He claimed that if he lost the vote, then all of the shareholders would lose everything, He also told me that he did not know why he had "given that asshole Lacey 10% of the Company". He claimed it was a "dumb thing to have done". He also claimed that he would never use the shares.
>
> I did not believe what MacMillan told me on November 7, 2016 when he suggested that if he didn't win the vote, then all shareholders would lose everything. It appeared to me that MacMillan was only acting in his own self-interest. MacMillan was trying to tell me that he wasn't going to use the shares, but at the same time he was going to use them to try to win a

> shareholder vote and remain in power. I do not believe that the shareholders will lose everything if Lacey and Radford's slate of directors are elected by the shareholders. In any event, it is the shareholders who get to decide who will manage the Company, not one person such as MacMillan. I believe we will have a far greater chance of success as a company with the removal of MacMillan.
>
> Further, in all of my conversations with MacMillan, at no point was I informed or did I have knowledge that he was pulling a salary from Purcell. On the contrary, Macmillan has stated to me that he would be receiving nothing for his work at the Mine, and that he was "doing it all for the shareholders". I was astounded when I learned that MacMillan had apparently decided to pay himself a salary of $8,000 per week.
>
> As a shareholder of Purcell, I am concerned about these recent revelations of MacMillan's dishonesty. If I had known in advance about the self-issuance of the 3 million shares, the high compensation he was receiving from the Company, or of him placing his security interests in priority over that of CuVeras, I would not have supported it as it is completely contrary to my expectations as a shareholder. I am very concerned that MacMillan's actions have harmed my interests in Purcell.

[71] A shareholder sympathetic to Mr. MacMillan, Ms. Schumacher in an email of November 18, 2016 appears to corroborate Mr. Roualt and Mr. Stewart's evidence in respect to the shares issued so Mr. MacMillan. She states:

> When it recently became apparent that the smear campaign by the dissidents were meeting with some success [MacMillan] was advised that issuing voting shares in lieu of receiving past wages could likely successfully ward off the hostile takeover. *That is the reason he issued the shares.* I can also tell you that it is 1.975 million not 3 million. *The shares are to be used to help us block the hostile takeover* and ensure that 95% of our company is not being sold off. [emphasis added]

[72] In respect to compensation Mr. MacMillan contests the idea that he stated he was not to be compensated by Purcell for his work; rather, it was that he had not been paid any compensation.

[73] With respect to proxies for the annual general meeting of Purcell which was scheduled for November 10, 2016 (the last possible day permitted under ss. 167(5) of the *BCA* to hold an annual general meeting, the corporate lawyers assisting the petitioners ("GPW") advise that "as of November 7, 2016, GPW had received from approximately 571 Purcell shareholders proxies representing at least 1,212,295 common shares of Purcell appointing Reg Radford and/or Ellwood Thompson ("Alternate Proxyholders") as their proxyholders which gives the Alternate Proxyholders discretionary authority to vote their shares in favour of the resolutions set out in a letter to shareholders from the petitioners mailed on or about October 25, 2016 and against any resolutions put forward by management of Purcell".

[74] Corporate counsel for Purcell advise that in relation the November 10, 201 meeting, they had as of November 8, 2016 received 216 proxies in favour of management representing 500,345 shares to be voted in favour of management and 144 proxies in favour of the dissidents representing 111,496 shares to be voted in favour of the dissidents. The proxies representing 500,345 shares to be voted in favour of management include 163,061 shares from Mr. Moretti, 68,000 shares from Highlands, and 95,257 shares from HPP. It is observed by the petitioners that "outside of Moretti and Highlands, only approximately 175,000 shares have been voted in favour of MacMillan.

[75] The Company has not yet held its first AGM or any shareholders' meeting. On November 9, 2016, Justice Johnston gave Oral Reasons for Judgment ordering the AGM be adjourned and held instead within 30 days following a decision on this petition. **17**

[76] The hearing of this petition took place on November 28 and 29, 2016.

C. Impugned Actions

[77] The petitioners allege they held the following reasonable expectations and that they were violated by the actions of the respondents:

1. the sole director and officer of the Company would disclose all conflicts to shareholders;
2. the sole director and officer of the Company would seek shareholder approval of any transaction that would purport to make him the majority and controlling shareholder of Purcell;
3. the sole director and officer of the Company, who was advising the shareholders in June 2015 that appointing a full board of directors and an operational CEO was still the plan, but it comes at a cost, would advise and disclose to shareholders that he had already unilaterally caused the Company to pay him an egregiously inflated, improper and unapproved compensation package of over USD$400,000 annually and would seek shareholder approval for any such compensation;
4. the sole director and officer of the Company would not cause the Company to grant him a priority secured interest over the Company's assets;
5. the sole director and officer of the Company would provide shareholders with financial information of the Company in a timely manner and as statutorily required;
6. the sole director and officer of the Company would call a shareholders meeting in a timely manner and as statutorily required; and,
7. the sole director and officer of the Company would not purport to enter into a new employment agreement in the face of this Petition and on the eve of a requisitioned meeting of shareholders where, without the shares he issued to himself, he would clearly be voted out.

III. ARTICLES AND LEGISLATION

A. The *BCA*

[78] The petitioners seek relief under the oppression remedy pursuant to s. 227 of the *BCA*. That section reads as follows:

> Complaints by shareholder
>
> 227(1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class

or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

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

(a) directing or prohibiting any act,

(b) regulating the conduct of the company's affairs,

(c) appointing a receiver or receiver manager,

(d) directing an issue or conversion or exchange of shares,

(e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,

(h) directing a shareholder to purchase some or all of the shares of any other shareholder,

(i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,

(j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

(k) varying or setting aside a resolution,

(l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

(n) directing correction of the registers or other records of the company,

(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(p) directing that an investigation be made under Division 3 of this Part,

(q) requiring the trial of any issue, or

(r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

[79] The *BCA* contains provisions relating to transfer of the powers of directors and granting a power of attorney:

Powers of directors may be transferred

137(1) Subject to subsection (1.1) but despite any other provision of this Act, the articles of a company may transfer, in whole or in part, the powers of the directors to manage or supervise the management of the business and affairs of the company to one or more other persons.

(1.1) A provision of the articles transferring powers of the directors to manage or supervise the management of the business and affairs of the company is effective

(a) if the provision is included in the articles at the time of the company's recognition or if the company resolved, by special resolution, to add that

provision to the articles, and

(b) if the provision clearly indicates, by express reference to this section or otherwise, the intention that the powers be transferred to the proposed transferee.

(2) If the whole or any part of the powers of the directors is transferred in the manner contemplated by subsection (1),

(a) the persons to whom those powers are transferred have all the rights, powers, duties and liabilities of the directors of the company, whether arising under this Act or otherwise, in relation to and to the extent of the transfer, including any defences available to the directors, and

(b) the directors are relieved of their rights, powers, duties and liabilities to the same extent.

(3) If and to the extent that the articles transfer to a person a right, power, duty or liability that is, under this Act, given to or imposed on a director or directors, the reference in this Act or the regulations to a director or directors in relation to that right, power, duty or liability is deemed to be a reference to the person.

...

Corporations may grant power of attorney in writing

144(1) British Columbia corporation may, in writing, designate a person as its attorney and empower that attorney, either generally or in respect of specified matters, to sign deeds, instruments or other records on its behalf.

(2) Every deed, instrument or other record signed by an attorney on behalf of a British Columbia corporation, so far as it is within the attorney's authority, binds the corporation.

B. The Articles of Purcell

[80] The authorized share structure as set out in the notice of articles specifies there is no maximum number of shares that can be issued, and that all shares are common shares without par value and without any special rights or restrictions.

[81] Article 3 relates to the issue of shares and includes this sub-section relating to the issuance of shares by directors:

> **3.1 Directors Authorized.** Subject to the *Business Corporations Act* and the rights of the holders of issued shares of the Company, the Company may issue, allot, sell or otherwise dispose of the unissued shares, and issued shares held by the Company, at the times, to the persons, including directors, in the manner, on the terms and conditions and for the issue prices ... that the directors may determine. ...
>
> ...

[82] Consideration for shares can include money, property or past services to the company.

[83] Among the Articles are provisions relating to borrowing powers (Article 8), shareholders' meetings (Article 10); directors, removal and election, powers and duties and disclosure of interest (Articles 13-16) and officers (Article 19), including the following:

> **8.1 Borrowing Powers.** The Company, if authorized by the directors, may:
>
> (a) borrow money in the manner and amount, on the security, from the sources and on the terms and conditions that they consider appropriate;

(b) issue bonds, debentures and other debt obligations either outright or as security for any liability or obligation of the Company or any other person and at such discounts or premiums and on such other terms as they consider appropriate;

(c) guarantee the repayment of money by any other person or the performance of any obligation of any other person; and

(d) mortgage, charge, whether by way of specific or floating charge, grant a security interest in, or give other security on, the whole or any part of the present and future assets and undertaking of the Company.

*****

10.1 Annual General Meetings. Unless an annual general meeting is deferred or waived in accordance with the Business Corporations Act, the Company must hold its first annual general meeting within 18 months after the date on which it was incorporated or otherwise recognized, and after that must hold an annual general meeting at least once in each calendar year and not more than 15 months after the last annual reference date at such time and place as may be determined by the directors.

...

10.4 Notice for Meetings of Shareholders. The Company must send notice of the date, time and location of any meeting of shareholders, in the manner provided in these Articles, or in such other manner, if any, as may be prescribed by ordinary resolution (whether previous notice of the resolution has been given or not), to each shareholder entitled to attend the meeting, to each director and to the auditor of the Company, unless these Articles otherwise provide, at least the following number of days before the meeting:

(a) if and for so long as the Company is a public company, 21 days;

(b) otherwise, 10 days.

...

10.7 Failure to Give Notice and Waiver of Notice. The accidental omission to send notice of any meeting to, or the non-receipt of any notice by, any of the persons entitled to notice does not invalidate any proceedings at that meeting. ...

...

13.5 Remuneration of Directors. The directors are entitled to remuneration for acting as directors, if any, as the directors may from time to time determine. If the directors so decide, the remuneration of the directors, if any, will be determined by the shareholders. That remuneration may be in addition to any salary or other remuneration paid to any officer or employee of the Company as such, who is also a director.

...

14.1 Election at Annual General Meeting. At every annual general meeting and in every unanimous resolution contemplated by Article 10.2:

(a) the shareholders entitled to vote at the annual general meeting for the election of directors must elect, or in the unanimous resolution appoint, a board of directors consisting of the number of directors for the time being set under these Articles; and

(b) all the directors cease to hold office immediately before the election or appointment of directors under paragraph (a), but are eligible for re-election or re-appointment.

*****

15.1 Powers of Management. The directors must, subject to the Business Corporations Act and these Articles, manage or supervise the management of the business and affairs of the Company and have the authority to exercise all such powers of the Company as are not, by the Business Corporations Act or by these Articles, required to be exercised by the shareholders of the Company.

15.2 **Appointment of Attorney of Company.** The directors may from time to time, by power of attorney or other instrument, under seal if so required by law, appoint any person to be the attorney of the Company for such purposes, and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these Articles and excepting the power to fill vacancies in the board of directors, to remove a director, to change the membership of, or fill vacancies in, any committee of the directors, to appoint or remove officers appointed by the directors and to declare dividends) and for such period, and with such remuneration and subject to such conditions as the directors may think fit. Any such power of attorney may contain such provisions for the protection or convenience of persons dealing with such attorney as the directors think fit. Any such attorney may be authorized by the directors to sub-delegate all or any of the powers, authorities and discretions for the time being vested in him or her.

...

16.1 **Obligation to Account for Profits.** A director or senior officer who holds a disclosable interest (as that term is used in the Business Corporations Act) in a contract or transaction into which the Company has entered or proposes to enter is liable to account to the Company for any profit that accrues to the director or senior officer under or as a result of the contract or transaction only if and to the extent provided in the Business Corporations Act.

16.2 **Restrictions on Voting by Reason of Interest.** A director who holds a disclosable interest in a contract or transaction into which the Company has entered or proposes to enter is not entitled to vote on any directors' resolution to approve that contract or transaction, unless all the directors have a disclosable interest in that contract or transaction, in which case any or all of those directors may vote on such resolution.

...

16.6 **No Disqualification.** No director or intended director is disqualified by his or her office from contracting with the Company either with regard to the holding of any office or place of profit the director holds with the Company or as vendor, purchaser or otherwise, and no contract or transaction entered into by or on behalf of the Company in which a director is in any way interested is liable to be voided for that reason.

...

19.4 **Remuneration and Terms of Appointment.** All appointments of officers are to be made on the terms and conditions and at the remuneration (whether by way of salary, fee, commission, participation in profits or otherwise) that the directors thinks fit and are subject to termination at the pleasure of the directors, and an officer may in addition to such remuneration be entitled to receive, after he or she ceases to hold such office or leaves the employment of the Company, a pension or gratuity.

IV. ISSUES

[84] I address the following issues:

1. Is the valuation report by Mr. Glanville admissible?
2. Are the complaints the petitioners raise properly the subject of an oppression claim?
3. If so, have the petitioners established that they held reasonable expectations?
4. Were those reasonable expectations disappointed by conduct that can be characterized as oppressive or unfairly prejudicial?
5. If oppression is established, what is the appropriate remedy?

A. Admissibility of Valuation Report

[85] At the start of the hearing, Mr. MacMillan applied to have an expert report admitted. The report dated November 24, 2016 is authored by Mr. Ross Glanville and Mr. Bruce McKnight and opines on the fair market value of the Mine and the value of Purcell's shares based on the other assets and liabilities of Purcell (the "Valuation Report").

[86] The report was prepared for the purposes of this litigation, but was provided to counsel for the petitioners outside of the dates agreed upon for the exchange of materials. The petition was filed November 7, 2016. Counsel had agreed that the petitioners' materials were to be delivered by November 15, the respondents' materials by November 22, and any reply materials on November 24, 2016.

[87] On November 22, 2016, counsel for the respondents Mr. MacMillan, Highlands and HPP delivered materials to the other side, but noted that one further affidavit containing a valuation of Purcell's assets would still be delivered. Respondents' counsel proposed the possibility of an adjournment to allow time to consider the evidence and reply if needed. Counsel for the petitioners did not find this option acceptable. The Valuation Report was ultimately delivered November 24, 2016.

[88] In summary, the Valuation Report concludes that the value of the Mine is approximately $5.2 million, with what the authors describe as, "a relatively wide range of value of between about $3 million and $7 million." The Valuation Report states that Purcell has debt of approximately $18 million, meaning the shares have a theoretical negative value. The authors state that the common shares, "would only have a nominal 'value' of say one or two cents per share — based on the future possibility that the debt might be dramatically reduced in negotiations with the debt holders."

[89] The Valuation Report does not provide a reference date for the assessed fair market value of the Mine or for the valuation of the shares.

[90] The authors were engaged to provide the Valuation Report on November 17, 2016.

[91] In conducting this review, the authors analyzed publicly-listed companies with similar or comparable deposits; reviewed the Scoping Study of the Property dated October 29, 2013; read the March 13, 2013, NI 43-101 compliant Technical Report on the Property prepared by Snowden Mining Industry Consultants; reviewed the Purcell-Bull River Draft Economic Model on the property, prepared by JDS Engineering on June 6, 2016; considered valuations of similar exploration and development project; reviewed the supply, demand and long-term price projects for copper, gold and silver; and reviewed other technical, financial and economic factors. The authors did not visit the Mine property or perform any independent geological or engineering investigations, or title searches to assist in preparing the Valuation Report.

[92] Pursuant to Rule 16-1(7) of the *Supreme Court Rules*, the court can order that a party serve an additional affidavit.

[93] The respondents Mr. MacMillan, Highlands and HPP, argued in support of admission that the report would be important for the court in making a just determination. Respondents' counsel submits that where, as here, the value of shares is a central question, the Valuation Report would assist in answering that question and the petitioners have not provided any direct evidence on the value of the shares, it would not be in the interests of justice to rule it inadmissible. The fact that the Valuation Report was delivered outside of the timelines should be viewed in light of the procedural accommodations the respondents themselves made including agreeing to an expedited schedule for delivery of materials.

[94] The petitioners indicated that in addition to a principled objection on the basis that the Valuation Report was provided outside of the agreed on timelines, they took issue with the relevance of the opinion as the valuation provided was not done with reference to a specific period. The valuation should have been provided when the Share Issuance occurred in April 2016.

[95] The respondents argued in reply that as the Moretti Agreements were made on November 7, 2016, in the same month the Valuation Report was prepared, the valuation is relevant to the events in April and November 2016.

[96] I ruled at the hearing of the petition that I would receive the report and hear argument on the merits but reserved on admission until all of the arguments had been received.

[97] Though the parties had agreed on a deadline, the delivery of the report was late by a day only and the petitioners did not seek the ability to file a responsive report or raise an argument on prejudice. There is some relevance. As a result, I admit the report and consider it in my assessment of the merits.

B. Availability of Oppression Remedy

[98] As a preliminary matter, the respondents say the oppression remedy is not available to the petitioners unless they have suffered loss or damage that is separate and distinct from the indirect effects of the wrong to the corporation, to which all shareholders are exposed. They submit the petitioners' claim is essentially that Mr. MacMillan has breached his fiduciary duty to the company and all of the shareholders are indirectly harmed. The petitioners should instead seek leave to bring a derivative action on behalf of the corporation under s. 232 of the *BCA*.

[99] The petitioners addressed this argument in reply. They disagree that the oppression remedy requires them to show harm unique to the petitioners, as opposed to harm that affects all shareholders in the same manner. They further submit that if this is a feature of the oppression remedy, their claims are unique in two ways: a number of shareholders are also creditors through CuVeras and so have

special standing distinct from other shareholders; and the petitioners are minority shareholders, whereas Highlands and Mr. MacMillan are in the majority.

[100] The British Columbia Court of Appeal recently considered the extent of the "overlap" and distinction between the derivative action and oppression remedy in *Jaguar Financial Corporation v. Alternative Earth Resources*, 2016 BCCA 193 [*Jaguar*] and *1043352 Ontario Ltd. v. CSA Building Sciences Western Ltd.,* 2016 BCCA 258, leave to appeal ref'd [2016] S.C.C.A. No. 383 [*CSA Building*].

[101] The petitioners contend the decisions in *Jaguar* and *CSA Building* do not support the respondents' suggestion that the petitioners must show harm unique to them to ground an oppression claim. The oppression claim, the petitioners say, contemplates harm to all shareholders. I do not agree.

[102] In *Jaguar*, Justice Savage clarified the nature of the "separate and distinct" harm requirement in an oppression proceeding, stating:

> [179] In my view the authorities require a shareholder to show it suffered harm that is "direct and special", "peculiar", or "separate and distinct" from the harm suffered generally by all of the shareholders. In other words, a shareholder need not be the only shareholder oppressed in order to claim oppression, nor suffer a different harm than the corporation does, but it must show peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly.
>
> [180] In *Pasnak v. Chura*, 2004 BCCA 221, Mr. Justice Donald held for this Court:
>
> > [5] For the reasons that follow, I can find no error on the part of the trial judge. The authorities are clear that a shareholder must show direct and special harm in order to maintain a personal action for oppression, otherwise he must seek leave to bring a derivative action in the name of the company. ...
> >
> > ...
> >
> > [27] ... *Second, unless [the shareholder] can show that he was affected in a peculiar way, that is, in a manner distinct from the other shareholders by the allegedly oppressive behaviour of [a director], he must seek leave to commence a derivative action against [the director] in [the company's] name.*

[103] I note that in *Jaguar*, Savage J.A. at para. 186 considered the analysis of the Ontario Court of Appeal in *Rea v. Wildeboer,* 2015 ONCA 373, as "directly relevant" and in particular cited the following paragraphs:

> [29] ...On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants. And most, if not all, involve small closely-held corporations not public companies.
>
> ...
>
> [33] Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, i.e., the collectivity of shareholders as a whole.

[104] Just as context is paramount in evaluating the merits of an oppression claim, the same is true in assessing whether a separate and distinct harm is alleged. In particular, the "size, nature and structure of a corporation" are important factors in the analysis (*Jaguar* at para. 184). 25

[105] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*], the Court referred to examples of behaviour that could found an oppression claim including, "squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, ..., preferring some shareholders with management fees and paying directors' fees higher than the industry norm" (at para. 93).

[106] Savage J.A. pointed out in *Jaguar*, failure to disclose related party transactions or payment of directors' fees rising above the industry standard are examples of harm that can potentially affect both the shareholders and the company. Post-*BCE*, case law in British Columbia has maintained separation between the oppression and derivative actions (in addition to *Jaguar* and *CSA Building* see also *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228 at para. 72 [*Lions Gate* CA]; *Khela v. Phoenix Homes Ltd.*, 2015 BCCA 202 at para. 45). Further, through attention to context, Savage J.A. reconciles the examples in *BCE* with the separate and distinct harm requirement. He stated as follows:

> [184] ... Thus, in a closely-held corporation, the payment of a director's fee may be in breach of an expectation that all monies would be paid out of the corporation to the shareholders in proportion to the shares held (*BCE*, para. 76). This would be a distinct harm as paying a director's fee would not only affect the company but separately and distinctly harm the other shareholder who alone would not receive a fee.
>
> [185] Clearly these scenarios will arise more frequently in closely-held corporations, as was the case in *Brokx v. Tattoo*, 2004 BCSC 1723, a decision relied upon by Jaguar. I note that in two other decisions referenced by Jaguar, majority shareholders were found to perpetrate oppressive conduct against minority shareholders: *International Energy and Mineral Resources Investment (Hong Kong) Co. v. Mosquito Consolidated Gold Mines Ltd.*, 2012 BCSC 1191 at para. 126; and *Jellema v. American Bullion Minerals Ltd.*, 2010 BCCA 495 at para. 7.

[107] In *CSA Building*, Newbury J.A. summarized the distinction between oppression and the derivative action as follows:

> [72] In this province, the relationship between the two actions has been resolved by the principle that where a petitioner under s. 227 complains of a wrong (usually breach of fiduciary duty) to the corporation, an oppression action is unlikely to be appropriate unless he or she suffered some loss or damage "separate and distinct from" the indirect effect of the wrong suffered by all shareholders generally: see *Pasnak v. Chura* 2004 BCCA 221 at paras. 32–3, citing *Goldex Mines Ltd. v. Revill* (1974) 54 D.L.R. (3d) 672 at 679-80 (Ont. C.A.) and *Furry Creek* at 254.

[108] The Court of Appeal found the particular prejudice requirement was met in *CSA Building*. The trial judge's findings of fact particularly that Mr. Jeck treated the company as if it was his alone and without regard for the minority shareholder was influential. The structure of the corporation was a factor in *CSA Building* not just in examining who suffered because of the prejudicial action, but also in determining who would benefit from the selected remedy.

[109] The petitioners need not be the only shareholders affected by the alleged loss or damage, but they must demonstrate harm stemming from a "peculiar prejudice", apart from that suffered generally by all shareholders as a result of harm to the company (*Jaguar* at para. 179). **26**

[110] I turn then to the question whether, taking into account the circumstances, the petitioners have shown that the harms alleged are, "'separate and distinct from the indirect effect of the wrong suffered by all shareholders generally".

[111] In my view, the petitioners have established that harms alleged are separate and distinct. In respect particularly to Mr. Lacey, his position or influence as the largest shareholder of Purcell at 10% (though still a minority position) was negated by the actions of Mr. MacMillan who at the time was a minority shareholder. Prior to the Share Issuance Mr. MacMillan personally held only one share of Purcell. As the principal of both Highlands and HPP, he held through those entities 68,000 shares and 95,257 shares respectively according to a shareholders' list current as of October 6, 2016. Prior to the Share Issuance, therefore, Mr. MacMillan directly and indirectly held approximately 163,258 shares of Purcell or approximately 6.8% of the shares outstanding at that time. Though Mr. Radford has a lesser stake in Purcell, the same can be said of the unique harm to his position relative to Mr. MacMillan.

[112] The April 25, 2016 Resolutions brought about the Share Issuance granting Mr. MacMillan three million shares at $0.10 per share. He unilaterally doubled the issue and outstanding shares of Purcell and caused over 125% of the existing shares to be issued to himself. As a result, he personally became a majority shareholder of Purcell with approximately 56% of the company's shares. This was later reduced under the EEA to 1.975 million shares at $0.20 per share; approximately 45% of the then 4.375 million shares in Purcell.

[113] Together, the shareholdings of Mr. MacMillan, Highlands and HPP following the reduction of shares under the EEA are approximately 2,138,257 shares or 48.87% of the 4.375 million shares outstanding in Purcell. Though not a majority shareholder, he diminished the position and influence of the petitioners. With his increased shareholding, he was able effectively to gain control without a large need for support.

[114] Separate and distinct harm also relates to the petitioners' position as stakeholders in CuVeras. Pursuant to the Plan of Arrangement, CuVeras as the DIP Lender for Purcell was issued a first priority note for $12,009,795 at 10% interest, maturing December 9, 2016. The petitioners contributed funds to CuVeras that were then used to provide DIP financing to the Stanfield Group during the *CCAA*. The petitioners have a unique interest in the payment of compensation, as they are creditors through CuVeras. This is particularly the case because Purcell has no income or revenue of significance and owes significant amounts of money to its creditors. Further, pursuant to the April 25, 2016 Resolutions, the previously senior CuVeras Note was subordinated to new obligations, including those owed to Mr. MacMillan for compensation. Repayment of the financing provided by CuVeras, to which they contributed, has also been delayed because of the transactions authorized by the April 25, 2016

Resolutions. The Senior Notes held by CuVeras requires Purcell to promptly notifying CuVeras if the priority of the note is endangered and to do all things necessary to protect the rights. These were not done. This establishes a separate and distinct harm.

[115] Further, I agree that the petitioners in light of their position in CuVeras suffered a peculiar harm through the failure to produce financial information for Purcell as well as call meetings. In this regard I note the Senior Notes issued to CuVeras by Purcell obligates Purcell to:

> keep proper books of accounts and records covering all of its business and affairs... and permit or cause to be permitted the Noteholder, at all reasonable times, either by its officers or authorized agents, to enter upon all or any of the premises of the issuer and to inspect and to inspect the books, records, inventories and assets of the Issuer...

[116] The respondents acknowledge the Court of Appeal in *Jaguar* recognized an excessive compensation claim might attract a claim for oppression in a closely held company where that wrong uniquely affects a particular shareholder or shareholders. They say, however, that is not the case here as Purcell is not a closely held corporation. Any reduction in compensation to Mr. MacMillan would benefit the company and the petitioners would derive only the same indirect benefit enjoyed proportionately by all shareholders. This of course does not take into effect the separate impact on the CuVeras debtholders. Neither does it consider the negative effect on the holdings of shareholders other than Mr. MacMillan. The structure of the company is not in itself determinative.

[117] Having determined the petitioners have established separate and distinct harm I turn to the question relating to reasonable expectations.

C. Reasonable Expectations

[118] In *BCE* the Court summarized the oppression inquiry in this way:

> [68] In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[119] Reasonable expectations are assessed by what is "objective and contextual", rather than only according to the stakeholder's own expectations. The expectations must be realistic. Expectations may evolve over time and not be static. The overarching considerations guiding the reasonable expectations analysis were best summarized by the Court in *BCE* as follows:

> [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.
>
> [63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.

> [64] ... The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".
>
> ...
>
> [82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

[120] The Court in *BCE* compiled a non-exhaustive list of factors that may be looked to in determining the existence of reasonable expectations: general commercial practice, the nature of the corporation, the relationship that exists between the parties, past practice, self-protection steps the petitioner could have taken, any representations and agreements and the fair resolution of conflicting interests between corporate stakeholders (*BCE* at para. 72).

[121] Evidence of expectation may take many forms depending on the facts of a case (*BCE* at para. 70). The determinations as to an expectation and its reasonableness are questions of fact.

[122] If a reasonably held expectation is established, the claimant must show not only that such an expectation was disappointed, but that this was done in a way that was "oppressive" (*BCA*, s. 227(2)(a)) or "unfairly prejudicial" (*BCA*, s. 227(2)(b)). The latter connotes a lesser level of negative conduct than the former.

[123] In *BCE*, the Court described the concepts of oppression and unfair prejudice as follows, referencing their use in the *CBCA*:

> [92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.
>
> [93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include 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: see Koehnen, at pp. 82-83.

[124] Whether oppression has occurred will be assessed in accordance with "business realities", rather than "narrow legalities" (*BCE* at para. 58). The oppression remedy is fact specific. Thus, oppressive or unfair prejudice conduct in one case may not necessarily be so in another case.

[125] Further, the oppression remedy is not confined to protecting strict legal rights.

[126] The approach to business decisions was addressed in *Peoples Department Store Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461 at paras. 64-67:

> 64 ... Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available ex post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.
>
> 65 In *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 1998 CanLII 5121 (ON CA), 42 O.R. (3d) 177, Weiler J.A. stated, at p. 192:
>
> > The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made *a reasonable* decision *not a perfect decision*. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction. [Italics in original; references omitted.]
>
> ...
>
> 67 Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

[127] In *Deluce Holdings Inc. v. Air Canada*, (1992), 12 O.R. (3d) 131 (Gen. Div.), Blair J. commented the approach as:

> All of the facts must be considered, however, I agree with Farley J.'s conclusion in *Ballard*, *supra*, at p. 176, that when assessing the directors' conduct in relation to the s. 122 duty to act in good faith with a view to the best interests of the corporation, "the question is, what was it the directors had uppermost in their minds *after a reasonable analysis of the situation*" (emphasis in original). I also agree with the view expressed at p. 178 of the same decision, that even if, after a proper analysis of the situation, the directors may be said to have acted in good faith, as required by s. 122 of the C.B.C.A., the result of such action may still be such that it "oppresses"

the interests of the minority shareholder in a fashion which brings the "oppression remedy" section (s. 241) into play. **30**

[128] Given the entire context of this situation, the petitioners submit they had legitimate and reasonable expectations (set out earlier in these Reasons) and that they were breached by the conduct of Mr. MacMillan.

D. Were there reasonable expectations and were they violated by oppressive and/or unfair conduct

[129] Having the foregoing in mind, I will address the existence of the asserted reasonable expectations and then determine whether the expectations (to the extent they are found) were violated by conduct falling within the terms of "oppression" and "unfair prejudice".

[130] The respondents argue that the petition while alleging reasonable expectations have been violated provides no statement or description of the expectations that have been violated by the conduct at issue in this proceeding. The respondents further point out that Mr. Radford provides no direct evidence of any specific expectation. With respect to Mr. Lacey's asserted expectation, the respondent notes that they are expressed as follows:

> When I became a shareholder of Purcell, I, like any other shareholder, expected that the shareholders would be entitled to decide, in a fair and transparent manner, who would manage the company and how it would be managed.
>
> ...
>
> It was my understanding and expectation that ... any salary or other compensation [for MacMillan] would have to be put to the shareholders at the first meeting and be approved.
>
> ...
>
> I expected that before Purcell would enter into any transaction with MacMillan or his companies, that MacMillan's self-interest or conflict in the transaction would be disclosed to the shareholders and they would be entitled to decide what they felt was best for Purcell.
>
> ...
>
> It is completely contrary to my expectation that one shareholder, Moretti, who is not dealing with MacMillan's at arm's length, should be able to usurp my say, and that of all other shareholders, and purport to enter into agreements with MacMillan, purportedly on behalf of Purcell.
>
> ...
>
> I had and have every expectation that the legitimate shareholders of Purcell should be able to vote, in a timely manner, on who is going to manage Purcell. ... Unless MacMillan's self-interested, improper and oppressive conduct is stopped, restrained and undone as necessary, my expectations, and those of all shareholders of Purcell, will continue to be ignored and trampled on by MacMillan.
>
> [Emphasis added]

[131] The respondents submit that Mr. Lacey does not explain the source of these expectations. It is also argued out that the asserted expectations are in the nature of legal rights, rather than equitable expectations that have been engendered by some specific conduct. Further, that the expectations are not specific to Mr. Lacey but could be asserted by any shareholder.

[132] It is submitted that there is no evidence of any representations or agreements that would support the expectations asserted as being reasonably held. As an example, there is no evidence of any limitations placed on Mr. MacMillan as director when he was appointed sole director and officer of Purcell, with the assent and approval of the petitioners. Similarly, it is pointed out that Mr. Lacey does not attest to a past practice within Purcell of the requirement of disclosure or approval as to the transactions in which the directors of the company may be interested. It is pointed out that there could not have been since Purcell was a new company.

[133] The respondents also point to inconsistencies in the petitioners' complaints as to expectations. In this regard they point to the Second Reid/Boyle Offer urged by Mr. Radford and the resignation sought by Mr. Radford and Mr. Lacey. In neither case was shareholder approval sought, including any compensation arrangement with Mr. Reid.

[134] The respondents also argue that the equitable expectations asserted are in the nature of legal rights but that the legal rights are fundamentally at odds with the actual legal rights of the parties as provided by the articles of Purcell and the provisions of the *BCA* and cannot be established as reasonable in all of the circumstances.

[135] In terms of disclosure, it is argued that a shareholder can reasonably expect only the disclosure required by corporate and securities law and in this case since Purcell is not a reporting issuer securities law does not apply. The respondents also note that the petitioners do not reference any corporate law or specific corporate articles. The respondents argue the same with respect to the December 9, 2014 Resolutions, the April 25, 2016 Resolutions and the Moretti agreements in terms of the need for shareholder approval.

[136] In terms of an implicit expectation that Purcell's director's would refrain from exercising their power to issue shares if they reasonably considered that it was in the best interests of the company to do so because it would be dilutive or have an effect on control of Purcell, the respondents argue that the evidence does not support this expectation. The respondents note that articles permit the issuance of shares as determined by the directors. There are no pre-emptive rights to existing shareholders of a pro rata offering.

[137] Further, it is argued that all the Company's financing options since inception, including an attempt to raise $13 million which the petitioner supported, would have resulted in large, dilutive issuance of shares that would have given control to new shareholders. It is noted that no complaints were raised previously as to the effect of the matters on control.

[138] It is submitted that an expectation against dilution, in the absence of an agreement to that effect is not reasonable, given Purcell's history, past practice and commercial realty. It is argued that shareholders are entitled to expect that directors will act in the best interests of the company. Shareholders cannot reasonably expect that directors will preserve the status *quo* or refrain from any transaction that may have a dilutive effect where the directors reasonably believe that the transaction

is in the best interests of the company. This is so even where shareholders are taking steps to replace the board and management or change control. In support they cite: *Lions Gate CA*, at para. 85, and *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103, at paras. 50-51.

[139] Notwithstanding the arguments of the respondents, my assessment of the circumstances is that the petitioners have established the expectations asserted (considered as being those of the petitioners and not those of the shareholders generally) and that they are reasonable.

[140] The bases for my conclusion are:

(a) reasonable expectations can be inferred from the circumstances and are not confined to strict legal rights or obligations;

(b) the history of a working relationship between the petitioners and the respondents during the *CCAA* proceedings. The petitioners and Mr. MacMillan had worked together through the proceedings including the involvement of Mr. MacMillan and Mr. Lacey in creating CuVeras, the company which provided financing in the *CCAA* proceedings and later to Purcell. The petitioners have not been passive shareholders. The fact that Purcell is a new company and has no history is not a barrier to considering the history leading up to the creation of Purcell.
Mr. Radford has continued to be engaged in monitoring the activities of Purcell, arranging payment to maintain and renew mineral claims held by Purcell. He also arranged for the provision of support from Mr. Reid and Ms. Boyle. The materials also indicate that Mr. MacMillan has consulted with Mr. Radford on the affairs of Purcell.

(c) Mr. MacMillan's compensation arrangement with CuVeras had been determined at the time of his appointment as manager of CuVeras. There were no terms for compensation for Mr. MacMillan as officer and director of Purcell when he was appointed. The appointments at CuVeras and Purcell were at the same time and lends credence to the view of the petitioners that Mr. MacMillan's role was limited and that any compensation would be addressed at a shareholders meeting.

(d) Mr. MacMillan indicating to various shareholders that he was not being compensated for his work for Purcell other than the success fee from the *CCAA* proceedings.

(e) the poor financial condition of Purcell, a company that has no ongoing operations.

(f) the suspension of Purcell's application for a permit under the *Mine Act*.

(g) Mr. MacMillan's communication through Purcell confirming the existence of the plan for a full board of directors and an operational CEO.

(h) the significant shareholder discontent with Mr. MacMillan as evidenced by the proxies in support of the petitioners.

(i) the requirement of a first meeting of shareholders within 18 months.

(j) the Articles of Purcell requiring a first meeting of shareholders and annual meetings thereafter; and that directors be elected each year. The number of directors also being a matter for the shareholders to vote upon each year.

(k) corporate governance principles relating to the independence of directors from management and avoidance of conflicts of interest.

(l) Mr. MacMillan prior to his actions was a minority shareholder and as such unlikely to have had sufficient support to carry a majority on a material issue.

(m) the obligations of Purcell to CuVeras and CuVeras' rights under the CuVeras Note.

(n) that the absence of restraints against directors from issuing shares that could be dilutive or affect control; or pre-emptive rights to existing shareholders to a pro rata sharing in an offering do not negate the existence of reasonable expectations.

(o) in regard to the Reid/Boyle Offer, the evidence is that a shareholder vote was to be held regarding the offer. Mr. MacMillan's failure to provide financial information played a role in the offer not going forward.

[141] I also find that the reasonable expectations were violated by conduct that considered cumulatively was oppressive and/or unfairly prejudicial. The latter connotes a lesser standard.

[142] The conduct relates to:

(a) the significant compensation, the agreements approved in the December 9, 2014 Resolutions and the April 25, 2016 Resolutions that Mr. MacMillan negotiated with himself, which were not disclosed to shareholders until long after the fact. The letter to Shareholders accompanying the Notice of Shareholder Meeting not referencing to these significant facts. While at a much later point Mr. MacMillan advised he would not rely on the compensation package, it does not undo the fact of his self-dealing.

(b) Mr. MacMillan's decision to award himself compensation and other arrangements (the April 25, 2016 Resolutions) on the very day (or soon after) that the Purcell application was suspended. It was apparent then that the suspension extended significantly the timetable for the Mine, thus negated any urgency for the funding at the level and on the terms that Mr. MacMillan negotiated with himself. The present balance on the line of credit evidences this. Mr. MacMillan's capital

requirement justification cannot sanitize the lack of probity. It is significant that Mr. MacMillan, a minority shareholder, took the actions here. Self-dealing is a significant indicator of oppressive and unfairly prejudicial conduct.

(c) Mr. MacMillan's decision to approve the non-arms length transactions in the April 25, 2016 Resolutions in the face of a clear conflict of interest as acknowledged in his own Minutes of Meeting relating to the April 25, 2016 Resolutions, in which he notes to himself that "Mr. MacMillan is the sole Director and sole officer of the Company, the principal of Highlands Pacific LLC ("Highlands"), a principal of Bull River Security Holding Ltd., ("Bull River") and the Manager of CuVeras, LLC ("CuVeras"), and thus has an interest in the various transactions which are the subject of the meeting of the Board."

(d) Mr. MacMillan's statement that his compensation package was based on his "mistaken view" as to his "compensation entitlement" evidences an acknowledgement of his overreach in conduct.

(e) Similarly, the appointment of Mr. Moretti as attorney for the company just before a general meeting of shareholders, where serious issues regarding Mr. MacMillan were known to the members of Purcell, adds to the lack of probity. The appointment was unfairly prejudicial. It is easy to infer that Mr. MacMillan knew or was clearly able to discern that Mr. Moretti was sympathetic to him before appointing him attorney. The shared business dealings of the two men also colour and militate against the appearance of independence and fairness. The appointment and resulting action cannot be viewed in isolation of the actions leading up to them. While Mr. Moretti's justification for the terms he arranged for Mr. MacMillan is framed from a business perspective, given the circumstances the invocation of the business judgment rule and the deference afforded under the rule should not be applied here. The same can be said for Mr. Mac Millan's justification in relation to the December and April Resolutions. I characterize the appointment of an attorney as a last minute attempt by Mr. MacMillan to unfairly obtain effective control over Purcell and protect his personal interests, things he knew could not be sustained under the April 25, 2016 Resolutions. The appointment was in my view a continuation of Mr. MacMillan's oppressive and/or unfairly prejudicial conduct.

(f) While Mr. Moretti was appointed to renegotiate compensation for Mr. MacMillan, the renegotiation appears not particularly vigorous. The impending shareholder's meeting gave considerable negotiation leverage to Purcell (Mr. Moretti) yet it appears not to have been exercised. Moreover, it was apparent that there were no impending capital requirements of the magnitude reflected in the Highlands Note ($15 million). The Mercer report was a "draft". It is not a fairness opinion as suggested in one of Mr. MacMillan's affidavits. The draft in any event notes that

Purcell should consider Mr. Macmillan's tenure, performance, contributions, job performance, and any retention risks. There is no consideration of retention risk and in my view, there was no such risk or need. In this regard, I note that the hiring of a full-time CEO was contemplated for Purcell. Mr. MacMillan's role was only temporary. There is no real assessment of Mr. MacMillan's performance by Mr. Moretti. The materials raise considerable concerns regarding Mr. MacMillan's management of Purcell, not the least of which being Mr. MacMillan's self-dealing, and were not considered.

(g) Mr. MacMillan stating to other shareholders that he only issued shares to defeat opposing shareholders evidences a lack of corporate purpose as well as an improper motive.

(h) The initial disclosure of the list of shareholder, which did not disclose the issuance of three million shares to Mr. MacMillan, the refusal to provide financial information to key shareholders, and the failure to call a shareholder meeting, in addition to the failure to disclose the December 9, 2014 Resolutions and April 25, 2016 Resolutions further evidences a lack of candour and obfuscation.

(i) Mr. MacMillan not notifying CuVeras of its priority being subordinated, that the maturity date of the debt was extended, and not causing Purcell to protect CuVeras' rights in breach of the CuVeras Note.

(j) The failure to call Purcell's first annual general meeting within 18 months of Purcell's formation as required by statute and the Articles. The meeting being called only after a significant group of shareholders led by the petitioners requisitioned a meeting.

(k) The failure to distribute financial information until ordered by this court.

(l) The evidence that Mr. MacMillan was appointed sole officer and director of Purcell to preserve Purcell's treasury pending the granting of the mine permit.

[143] Given my findings, that the reasonable expectations were violated oppressively and or by unfair prejudice, I turn to the relief sought.

V. RELIEF SOUGHT

[144] Section 277 of British Columbia *BCA* gives the court discretion in fashioning a remedy to rectify the oppressive and/or unfairly prejudicial conduct. Having considered the relief sought by the petitioners, I conclude the following to be appropriate:

(a) a declaration that Mr. MacMillan has engaged in conduct that is oppressive or unfairly prejudicial to the petitioners, within the meaning of s. 227 of the *BCA*;

...

(c) an order setting aside the issuance of the three million shares Mr. MacMillan, either directly or indirectly, caused Purcell to issue to himself, Highlands Pacific LLC or any other corporation under his control or direction;

(d) an order setting aside the compensation package Mr. MacMillan gave himself both through the December 9, 2014 Resolutions and April 25, 2016 Resolutions;

(e) an order setting aside the EEA Mr. MacMillan entered into with Purcell on November 7, 2016;

(g) an order setting aside any security or priority of security Mr. MacMillan caused Purcell to grant to him, to Highlands or any corporation under his control or direction, and particularly any agreement, resolution or other instrument which purportedly gave priority to Mr. MacMillan, Highlands or any company under his control or direction over any already existing secured debt or other secured instrument; and

(h) an accounting and repayment with respect to any monies improperly paid to Mr. MacMillan, Highlands or companies under his control or direction by Purcell, including any salary paid to MacMillan.

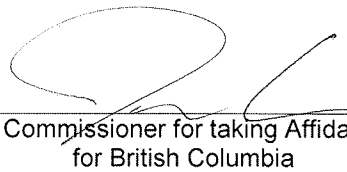
[145] The question of Mr. MacMillan remaining a director is to be determined in the election process at the meeting of shareholders.

[146] As I understand it, the opposing sides agree to Mr. Cory Dean being the Chair of the shareholders meeting. If this is not the case, then, notwithstanding Articles 11.9 and 11.10 of Purcell's articles, the meeting of shareholders is to be chaired by an individual elected by the shareholders who are present in person or by proxy at the meeting and are entitled to vote at the meeting; and that chair must be a shareholder or proxyholder who is entitled to vote at the meeting.

[147] If the issue of costs cannot be settled between the parties, then a hearing should be arranged through Court Scheduling.

"The Honourable Mr. Justice Masuhara"

This is **Exhibit "B"** referred to in Affidavit #1 of **Susan Danielisz**, sworn before me at Vancouver, British Columbia, on July 12, 2018.



A Commissioner for taking Affidavits
for British Columbia

Court of Appeal File No. CA44587

COURT OF APPEAL

ON APPEAL FROM: the judgment of the Honourable Mr. Justice Masuhara of the Supreme Court of British Columbia pronounced July 10th, 2017

BETWEEN:

REG REDFORD AND PETER LACEY

RESPONDENTS
(PETITIONERS)

AND:

BRENDAN MACMILLAN, HIGHLANDS PACIFIC LLC AND HIGHLANDS PACIFIC PARTNERS LLP

APPELLANTS
(RESPONDENTS)

AND:

PURCELL BASIN MINERALS INC.

RESPONDENT
(RESPONDENT)

APPELLANTS' FACTUM

Counsel for the Appellants Brendan MacMillan, Highlands Pacific LLC and Highlands Pacific Partners LLP:

ANDREW I. NATHANSON
JENNIFER FRANCIS

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3

Phone: +1 604 631 3131
Fax: +1 604 631 3232

Counsel for the Respondents Reg Radford and Peter Lacey:

JOE GROIA
DAVID SISCHY

Address for service in British Columbia:
Getz Prince Wells LLP
Barristers and Solicitors
#530 - 55 Burrard Street
Vancouver, BC V6C 2G8

Phone: 604 605 4291
Fax: 604 685 9798

Counsel for the Respondent Purcell Basin Minerals Inc.:

DANA PRINCE

Getz Prince Wells
Barristers and Solicitors
#530 - 55 Burrard Street
Vancouver, BC V6C 2G8

Phone: 604 605 4291
Fax: 604 685 9798

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CHRONOLOGY

Date	Event
May 26, 2011	Stanfield Group obtains initial CCAA order
Nov. 18, 2014	Stanfield Group plan of arrangement approved
Dec. 9, 2014	Purcell established
Dec. 9, 2014	Date of director's resolutions approving MacMillan initial compensation package
April 25, 2016	Director's resolutions approving Share Issuance and Highlands Loan
Nov. 7, 2016	Moretti Agreements including new employment agreement for MacMillan
Nov. 7, 2016	Oppression petition filed
Nov. 9, 2016	Purcell AGM adjourned to 30 days following decision on oppression petition
Nov. 28-29, 2016	Hearing of oppression petition
July 10, 2017	Judgment of Masuhara J.

OPENING STATEMENT

In this oppression claim, the chambers judge made orders rescinding or partially rescinding transactions related to (a) a loan (the "Highlands Loan") made by a corporation related to MacMillan, Purcell's sole director, to keep Purcell, a troubled company, afloat; and (b) the issuance of shares to MacMillan as part payment for two years' of uncompensated service as president. The judge acted on the basis of expectations that were asserted in argument but which were not pleaded and in the absence of direct evidence from the petitioners of their specific expectations. As acknowledged by Lacey, one of the petitioners, the complaints were those "any other shareholder" could have made.

The judge erred in law in finding the petitioners had suffered the "separate and distinct" harm necessary to establish oppression. The petitioners' complaints were of breach of fiduciary duty and of derivative harm. The proportionate dilution of their shares was not peculiar to them. The indirect harm complained of by Lacey as a debtholder of Purcell's largest creditor, CuVeras, was not prejudice suffered in his capacity as a Purcell shareholder. This was a personal action by Purcell shareholders for oppression, not a claim by CuVeras.

The judge also erred in granting remedies that exceeded the petitioners' expectations, and which were punitive and inequitable. The remedial orders were not the subject of any analysis by the judge. In particular, the judge set aside "any security or priority" for the Highlands Loan. Doing so impermissibly re-wrote the parties' bargain. It left Highlands with an unrecoverable claim against a debtor with no income, $5 million in assets and $17 million of secured priority claims. The judge overlooked that CuVeras consented to the transaction. If rescission of the security and priority was to be made, established rules of equity required Purcell to first make restitution of the benefits already conferred under the Highlands Loan. The judge erred in granting relief that was not available and in any case was already the subject of separate proceedings between CuVeras and Highlands in the New York courts.

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PART 1 - STATEMENT OF FACTS

A. The parties

1. The respondent Purcell Basin Minerals Inc. ("Purcell") is a private B.C. company. Purcell owns the Gallowai Bul River Mine near Cranbrook (the "Mine"). The Mine is not in production and Purcell has no income or revenue of significance.[1]

2. The appellant Brendan MacMillan ("MacMillan") was, at the time of the hearing and judgment, Purcell's president, sole director and officer. He was also the principal of the appellants Highlands Pacific Partners LLP ("HPP") and Highlands Pacific LLC ("Highlands").[2] HPP and Highlands are significant shareholders and creditors of Purcell.

3. The respondents Reg Radford and Peter Lacey ("Radford and Lacey" or the "petitioners") are shareholders of Purcell. Prior to the share issuance to MacMillan described below, Lacey was the largest single shareholder of Purcell, with approximately 10% of Purcell's outstanding shares.[3] Radford was a comparatively small shareholder of Purcell, holding less than 1% of the shares.[4]

B. Relevant background

4. The chambers judge summarised the events leading up to the creation of Purcell. Purcell was the restructuring vehicle for a plan of arrangement made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") of the Stanfield Group of Companies ("Stanfield Group"). After a lengthy and difficult restructuring, the plan was approved by Fitzpatrick J. in December 2014 (the "Arrangement Order"). As a

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[1] Reasons for Judgment ("Reasons"), paras. 7 and 9, Appeal Record ("AR"), pp. 68-69.

[2] Reasons, para. 11, AR p. 69.

[3] Reasons, paras. 14 and 111, AR pp. 69, 99.

[4] Reasons, para. 16, AR p. 70.

result of the plan, the 3,500 shareholders in the Stanfield Group received common shares of Purcell. MacMillan was the sole director and officer of Purcell.[5]

5. The chambers judge did not discuss Purcell's financial situation at the time of the Arrangement Order. As Fitzpatrick J. noted, realising value for the shareholders depended on the company obtaining permits and placing the Mine into production, and on its ability to raise the capital (estimated to be $13 million)[6] necessary to do so. The value of Purcell's shares post-restructuring was accordingly significantly uncertain. The Stanfield Group's stakeholders overwhelmingly approved the plan because there were no commercially viable alternatives and on a liquidation, the shareholders stood to receive nothing.[7]

6. While the Stanfield Group was under court protection, its operations were funded through debtor in possession ("DIP") financing extended by CuVeras LLC, a Delaware corporation ("CuVeras"). In exchange for unsecured notes of CuVeras, Highlands, Lacey and others contributed funds to CuVeras with which CuVeras provided the DIP financing.[8] Contrary to some of the judge's statements,[9] Radford personally did not have an interest in CuVeras. At the material times, Highlands was the manager of CuVeras and was entitled to compensation from that company. While the record refers tangentially to Highlands' authority to bind CuVeras,[10] this was not an issue raised in the petition and Lacey's evidence was that "it appears that what MacMillan did or did not do

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[5] Reasons, paras. 17-28, AR, pp. 70-73.

[6] AAB, p. 439 and pp. 443-444, MacMillan #4, paras. 14-18 and 35-40.

[7] *Bul River Mineral Corporation (Re)*, 2015 BCSC 113 at paras. 8, 54-62, 70-75, 91.

[8] Reasons, paras. 20-26, AR pp. 71-73.

[9] Reasons, paras. 114-116, AR, pp. 100-101; contrast to Reasons, paras. 12 and 16, AR, pp. 69-70; AAB, p. 437, MacMillan #4, para. 8.

[10] AAB, p. 175 and p. 183, MacMillan #3, para. 2 and Ex. A (pp. 185, 208, 213, 224-114, 238 of AAB); AAB, p. 129, Lacey #2, para. 5.

for CuVeras is not relevant to the within proceeding".[11] Highlands' powers as manager of CuVeras were accordingly not specifically addressed in the appellants' evidence.

7. On exiting court protection, Purcell had approximately $1.2 million in cash. Its senior debt was in excess of $14 million: $12 million plus accrued interest owed to CuVeras pursuant to a 10% Senior Note (the "CuVeras Note") and $2.338 million owed to HPP pursuant to a 10% Senior Note (the "HPP Note"). The debt represented by the CuVeras and HPP Notes[12] was approved as part of the plan of arrangement.[13] At about this time, MacMillan approved a compensation package for his service as president of Purcell that guaranteed him a minimum payment of US$800,000 (the "Initial Compensation Package"). MacMillan's evidence was that by reason of its financial position, Purcell did not actually pay him any part of this compensation.[14]

8. MacMillan attempted to sell Purcell shares to raise the necessary capital to take the Mine into production, but was able to raise less than $1 million. It was not disputed that the petitioners did not participate in these issuances and were diluted.[15] As he explained in his evidence, from December 2014 to April 2016 MacMillan explored other alternatives without success. He resisted as not being in the best interests of Purcell offers that Radford and Lacey urged him to accept, which would have wiped out any shareholder value for the 3,500 Stanfield Group legacy shareholders. This latter evidence was not contradicted by the petitioners. The judge referred in passing to some these matters, noting that it "appeared" that the Reid/Boyle financing proposal did not proceed because Purcell did not provide necessary financial information.[16]

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[11] AAB, p. 129, Lacey #2, para. 5.

[12] Reasons, para. 21, AR, pp. 71-72 (referred to there as "Purcell Notes").

[13] AAB, pp. 711, 722-723, Chui #1, Ex. A (plan of arrangement, ss. 2.3 and 6.1).

[14] AAB, pp. 441-442, 448-449 and 453 , MacMillan #4, paras. 28, 30, 63-64 and 90.

[15] AAB, pp. 437-438, MacMillan #4, paras. 8-11.

[16] Reasons, paras. 30-34 and 45, AR pp. 73-74 and 76; AAB pp. 441-452, MacMillan #4, paras. 23-80.

(a) *The April 25, 2016 Resolutions and transactions*

9. MacMillan made further director's resolutions dated as of April 25, 2016 (the "April 25, 2016 Resolutions"). These resolutions, as described in meeting minutes, had two purposes: to provide Purcell with a means of funding the company's operations and to pay MacMillan part of the compensation owed for his service as the officer of Purcell.

10. The judge described the context in which the April 25, 2016 Resolutions were made. Purcell's *Mines Act* permit application had recently been suspended. This "indicated a considerably longer timeline and higher costs" to achieve production than previously anticipated. Purcell had urgent expenses: as MacMillan detailed, the company was out of money and had outstanding liabilities of over $1 million. MacMillan concluded that "the most reasonable and only timely alternative he could see was for Highlands to extend a loan to enable Purcell to operate and pursue the permitting process". MacMillan wanted "secure protection for the new money" to be advanced to Purcell. He had received no compensation since December 2014; since Purcell had no money, he determined that accepting shares in part payment was the only realistic option. MacMillan also knew that the petitioners were trying to bring about a change in Purcell's leadership. MacMillan deposed that the Share Issuance (described below) was integral to Highlands' agreement to loan Purcell money and that Highlands would not have agreed to advance the Highlands Loan without it.[17]

11. The April 25, 2016 Resolutions approved the following transactions:[18]

> (a) an agreement by Highlands to make available a credit facility of up to $15 million to Purcell on a senior and secured basis (the "Highlands Loan");
>
> (b) Purcell's execution of a promissory note in Highlands' favour providing that the Highlands Loan ranks senior to any other debt of the company, except for the compensation payments discussed below (the "Highlands Senior Note"). The Highlands Loan had an

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[17] Reasons, paras. 35, 42-45, AR pp. 74-76; AAB, pp. 452-453, MacMillan #4, paras. 81-89.

[18] Reasons, para. 36, AR p. 74.

annual interest rate of 10% and was repayable on December 8, 2016;[19]

(c) issuance of three million common shares to MacMillan at $0.10 per share as (the "Share Issuance"); and

(d) execution of a promissory note evidencing Purcell's indebtedness to MacMillan for past compensation (the "Compensatory Note") in the amount of US$1,453,802.

12. With the Share Issuance, MacMillan became the majority and controlling shareholder of Purcell.[20] Prior to the commencement of proceedings, MacMillan abandoned his reliance on the Compensatory Note,[21] and his compensation arrangements were superseded by the Moretti Agreements, described below.

13. The judge described the Highlands Senior Note and Compensatory Note as being "secured by a first priority security interest over the assets of Purcell (the "Priority Agreement")".[22] Under the Priority Agreement,[23] Purcell covenanted to grant "a first priority mortgage and security agreement" to secure its obligations under the Highlands Loan and the notes. Purcell also covenanted to grant "a second priority mortgage and security interest to HPP" to secure Purcell's obligations under the HPP Note. The mortgages and security were to provide "the same rights and protections as contained in the existing CuVeras [Note]". CuVeras, through its manager, Highlands, was a party to and consented to the terms of the Priority Agreement. MacMillan executed the Priority Agreement on behalf of each of Purcell, CuVeras, Highlands and HPP. MacMillan also amended the CuVeras Note, postponing its maturity date to 2029.[24]

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[19] Reasons, para. 37, AR p. 75.

[20] Reasons, para. 39, AR p. 75.

[21] AAB, p. 456, MacMillan #4, para. 101; AAB, pp. 408-410, MacMillan #3, Ex. AK, letter of October 13, 2016.

[22] Reasons, para. 40, AR p. 75.

[23] AAB, pp. 384-386, MacMillan #3, Ex. AC.

[24] Reasons, para. 40, AR p. 75

14. To the date of the hearing of the petition, Highlands had advanced approximately $400,000 pursuant to the Highlands Loan.[25]

(b) *Events leading up to a meeting of shareholders*

15. In July of 2016, a group of Purcell shareholders including Radford and Lacey delivered a requisition for a general meeting of shareholders to increase the number of directors to seven and to elect a slate of directors. On September 28, 2016 MacMillan issued a notice of general meeting of shareholders for November 10, 2016.[26] The petitioners learned of the Initial Compensation Package and April 25, 2016 Resolutions for the first time on or about October 21, 2016, through counsel for Purcell.[27] The general meeting was adjourned by order of Johnston J. until 30 days following a decision on the oppression petition.[28]

(c) *The Moretti Agreements*

16. In October 2016, MacMillan agreed to renegotiate the terms of some of the arrangements with Purcell, including his compensation.[29] MacMillan explained that he did so to address concerns about fairness and conflict of interest.[30]

17. By director's resolution dated October 21, 2016, MacMillan appointed Michael Moretti ("Moretti") to act as attorney for the company, exercising the powers of Purcell's directors for the purposes of renegotiating MacMillan's compensation and the terms of the Highlands Loan. Moretti is one of the largest shareholders in Purcell, and also holds an interest in Purcell's debt through CuVeras. Moretti's appointment and mandate were

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[25] Reasons, para. 44, AR p. 76.

[26] Reasons, paras. 48-51, AR p. 77.

[27] Reasons, paras. 53-54, AR p. 78.

[28] Reasons, para. 75, AR p. 86.

[29] Reasons, paras. 52, 56, AR pp. 78-79.

[30] AAB, pp. 135-136, MacMillan #2, para. 2.

disclosed to Purcell's shareholders on October 24, 2016. No shareholders, including the petitioners, complained to MacMillan or Purcell about the appointment.[31]

18. There was a dispute in the court below whether Moretti was at arm's length from MacMillan. Moretti deposed that he was at arm's length and that he made decisions for Purcell independently and on the basis of what he believed to be in the best interests of Purcell. Among other things, Moretti obtained compensation advice from a consultant (Mercer LLC) to assist him in making decisions on compensation.[32] On November 7, 2016, Purcell, represented by Moretti, and MacMillan entered into an executive employment agreement ("EEA"), an amended and restated senior promissory note, and a new form of indemnity agreement (together, the "Moretti Agreements").[33] The effect of the Moretti Agreements is summarised at para. 65 of the judge's reasons.[34] The Share Issuance was reduced by one-third and the price doubled to $0.20 per share.

19. The judge admitted an expert opinion prepared in November 2016 (the "Valuation Report"). It concluded that the value of the Mine was approximately $5.2 million. Based on Purcell's debt, which by that time was approximately $18 million, Purcell's shares had a nominal value of $0.01 to $0.02 per share, based on the possibility that the debt might be reduced in negotiations with the debtholders.[35]

(d) *The New York Action*

20. In June of 2016, Lacey as the sole member of CuVeras signed a written consent purporting to remove Highlands as the manager for CuVeras. On October 27, 2016,

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[31] Lacey did allege to Moretti that there had been a "significant fraud" on the company and Moretti should not have any part of it. Reasons, paras. 56 and 59, AR pp. 78-79; AAB, p. 482 and pp. 484-486, 555A-555B, Moretti #1, paras. 47-49 & Exs. A, D.

[32] Reasons, paras. 59-66, AR pp. 79-82; AAB, pp. 493-511, Moretti #1, Ex. B (Mercer report).

[33] AAB, pp. 145-174, MacMillan #2, Ex. M.

[34] Reasons, para. 65, AR pp. 82-83.

[35] Reasons, paras. 85-91, AR pp. 93-95; AAB, pp. 652-671, Glanville #1.

MacMillan filed an action on behalf of Highlands, HPP and himself in the Supreme Court of the State of New York against CuVeras and Lacey (the "New York Action"). The New York Action sought various remedies including damages for unpaid management fees and declarations that (a) the purported removal of Highlands as manager of CuVeras was unlawful and void; and (b) the Priority Agreement was valid and enforceable against CuVeras.[36]

C. The pleadings

21. The petition challenged the issuance of shares to MacMillan, the compensation arrangements, the grant of priority to Highlands, and the failure to provide financial information or call a general meeting. The petition also pleads that subordination of the CuVeras Note was "done without the knowledge of other stakeholders in CuVeras, including the Petitioners". The petition alleged that "MacMillan has shown complete disregard for the reasonable expectations or fair treatment of the Petitioners and other stakeholders in Purcell", that he had acted "to detriment of other shareholders" and had placed himself in a conflict of interest. The impugned "conduct was not in the best interest of the Company and constitutes a breach of MacMillan's fiduciary duties to Purcell's shareholders". The petition did not describe the individual expectations of Lacey or Radford, or the basis for those expectations.[37]

D. Evidence relevant to findings that are challenged on appeal

22. Consistent with the focus of the petition, in their initial supporting affidavits Radford and Lacey provided no direct evidence of any specific expectations they held as shareholders of Purcell.[38] The only direct evidence of an expectation came from

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[36] Reasons, paras. 46, 58, AR pp. 76, 79; AAB, pp. 416-431, MacMillan #3, Ex. AO (New York Action Complaint).

[37] Petition, AR pp. 1-16 esp. at pp. 11, 14-15.

[38] Reasons, para. 130, AR, p. 105; AAB, p. 2 and pp.9-76; John #1, para. 4 and Exs. A and B (attaching affidavits of Mr. Radford sworn in prior proceedings); AAB, pp. 96-105, Lacey #1.

Lacey in his second affidavit, delivered after the petition was filed and served. There, Lacey deposed that he had expectations "like any other shareholder" and that MacMillan's conduct violated those expectations.[39] While Lacey complained of MacMillan's conflict and that he "did not give any authorization" to MacMillan to alter CuVeras' security,[40] Lacey did not assert the expectation found by the judge, that "the sole director and officer of [Purcell] would not cause the Company to grant him a priority security interest over the Company's assets".[41]

E. The reasons for judgment

23. The chambers judge found that Lacey had established harm separate and distinct from the indirect effects of a wrong to the corporation because Lacey's "position or influence as the largest shareholder of Purcell at 10% (though still a minority position) was negated" by the Share Issuance to MacMillan. The chambers judge concluded that "[t]hough Mr. Radford has a lesser stake in Purcell, the same can be said of the unique harm to his position relative to Mr. MacMillan".[42]

24. The chambers judge also decided that the petitioners had suffered separate and distinct harm by virtue of their "position as stakeholders in CuVeras". The chambers judge appears to have reasoned that because the petitioners had contributed funds to CuVeras, they were "creditors of Purcell through CuVeras". In the chambers judge's view, subordination of the CuVeras Note and failure to produce Purcell financial information to CuVeras amounted to a separate and distinct harm that entitled the petitioners to seek an oppression remedy.[43]

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[39] Reasons, para. 130, AR pp. 105-106; AAB, pp. 128-131, Lacey #2, paras. 3, 6-7, 9-11.

[40] AAB, p. 102, Lacey #1, para. 27; AAB, p. 98, Lacey #2, para. 9; AAB, pp. 673-674, Lacey #3, paras. 5-7.

[41] Reasons, para. 77(4) and 139, AR, pp. 87 and 108.

[42] Reasons, paras. 98, 110-113, AR pp. 96-1-1

[43] Reasons, paras. 114-115, AR p. 100.

25. The chambers judge found that the petitioners had established the expectations asserted, including that the sole director would disclose all conflicts and seek shareholder approval of the impugned transactions. The bases for the chambers judge's finding about expectations included the "working relationship" between the parties during the CCAA proceedings, evidence that some shareholders did not understand that MacMillan was to be compensated as president of Purcell, complaints about MacMillan's performance, the poor financial condition of Purcell, and "the obligations of Purcell to CuVeras and CuVeras' rights under the CuVeras Note". The chambers judge found that MacMillan had violated the petitioners' reasonable expectations by "self-dealing" and acting in a conflict of interest, and by "not notifying CuVeras of its priority being subordinated, that the maturity date of the debt was extended, and not causing Purcell to protect CuVeras's rights in breach of the CuVeras Note".[44]

26. Without any analysis, the chambers judge granted most of the relief sought by the petitioners including an order setting aside the modified Share Issuance, all agreements providing for compensation to MacMillan, and any security or priority granted to Highlands in respect of the Highlands Loan. The chambers judge also ordered "an accounting and repayment with respect to any monies improperly paid" to MacMillan or his companies, including any salary paid to MacMillan."[45]

F. Subsequent events

27. Following the judge's order, MacMillan resigned as a director and officer of Purcell and the company held a general meeting as ordered by Johnston J., at which directors, including Radford, were elected. New management of Purcell has refused to pay MacMillan any management compensation; has taken the position there is a "serious question" of whether the order invalidates the HPP Note; and has refused to execute security and take other steps required by the HPP Note and the Arrangement Order. The appellants propose to bring a new evidence motion to provide this Court with current information relevant to the issues raised on appeal.

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[44] Reasons, para. 77, AR pp. 86-87 and paras. 139-143, AR pp. 108-113.

[45] Reasons, para. 144, AR pp. 113-114.

PART 2 - ERRORS IN JUDGMENT

28. The chambers judge made errors of law and palpable and overriding errors of fact in finding the petitioners had a reasonable expectation limiting the grant of security over Purcell's assets.

29. The chambers judge erred in law in finding the petitioners suffered the "separate and distinct" harm necessary to establish oppression.

30. The chambers judge erred in law and in principle in granting remedies which exceeded the petitioners' expectations, were not available, and were inequitable. In particular, the chambers judge erred in making orders that set aside security and priority in favour of Highlands and which deprive MacMillan of any entitlement to compensation for his services as president of Purcell.

PART 3 - ARGUMENT

A. The standard of review in oppression cases

31. The palpable and overriding error standard applies to whether a party possessed reasonable expectations (a question of fact) and whether conduct amounts to oppression (a question of mixed fact and law).[46] "However, an appellate court is entitled to intervene and reconsider the evidence where there is a reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected their conclusion".[47] An appellate court may also intervene if the judgment is based on "errors of law ... erroneous principles or irrelevant considerations" or if the decision below is manifestly unjust.[48] Extricable questions of law are reviewed for correctness.

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[46] *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 ("*Jaguar Financial*") at para. 64; *1216808 Alberta Ltd. (Prairie Bailiff Services) v. Devtex Ltd.*, 2014 ABCA 386 ("*Prairie Bailiff Services*") at para. 24.

[47] *Prairie Bailiff Services* at para. 25.

[48] *Wilson v. Alharayeri*, 2017 SCC 39 ("*Alharayeri*") at para. 59; *Jaguar Financial* at paras. 63-64.

"If the issue relates to a legal principle, it will be reviewed for correctness. That will include the failure to consider and apply a required element of a legal test".[49]

32. The imposition of a remedy for oppression is discretionary, and entitled to deference, unless an error in principle has been made or the decision is otherwise unjust".[50] It is an error of law to make a finding of oppression and grant a remedy unless the complaining shareholder proves it suffered harm distinct from that suffered by all shareholders.[51] It is an error in principle to grant an order that does more than simply rectify oppression.[52] It is similarly an error of law or principle to grant the remedy of rescission while failing to address the requirement to make counter-restitution of the benefits exchanged under the rescinded bargain.[53]

B. The chambers judge made errors of law and palpable and overriding errors of fact in finding the petitioners had a reasonable expectation limiting the grant of security over Purcell's assets

33. The chambers judge found that the petitioners had a reasonable expectation that "the sole director and officer of the Company would not cause the Company to grant him a priority secured interest over the Company's assets".[54] The judge did not specifically address the basis for this finding but cited factors including: MacMillan's appointments "at CuVeras and Purcell were at the same time", which supported the petitioners' view of his limited role at Purcell; "corporate governance principles relating to the independence of directors from management and avoidance of conflicts of interest"; and "the obligations of Purcell to CuVeras and CuVeras' rights under the

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[49] *Prairie Bailiff Services* at para. 23.

[50] *Shefsky v California Gold Mining Inc.*, 2016 ABCA 103 ("*Shefsky*") at para. 21.

[51] *Jaguar Financial* at para. 187.

[52] *Naneff v. Con-Crete Holdings Ltd.*, (1995), 23 O.R. (3d) 481 (C.A.) ("*Naneff*") at pp. 487 and 491.

[53] *Maguire v. Makaronis*, [1997] HCA 23, 144 ALR 729 (Australian H.C.) at p. 763 (ALR) (per Kirby J. concurring).

[54] Reasons, at paras. 77(4) and 139-140, AR pp. 86-87, 108-110.

CuVeras Note".[55] With respect, the factors on which the judge relied at para. 140 of his reasons were not logically probative of this particular expectation.

34. The determination of a reasonable expectation is "objective and contextual".[56] The petitioners were required to identify the subjective expectations they claimed were violated and establish that, objectively, those expectations were reasonably held.[57] The chambers judge was, in turn, required to assess the reasonableness of the asserted expectations "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".[58] The judge was also obliged to apply the governing principles that oppression "must generally be suffered by the 'shareholder' (as defined) *qua* shareholder"[59]; the remedy "cannot be used to protect or to advance directly or indirectly [the complainant's] other personal interests"[60]; and the structure of the corporation and the parties' legal rights are the "framework" and starting point within which the oppression remedy must be considered.[61]

35. The chambers judge erred in law in failing to apply these principles. As explained below in relation to the requirement of "separate and distinct" harm, the judge erred in law in treating the petitioners' derivative interest in CuVeras as the basis for the

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[55] Reasons, at paras. 140(c), (k) and (m), AR pp. 108-109.

[56] *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, 2008 SCC 69 ("*BCE*") at para. 62.

[57] *Mennillo v. Intramodal inc.*, [2016] 2 S.C.R. 438, 2016 SCC 51 ("*Mennillo*") at para. 9; *BCE* at para. 70; *Jaguar Financial* at para. 113.

[58] *BCE* at para. 62.

[59] *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2016 BCCA 258, [2017] 1 W.W.R. 247, application for leave to appeal dismissed [2016] S.C.C.A. No. 383 ("*CSA Building Sciences*") at paras. 48 and 54.

[60] *Naneff* at pp. 488-490, 492.

[61] *Hui v. Hoa,* 2015 BCCA 128 at paras. 50-58.

assertion of an equitable wrong to them in their capacity as Purcell shareholders. This expectation was neither pleaded[62] nor supported in the evidence.

36. The judge also misconstrued "corporate governance principles relating to the independence of directors from management and avoidance of conflicts of interest". The judge did not identify which "corporate governance principles" applied and there was no opinion evidence about such principles. Purcell is not a reporting issuer; securities law and policy concerning independent directors for issuers has no application.[63] When the plan of arrangement, which provided for the amalgamation of the Stanfield Group with Purcell, was approved, Radford and Lacey were aware that MacMillan was and would continue to be the sole director and officer of Purcell.[64]

37. The judge treated the disclosable interest provisions of the *Business Corporations Act*[65] and Purcell's articles as supporting a reasonable expectation that MacMillan would not cause Purcell to grant him or a related party "a priority secured interest over the Company's assets", but neither did so. Purcell's articles authorised the directors to borrow money and give security "on, the whole or any part of the present and future assets and undertaking of the Company"; provided that no director was disqualified from contracting with the Company "and no contract or transaction entered into by or on behalf of the Company in which a director is in any way interested is liable to be voided for that reason"; and prescribed that where all directors have a disclosable interest in a contract or transaction, all may vote on it.[66] The provisions of the Act are similar. Despite his interest, as the sole director MacMillan was entitled to vote to approve the transaction and it was not invalid merely because of his interest. MacMillan

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[62] Petition, Part 2, para. 21 and Part 3, para. 9, AR pp. 11, 14-15.

[63] National Instrument 58-101 Disclosure of Corporate Governance Practices, BC Reg 241/2005; National Policy 58-201, Corporate Governance Guidelines.

[64] AAB, pp. 440-441, MacMillan #4, paras. 21-22.

[65] *Business Corporations Act* , S.B.C. 2002, c. 57 (the "Act").

[66] Reasons, para. 83, AR pp. 90-93 (articles 8.1, 16.2 and 16.6).

was required to disclose his interest, which he did,[67] and without shareholder approval he could be liable to account for profits.[68] Both the petitioners and the judge proceeded on the wrong premise that disclosure of the director's interest must be made to the shareholders: this is not the law.[69]

38. It is a fundamental principle of corporate law that, except on a winding up, shareholders have no legal or equitable interest in the assets of the company in which they hold shares.[70] This is a further reason that Radford and Lacey as shareholders could not reasonably expect that MacMillan would not grant a charge over Purcell's assets if it were in Purcell's interests to do so. Priorities among existing lenders is not, normally or as a matter of business realities, a matter of concern for shareholders, particularly if it facilitates the injection of badly-needed new capital, as in this case.

39. The judge also made palpable errors of fact which, taken together, destroyed the basis for the findings on which this expectation depended. The judge justified the alleged limitation on MacMillan's powers in part because MacMillan's appointments at CuVeras and Purcell were at the same time. The uncontradicted evidence established that Highlands was appointed manager of CuVeras in 2011.[71] Purcell was not incorporated until 2014 and the decision to use it as the restructuring vehicle for the Stanfield Group was made the same year.[72] The judge also relied on "the obligations of

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[67] Reasons, para. 142(c), AR p. 111.

[68] *Business Corporations Act*, S.B.C. 2002, c. 57, ss. 147-153.

[69] *Canadian Metals Exploration Ltd. v. Wiese*, 2007 BCCA 318, (2007), 71 B.C.L.R. (4th) 16, at paras. 28-29.

[70] *Khela v. Phoenix Homes Limited* 2015 BCCA 202 at paras. 35 and 45-48.

[71] AAB, p. 441, MacMillan #4, para. 24; see also AAB, pp. 1-2, John #1, Ex. I, paras. 1-6.

[72] *Bul River Mineral Corporation (Re)*, 2015 BCSC 113 at para. 13; AAB, pp. 27-65, John #1, Ex. A (showing Purcell's articles dated August 13, 2014); AAB, pp. 261-282, MacMillan #3, Ex. E, pp. 261-262, 266 and 271-272 (excerpts from Monitor's Fifteenth Report).

Purcell to CuVeras and CuVeras' rights under the CuVeras Note"; he later referred to CuVeras not being notified that its priority was subordinated and to Purcell's breach of the CuVeras Note.[73] This was a palpable and overriding error. The judge failed to recognize that CuVeras was itself a party to the Priority Agreement and, through its manager, Highlands, consented to the subordination of its security. Whether this was consistent with Highlands' fiduciary obligations to CuVeras was a question of Delaware law that fell to be decided between those parties in the New York Action, and not in a Purcell shareholder dispute in British Columbia.

40. These errors fundamentally undermined the basis of the judge's finding that the petitioners had a reasonable expectation that precluded MacMillan from causing Purcell to enter into the Highlands Loan and Priority Agreement. They also contributed to the judge's unwarranted findings concerning MacMillan's "lack of probity" and "self-dealing".[74] As much as the petitioners sought to make it one, this was not an action for breach of MacMillan's fiduciary duty to Purcell, or Highlands' duty to CuVeras. The finding of this particular expectation was manifestly wrong, and the relief granted as a consequence should be set aside.

C. The chambers judge erred in law in finding the petitioners suffered the "separate and distinct" harm necessary to establish oppression

41. The chambers judge accepted that in order to bring a personal claim for oppression, Radford and Lacey had to show that they had suffered harm which was "separate and distinct" from the indirect effects of the wrong to the corporation.[75] He found this requirement was satisfied in two ways. Through the newly-issued shares, MacMillan was able to gain effective control of Purcell "without a large need for support". This "negated" the "position and influence" of Lacey, who was previously the largest shareholder, with 10% of the shares.[76] The judge found that "[t]hough Mr.

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[73] Reasons, paras. 142(i); see also Reasons, at para. 114; AR pp. 100 and 113.

[74] Reasons, para. 142, AR pp. 110-113.

[75] Reasons, paras. 101, 106 and 110, AR pp. 96, 98-99.

[76] Reasons, paras. 111-113, AR pp. 99-100.

Radford has a lesser stake in Purcell, the same can be said of the unique harm to his position relative to Mr. MacMillan".[77]

42. The judge also found that Radford and Lacey suffered separate and distinct harm by reason of their "position as stakeholders in CuVeras". They had contributed funds to CuVeras that it loaned to Purcell, and CuVeras was Purcell's largest creditor. The judge found that the petitioners "have a unique interest in the payment of compensation, as they are creditors through CuVeras". He noted that the CuVeras Note was subordinated to MacMillan's compensation entitlement and that the repayment of the CuVeras debt was delayed because of the transactions approved by MacMillan. The CuVeras Note required Purcell to notify CuVeras if its priority was endangered and to do all things necessary to protect CuVeras' rights. These steps, the judge said, were not taken. The judge concluded that these facts established a separate and distinct harm.[78]

43. Where a petitioner "complains of a wrong (usually breach of fiduciary duty) to the corporation, an oppression action is unlikely to be appropriate unless he or she suffered some loss or damage 'separate and distinct from' the indirect effect of the wrong suffered by all shareholders generally."[79] The oppression remedy is not available simply because a complainant asserts a "reasonable expectation" (for example, that directors will conduct themselves with honesty and probity and in the best interests of the corporation) ... the harm must impact the interest of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as a part of the collectivity of stakeholders as a whole".[80]

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[77] Reasons, para. 111, AR p. 99.

[78] Reasons, paras. 114-117, AR pp. 100-101.

[79] *CSA Building Sciences* at para. 72; see also para. 54; *Jaguar Financial*, at paras. 179-180.

[80] *Rea v. Wildeboer*, 2015 ONCA 373 at paras. 19, 34-35; *Shefsky* at para. 40.

44. The requirement of "distinct harm" is related to the rule that the oppression "must generally be suffered by the "*qua* shareholder"[81] and the remedy is not available to "protect or to advance directly or indirectly [the complainant's] other personal interests".[82] This is developed below in relation to the submissions on remedy.

45. As this Court has held, an oppression claimant "must show particular prejudice or damage beyond the diminution in value of his or her shares as a result of the allegedly oppressive conduct".[83] By parity of reasoning, this applies equally to dilution, a proportionate diminution of the value of the shareholder's voting power. Shareholders do not have a right (nor, generally, the expectation) not to be diluted. The directors had the power to issue and set the price for the company's shares.[84] As the judge noted, Purcell's articles did not contain pre-emptive rights permitting existing shareholders to participate *pro rata* in share issuances.[85] The petitioners knew Purcell's business plan depended on raising $13 million in new share capital, which would have significantly diluted their positions. Even where a contest for control of a widely-held corporation is underway, there can be no reasonable expectation against voting dilution; the only reasonable expectation can be that the directors will exercise their business judgment in issuing shares in the best interests of the corporation.[86] Complaints about dilutive share issuances accordingly belong to the corporation.[87] Similarly, where a company is widely-held, complaints that a director or manager has received excessive compensation properly reside with the corporation because a complaining shareholder

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[81] *CSA Building Sciences* at paras. 48 and 54.

[82] *Naneff* at pp. 488-490, 492.

[83] *CSA Building Sciences* at paras. 72-78; *Jaguar Financial* at paras. 179-188.

[84] Act, ss. 62-64; *Shefsky*, at paras. 44-45; Reasons, para. 81, AR p. 90.

[85] Reasons, paras. 136 and 140(n), AR pp. 107, 109-110.

[86] *Icahn Partners LP v. Lions Gate Entertainment Corp.* 2011 BCCA 228 at paras. 77-85; *Shefsky*, at paras. 39-40, 44-48.

[87] *Shefsky*, at para. 46.

cannot demonstrate particular prejudice.[88] The nature of the corporation is crucial.[89] Most cases where such conduct supported an oppression remedy involved shareholders in small, closely-held corporations.[90]

46. The judge correctly identified this threshold issue and the relevant legal principles[91] but, with respect, failed to apply them correctly. The modified Share Issuance diluted Radford and Lacey's holdings in the same manner and proportion as all other shareholders. Purcell was not a closely-held company where relationships between the parties might make an expectation of voting parity or avoiding dilution reasonable. Lacey was previously the largest shareholder, but he did not have control. He did not assert and the judge did not find that he had a reasonable expectation of remaining the largest shareholder. Indeed, in his evidence Lacey admitted that his expectations were not distinct but were those that "any other shareholder" would share.[92] Radford provided no direct evidence of any expectation.[93] The judge's finding that Radford, who had less than 1% of the shares, suffered the same "unique harm" as Lacey demonstrates that the prejudice was not peculiar to Radford and Lacey. The same complaint could have been made by any shareholder.

47. The judge also erred in finding a "separate and distinct" harm by reason of Radford and Lacey's "position as stakeholders in CuVeras". The judge relied on the alteration of CuVeras' priority position, the delay in repayment of CuVeras' debt, and Purcell's failure to protect CuVeras' rights. This was not an oppression claim by CuVeras. These considerations could not, in law, satisfy the requirement of "separate and distinct" harm to the petitioners' interests. The judge erred in referring to Radford's interest in CuVeras: he had none. It was not open to the judge to rely on harm Lacey

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[88] *CSA Building Sciences* at para. 74; *Jaguar Financial* at paras. 179-188.

[89] *CSA Building Sciences* at paras. 73-74 and 80.

[90] *Jaguar Financial*, at paras. 184-185; *Rea v. Wildeboer* at para. 29.

[91] Reasons, paras. 98-110, AR p. 96.

[92] Reasons, para. 130, AR pp. 105-106.

[93] Reasons, para. 130, AR p. 105.

may have suffered derivatively, through CuVeras, to establish the petitioners' right to bring a claim for a personal wrong done to them as Purcell shareholders. The petitioners described the alleged wrong the failure to obtain consent of Lacey and *CuVeras'* other stakeholders to the alteration of its rights. A claim for oppression cannot be used to advance the claimant's "other personal interests", such as Lacey's interest as a CuVeras stakeholder. Indeed, despite that interest, it was in the petitioners' interests as Purcell shareholders for the financially troubled company to have received the benefit of the Highlands Loan.

48. The petitioners' true complaint, as demonstrated by their pleading[94] and argument below,[95] was that MacMillan's entitlement to compensation and shares represented a breach of his fiduciary duty. Such a claim must be prosecuted by or on behalf of the company. It was not open to the judge to treat this as a personal shareholder claim belonging particularly to Radford and Lacey. The problems with doing so are underscored by the accounting remedy the judge granted, apparently to be prosecuted by the petitioners, and an order for repayment of any monies "improperly paid ... including any salary" paid to MacMillan.[96] The petitioners are not entitled to any such funds; only Purcell could be. The complaints of breaches of duty owed to CuVeras were for CuVeras to advance and properly belonged in the New York Action, to which CuVeras, Lacey, MacMillan, HPP and Highlands were already parties. The judge erred in law in holding that the petitioners suffered the separate harm necessary for an oppression remedy.

D. The chambers judge erred in law and in principle in granting remedies which exceeded the petitioners' expectations, were not available, and were inequitable

(a) *The legal principles applicable to ordering a remedy for oppression*

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[94] Reasons, paras. 2 and 4; Petition, Part 3, paras. 3, 7-10, AR, pp. 12-15.

[95] Reasons, para. 99, AR p. 96.

[96] Reasons, para. 144(h), AR p. 114.

49. Under s. 227, the court enjoys a wide discretion to fashion a remedy to correct oppressive or unfairly prejudicial conduct.[97] Despite its breadth, this power, "like any other statutory discretion, must be exercised judicially and in a manner consistent with the intention of the legislature and the scheme and object of the statute under which the discretion is conferred", as well as "in conformity with the legal principles that govern corporate law issues".[98] "[A]s in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression".[99]

50. Two central considerations that inform the exercise of the court's discretion are the equitable nature of the oppression remedy and its remedial purpose. First, the appropriateness of a s. 227(3) order "turns on equitable considerations".[100] The remedy is rooted in fairness, which "is ultimately unamenable to formulaic exposition and must be assessed on a case-by-case basis having regard to all of the circumstances".[101] Second, the purpose of the oppression remedy is corrective. A s. 227 order "exists *solely* to 'rectify the matters complained of'".[102] "[T]he oppression remedy must (a) rectify only the oppressive conduct; and (b) only protect the applicant's interest as a shareholder, officer or director". These are "established limits" that "apply in the imposition of a remedy flowing from corporate oppressive conduct".[103]

51. In its recent decision in *Alharayeri*, the Supreme Court of Canada summarised the principles that guide the exercise of the court's remedial discretion. Where "relief is justified to correct an oppressive type of situation, the surgery should be done with a

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[97] *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, 2006 CanLII 7392, 266 D.L.R. (4th) 228 (Ont. C.A.) ("*Catalyst*") at para. 49.

[98] *Catalyst* at para. 54.

[99] *BCE* at para. 90.

[100] *BCE* at para. 58; *Mennillo* at para. 8.

[101] *Alharayeri* at para. 52; see also paras. 45, 49 and 56; *Mennillo* at paras. 8 and 11.

[102] *Alharayeri* at paras. 27 (emphasis added) and 45.

[103] *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 at para. 64, application for leave to appeal dismissed Aug. 13, 2015.

scalpel, and not a battle axe".[104] Any order may not be punitive and "should go no further than necessary to rectify the oppression".[105] This has been referred to as the principle of "minimal interference".[106] Remedial orders may not vindicate expectations arising in another capacity, or serve a purely tactical purpose. A remedy must be "rooted in, informed by, and responsive to the reasonable expectations of the corporate stakeholder".[107] This is consistent with earlier decisions including those of this Court.[108]

52. *Alharayeri* also confirms that a court should consider the general corporate law context in exercising its remedial discretion under s. 227(3). Statutory oppression cannot swallow other corporate law remedies, or "be the total law with everything else ignored or completely secondary". A remedy for oppression cannot be "a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances".[109] As Newbury J.A. has explained, "[i]t is clear the oppression action was intended to permit courts to remedy oppressive or unfairly prejudicial conduct not generally susceptible to correction by other forms of redress."[110]

53. Because *Alharayeri* was decided after the hearing below, the chambers judge did not have the benefit of its reasoning. However, *Alharayeri* principally restates existing law. In any event, the chambers judge gave no reasons for the remedies he granted.

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[104] *Alharayeri* at paras. 49 and 52.

[105] *Alharayeri* at para. 53; *Hui v. Hoa* at paras. 46-47; *Vlasblom v. NetPCS Networks Inc.* (2003), 31 B.L.R. (3d) 255, 2003 CanLII 48077 (Ont. S.C.) at paras. 254 and 261.

[106] Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) ("Koehnen") at pp. 328-330.

[107] *Alharayeri* at para. 54; *Naneff* at pp. 488-490.

[108] *Kwinter v. Metrowest Developments Ltd.*, 2011 ABCA 61 at para. 14. Koehnen at p. 334; *Naneff* at pp. 488-490, 492; *CSA Building Sciences* at paras. 48 and 54.

[109] *Alharayeri* at para. 55.

[110] *CSA Building Sciences* at para. 53.

(b) *Specific principles applicable to remedy: compliance is preferable to rescission and equity requires rescission to be accompanied by restitution of benefits conferred under the rescinded agreement*

54. The chambers judge also failed to pay heed to other principles which governed the exercise of his discretion. The judge did not apply the principle that where the complaint is the procedural failure to obtain approval, "an order requiring compliance with the proper approval process is preferred to an order rescinding the transaction".[111] In *Low v. Ascot Jockey Club Ltd.*, where the defendant paid himself management fees without board approval, Southin J. (as she then was) made an interim order that the payments be set aside and that the board meet to fix an appropriate salary.[112] Similarly, in *CSA Building Sciences*, where the majority shareholder and sole director paid himself excess management fees and acted dishonestly in an attempt to conceal this, the appropriate remedy was not to disallow all compensation, but rather to allow him to retain what the evidence established was reasonable compensation and to divide the "excess" between the parties in proportion to their shareholdings and corresponding expectation to receive the company's profits as dividends.[113] In *Zysko v. Thorarinson*, the court set aside a directors' resolution approving the granting of a mortgage and other security in favour of a related party lender as contrary to the disclosable interest provisions of the Alberta *Business Corporations Act* and oppressive; but the lender was still entitled to recover the funds it advanced as loans with interest.[114]

55. The chambers judge also failed to take into account that where a court exercises the power to rescind transactions found in s. 227(3)(j), this power remains subject to equitable principles. In equity, a party seeking to set aside a transaction must make counter-restitution of benefits received from the defendant in exchange, and if this is

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[111] Koehnen at p. 375; see generally pp. 374-376.

[112] *Low v. Ascot Jockey Club Ltd.*, (1986), 1 B.C.L.R. (2d) 123 (S.C.).

[113] *CSA Building Sciences* at para. 85.

[114] *Zysko v. Thorarinson,* 2003 ABQB 911, [2004] 10 W.W.R. 116 at paras. 81-83.

impossible, then the relief will ordinarily be refused.[115] "[I]t is commonly said that it is a condition of the availability of such relief [equitable rescission] that it is possible to effect a *restitutio in integrum* of both parties -- there must be a restoration of the *status quo ante*", such that the order "will protect the restitutionary interests of both parties to the transaction".[116] This requirement of counter-restitution is "ancient and very common".[117] Its purpose is to protect the defendant from being put in an "unjustifiably worse position" than he occupied before the rescinded contract was made.[118] Counter-restitution in this context includes the requirement to pay interest.[119] Courts of equity do not require precise restoration or restitution *in specie*, and may do what is "practically just";[120] however, "[r]escission of a performed contract is not easily available where prejudice would result to the other party".[121] Although they arise in the context of rescission of

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[115] Mitchell, Mitchell and Watterson eds., *Goff & Jones The Law of Unjust Enrichment*, 9th ed. (London: Sweet & Maxwell, 2016) ("Goff & Jones") at p. 835; *Maguire v. Makaronis* at pp. 744-746, 763-765.

[116] Maddaugh and McCamus, *The Law of Restitution*, looseleaf edition (Toronto: Thomson Reuters, 2017) ("Maddaugh and McCamus") at pp. 5-51 to 5-52; see also p. 20-16 and pp. 20-16 to 20-18 generally; *Kingu v. Walmar Ventures Ltd.*, (1986), 10 B.C.L.R. (2d) 15 (C.A.) ("*Kingu*") at pp. 20-21; *Johnson v. EBS Pensioner Trustees Ltd.*, [2002] EWCA Civ. 164 ("*Johnson v. EBS*") at paras. 57-58.

[117] *Maguire v. Makaronis* at p. 763 (per Kirby J. concurring).

[118] O'Sullivan, Elliot & Zakrzewski, *The Law of Rescission* (New York: Oxford University Press, 2008) ("*The Law of Rescission*") at pp. 366-368.

[119] *The Law of Rescission* at pp. 352-353.

[120] Maddaugh and McCamus at pp. 5-51 to 5-52 and 20-10 to 20-11; *415703 B.C. Ltd. v. JEL Investments Ltd.* 2010 BCSC 202 ("*JEL Investments*") at para. 220; *The Law of Rescission*, at pp. 372-373.

[121] *Sumner v. PCL Constructors Inc.* 2011 ABCA 326 at para. 62, application for leave to appeal dismissed 2012 CanLII 36230 (S.C.C.); *The Law of Rescission* at pp. 366 and 392.

contracts for misrepresentation, these principles are equitable ones,[122] and are consistent with the equitable nature and corrective purpose of the oppression remedy described above.

56. In *Maguire v. Makaronis*, for example, the defendants took a short term loan to acquire a farm business. As security for the loan, they granted a mortgage over an unrelated property. Their solicitors on the transaction were the mortgagees. This was not disclosed and informed consent to this conflict was not obtained. The true and ultimate source of the loan was a bank, which relied for its security on an equitable mortgage by the solicitors. The defendants mismanaged the business, failed to repay the loan and became insolvent. They successfully resisted the solicitors' action to enforce the mortgage on the basis of breach of fiduciary duty, as a result of which the primary judge made an "unconditional" order setting aside the mortgage. This left the lawyers with a bare covenant to pay "but shorn of the supporting security". The High Court of Australia allowed the appeal. As the majority explained:

> To set aside the Mortgage purely in its operation as a security, without conditioning that upon repayment, would be to reform the transaction in an impermissible fashion. It would be to strike down the security interest without ensuring repayment of that which was paid in return for it. The respondents would be left with the fruits of the transaction of which they complain, whereas their equity was to have the whole transaction rescinded and, so far as possible, the parties remitted to their original position.[123]

57. Kirby J., concurring, said that the purpose of equitable relief is not punishment, but to do what is "practically just": the fiduciary must not be "robbed"; nor should the beneficiary be unjustly enriched. The defendants' insolvency meant that absent the security, the prospect of recovery was "chimerical"; giving them a "windfall benefit" would be neither practical nor just.[124] These considerations apply here.

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[122] *Maguire v. Makaronis* at pp. 744-746, 763-764; *Johnson v. EBS Pensioner Trustees Ltd.* at paras. 57, 78-79.

[123] *Maguire v. Makaronis* at p. 746.

[124] *Maguire v. Makaronis* at pp. 763-766 per Kirby J. concurring.

58. To similar effect is the English Court of Appeal decision in *Johnson v. EBS Pensioner Trustees Ltd.*, where rescission of a guarantee only was denied. The loan and guarantee were in reality all part of one transaction, and to set aside the guarantee only would have released the plaintiff "from substantial contractual obligations from which he had derived very considerable benefit which would not be restored to the lenders. Fairness and justice do not require such an outcome".[125]

(c) *The judge's order setting aside the security and priority granted as part of the Highlands Loan did not protect the petitioners' expectations*

59. The judge made an order setting aside "any security or priority of security" that MacMillan caused Purcell to grant to him, to Highlands or to any corporation under his control or direction. This included any agreement, resolution or instrument that gave them "priority ... over any already existing secured debt or other secured instrument".[126]

60. The only entity which could have complained of unfair prejudice resulting from the security and priority granted in connection with the Highlands Loan was CuVeras. As explained above, CuVeras consented to the Priority Agreement. The petitioners were not entitled to use a personal action for oppression as if they were CuVeras, in an effort to indirectly advance its interests. The judge's order setting aside Highlands' security and priority also gave the petitioners something they, as shareholders, could not have reasonably expected: the ability to constrain how Purcell dealt with its assets. Despite the terms of the Arrangement Order, Purcell, through its new management including Radford and new counsel (also counsel for the petitioners) has even suggested that the order extends to invalidate the HPP Note. This relief is also contrary to the principle that an oppression remedy may not serve a purely tactical purpose. Granting this remedy allowed the petitioners and CuVeras to bypass the New York Action which raised the validity of the Priority Agreement; the dispute over whether Highlands remained the manager of CuVeras; and the questions of Delaware law that

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[125] *Johnson v. EBS* at para. 82 (per Dyson L.J. concurring); see also paras. 57-58 (per Mummery L.J.).

[126] Reasons, para. 144(g), AR p. 114.

applied to the contract and fiduciary questions arising from the Priority Agreement and alterations to the CuVeras Note. In making an order to which the petitioners were not entitled in their personal capacities, and which went beyond protecting their expectations *qua* shareholders, the judge erred in principle.

(d) *The judge erred in setting aside Highlands' security and priority, granting partial rescission and without requiring of benefits conferred by Highlands*

61. The chambers judge also erred in law and in principle in the manner in which he varied the Highlands Loan transaction. By the time of the hearing, Highlands had advanced approximately $400,000 under the Highlands Loan.[127] The Highlands Loan was made, and funds advanced, on terms giving Highlands security and priority over the senior debt owed to CuVeras and HPP. Those terms were crucial to the bargain: Purcell had $17 million in senior debt[128] as against what the Valuation Report described as a value of $5.2 million for the Mine. The Highlands Loan was made in distressed circumstances,[129] and absent priority, the funds advanced will be unrecoverable.

62. In setting aside the security and priority terms for the Highlands Loan but leaving the existing indebtedness and other contractual terms in place, the judge "reformed" the transaction in the manner criticised in *Maguire v. Makaronis* as "impermissible" and unfair. The judge's order also amounted to partial rescission of the Highlands Loan. This was not possible. Rescission "is an 'all or nothing' remedy".[130] As this court has held, "[n]o such remedy [partial rescission] is known at common law or equity".[131] The rule against partial rescission rests on the idea that the court should not re-write bargains and "is part of the wider requirement that there cannot be rescission unless

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[127] Reasons, para. 44, AR p. 76. The Reasons refer to the amount as being "to date", but the Reasons were issued some seven and a half months after the hearing.

[128] Reasons, para. 10, AR p. 69.

[129] Reasons, paras. 36, 42-45, AR pp. 74-76.

[130] *S-244 holdings Ltd. v. Seymour Building Systems Ltd.* (1994) 93 B.C.L.R. (2d) 34 (C.A.) at para. 23; *The Law of Rescission* at p. 402.

[131] *Kingu* at p. 20.

there can be *restitutio in integrum*".[132] The rule against partial rescission applies to bargains, not individual contracts.[133] It will prevent the rescission of one of two interdependent contracts, or where "the contract not sought to be rescinded would never have been entered into by the parties without also entering into the other".[134] The prohibition on partial rescission is distinct from the court's discretionary power to order rescission on terms, which is permitted, but only for the purpose of restoring the parties to their previous positions and not to reform the transaction.[135]

63. Ordering partial rescission is also contrary to the principle that in granting an equitable remedy, the judge was required to make an order that protected the restitutionary interests of Highlands and that was fair to both parties. It is important to recall that the judge made no finding of fraud, or that the Highlands Loan advances were not properly applied to Purcell's working capital needs. Nor did he find that the substance of the bargain was unfair to Purcell; the absence of other options and the 10% interest rate, despite the circumstances, support this.

64. Setting aside the security and priority terms of the Highlands Loan while permitting Purcell to retain the benefit of advances Highlands made in reliance on those protections was punitive and inequitable. If an order for rescission was to be made, it had to be on terms that required counter-restitution of the benefits Purcell had received, thereby restoring the parties to their positions before the Highlands Loan was made.

(e) *Relief concerning MacMillan's compensation exceeded the petitioners' expectations and was inequitable*

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[132] *Mirage Consulting Ltd. et al. v. Astra Credit Union Ltd.*, 2017 MBQB 63 at para. 15; *JEL Investments* at para. 195.

[133] *The Law of Rescission*, p. 399; *JEL Investments*, at para. 203; see also paras. 204-221.

[134] *JEL Investments*, at para. 206.

[135] *The Law of Rescission*, p. 402; *Maguire v. Makaronis* at pp. 744-746; *JEL Investments*, at para. 200.

65. The judge also erred in principle in setting aside all arrangements concerning MacMillan's compensation. Again, a remedy was available only to correct breaches of the petitioners' reasonable expectations. The judge did not find that the petitioners had the expectation that MacMillan would not be paid for more than two years' of service, nor would such an expectation have been reasonable. Instead, the judge found that Radford and Lacey reasonably expected that MacMillan would disclose and seek shareholder approval for his compensation package.[136] The remedy granted by the judge stripped MacMillan of any right to compensation and required repayment of any salary received.[137] These orders granted the petitioners something they could not reasonably expect. The punitive denial of compensation is contrary to Purcell's articles, violates the principles and authorities cited above, and wrongly requires rescission without imposing any corresponding counter-restitutionary obligation on Purcell.

66. The chambers judge also made a palpable and overriding error in finding a reasonable expectation that MacMillan's compensation required shareholder approval. This was not required under corporative governance principles or Purcell's articles.[138] Nor did the petitioners depose that they held this specific expectation. The factors cited by the judge[139] do not support an inference that shareholder approval was required.

67. In the alternative, if the failure to obtain shareholder approval was a breach of the petitioners' expectations, the appropriate order is not to set aside the EEA but to put it to a shareholders' vote. The shareholders will presumably vote with the benefit of advice from new management as to reasonable compensation and the company's obligations.

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[136] Reasons, para. 77, AR pp. 86-87.

[137] Reasons, para. 144, AR pp. 113-114.

[138] Cited above at paras. 36-37; see also Reasons, para. 83, AR pp. 90-92 (arts. 13.5, 15.1 and 18.4).

[139] Reasons, para. 140, AR pp. 108-110.

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PART 4 - NATURE OF ORDER SOUGHT

68. That the appeal be allowed and the following orders:(a) that the order of Masuhara J. be set aside and the petition dismissed;

(b) in the alternative, the order of Masuhara J. be varied as follows:

(i) that the order setting aside the EEA dated November 7, 2016 be set aside;

(ii) in the alternative, that the EEA or MacMillan's compensation be put to a shareholder's vote;

(iii) that the order setting aside any security or priority of security to Highlands in respect of the Highlands Loan be set aside;

(iv) in the alternative, an order for rescission of the Highlands Loan such that the rescission of Highlands' security and priority be conditional on Purcell's repayment of all funds advanced pursuant to the Highlands Loan, with interest;

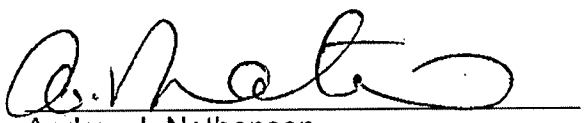
(v) an order setting aside the order for an accounting and repayment with respect to any monies paid to MacMillan, Highlands or companies under MacMillan's control or direction, including salary;

(c) costs of the appeal; and

(d) costs of proceedings in the court below.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia, the 16th day of October, 2017.



Andrew I. Nathanson
Counsel for the Appellants
Brendan MacMillan, Highlands Pacific LLC and Highlands Pacific Partners LLP

LIST OF AUTHORITIES

This is **Exhibit "C"** referred to in Affidavit #1 of **Susan Danielisz**, sworn before me at Vancouver, British Columbia, on July 12, 2018.

A Commissioner for taking Affidavits
for British Columbia

COURT OF APPEAL FILE NO. CA44587

COURT OF APPEAL

ON APPEAL FROM the judgment of the Honourable Mr. Justice Masuhara of the Supreme Court of British Columbia pronounced July 10, 2017

BETWEEN:

Reg Radford and Peter Lacey

Respondents
(Petitioners)

AND

Brendan MacMillan, Highlands Pacific LLC and Highlands Pacific Partners LLP

Appellants
(Respondents)

AND

Purcell Basin Minerals Inc.

Respondent
(Respondent)

FACTUM OF THE RESPONDENTS, REG RADFORD AND PETER LACEY

Counsel for the Appellants
Brendan MacMillan, Highlands Pacific LLC
and Highlands Pacific Partners LLP

Andrew I. Nathanson
Jennifer Francis

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3

Phone: 604-631-3131
Fax: 604-631-3232

Counsel for the Respondents
Reg Radford and Peter Lacey

Joseph Groia
David Sischy

Address for service in British Columbia:
Getz Prince Wells LLP
Barristers and Solicitors
#530-55 Burrard Street
Vancouver, BC V6C 2G8
Phone: 604-605-4291
Fax: 604-685-9798

Counsel for the Respondent
Purcell Basin Minerals Inc.

Dana Prince

Getz Prince Wells
Barristers and Solicitors
#530-55 Burrard Street
Vancouver, BC V6C 2G8

Phone: 604-605-4291
Fax: 604-685-9798

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CHRONOLOGY

Date	Event
May 26, 2011	Stanfield Group obtains initial CCAA order
Nov. 18, 2014	Stanfield Group Plan of Arrangement approved
Dec. 9, 2014	Purcell Basin Minerals Inc. ("Purcell") established
Dec. 9, 2014	Dec. 9, 2014 Resolutions – Mr. MacMillan grants himself excessive compensation package
Dec. 9, 2014	10% Senior Notes issued by Purcell to CuVeras in principal amount of $12,009,795
Dec. 9, 2014	10% Senior Note issued by Purcell to Highlands Pacific Partners LLP in principal amount of $2,338,000
April 25, 2016	Ministry of Energy advised Purcell that its *Mine Act* permit application had been suspended.
April 25, 2016	April 25, 2016 Resolutions (settled on approximately May 27, 2016) – Mr. MacMillan grants himself, among other things, 3 million shares in Purcell and priority over Purcell's assets.
June 9, 2016	Date by which Purcell's first AGM had to be held under the *BCBCA* and Purcell's articles
July 15, 2016	Mr. Radford delivers requisition for AGM for purpose of electing new Board
Aug. 5, 2016	Mr. Radford receives Notice of Meeting for 8pm on Nov. 10, 2016 in Richmond, B.C.
Sept. 14, 2016	Release of Justice Morellato's Reasons in Docket No. 167967 (heard on Sept. 7, 2016) dismissing Mr. Radford's request for earlier AGM and change of location, but ordering financial disclosure by no later than Oct. 24, 2016
Oct. 13, 2016	Email from Mr. MacMillan's lawyer to Purcell's lawyer advising of Mr. MacMillan's position that the 3 million shares he issued himself should count for the upcoming meeting
Oct. 21, 2016	Letter from Purcell's counsel to Mr. Radford's counsel advising of existence of 3 million shares Mr. MacMillan issued to himself and that 3 million shares were not included in previous shareholders list provided to Mr. Radford

Oct. 21, 2016	Corporate Power of Attorney and Director's resolution appointing Mr. Moretti as "Attorney"
Oct. 24, 2016	Financial disclosure posted on Purcell's website
Nov. 4/5, 2016	Letter from Mr. Radford and Mr. Lacey's counsel to counsel for Purcell and Mr. MacMillan advising of instructions to bring oppression proceeding
Nov. 6, 2016	Unfiled Petition materials sent to counsel for Purcell and Mr. MacMillan
Nov. 7, 2016	Petition filed; Petitioners obtain short leave to have Application for interim relief heard on Nov. 9, 2016
Nov. 7, 2016	Mr. MacMillan and Purcell enter into "Executive Employment Agreement"
Nov. 9, 2016	Application for interim relief heard before Justice Johnston – Nov. 10, 2016 meeting adjourned until no more than 30 days following release of decision in the Petition
Nov. 28-29, 2016	Hearing of Oppression Petition
July 10, 2017	Release of Justice Masuhara's Reasons for Judgment

OPENING STATEMENT

Brendan MacMillan and his two holding companies, engaged in flagrant, repeated and abusive self-dealing aimed at maintaining his control of Purcell Basin Minerals Inc. ("Purcell") and intended to allow him to continue to loot Purcell and defeat the interests of Reg Radford and Peter Lacey. Most egregiously, Mr. MacMillan did this by, among his oppressive acts, issuing himself 3 million shares in Purcell in advance of a shareholder meeting where a new Board of Directors was to be voted on. He also tried to grant himself excessive compensation packages as the President of a non-operational mining company, and grant himself a first priority security interest over the assets of Purcell, in violation of Mr. Radford and Mr. Lacey's reasonable expectations. He did not disclose any of this until forced to do so by the Court. He then used Company resources for as long as he could to resist the efforts of Purcell's shareholders to take back their company.

In arriving at his findings that Mr. MacMillan's conduct was oppressive and/or unfairly prejudicial the experienced Petition judge, Justice Masuhara, engaged in a "fact-intensive examination" and a detailed review of a "significant volume of materials". He found that Mr. MacMillan had engaged in numerous instances of abusive self-dealing in circumstances where he was in a hopeless conflict of interest. He found that Mr. MacMillan caused the company to enter into transactions for improper purposes. He found that Mr. MacMillan failed to disclose these self-dealings and any financial information until ordered to by the Court, long after he had purported to enter into the transactions with himself. These findings are entitled to a high degree of deference on this appeal and they are all correct and well supported by the record.

Justice Masuhara properly engaged in a contextual and fact-specific analysis that identified Mr. Radford and Mr. Lacey's reasonable expectations and the oppressive manner in which they were repeatedly violated by Mr. MacMillan. He granted remedies aimed at rectifying Mr. MacMillan's improper conduct. There were no errors of law, overriding and palpable errors of fact and no fact or law that came close to justifying Mr. MacMillan's misconduct.

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PART 1 - STATEMENT OF FACTS

The Parties

1. The respondent Purcell Basin Minerals Inc. ("Purcell" or the "Company") is a private British Columbia company engaged in mineral exploration and development. The mine that it owns is not in production and Purcell has no income or revenue of significance.[1]

2. The respondent Peter Lacey is a businessman and shareholder in Purcell. He is the founder and Chairman of Cervus Equipment Corporation (TSX:CVL) a Canadian public company headquartered in Calgary, Alberta, which had annual sales in excess of $1 billion in 2015. He serves as a director of several other public and private companies.[2]

3. Mr. Lacey has invested approximately $600,000 in Purcell and holds approximately 251,000 of the issued and outstanding common shares of the Company, personally and through his holding company 1656993 Alberta Ltd ("165"). This represented approximately 10.5% of the issued and outstanding common shares of Purcell prior to the attempted improper Share Issuance (as defined below) by Mr. MacMillan. Mr. Lacey is the single largest shareholder in Purcell.[3] Mr. Lacey also has an indirect interest in Purcell debt held by CuVeras LLC ("CuVeras"), through the CuVeras Note (as defined below).

4. The respondent Reg Radford is a businessman and shareholder in Purcell. He has invested, directly and indirectly, approximately $200,000 in Purcell and holds directly and indirectly approximately 20,000 shares of Purcell.[4] On or around August 7, 2017, following the release of Justice Masuhara's Reasons for Judgment, Mr. Radford was

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[1] Reasons for Judgment of Justice Masuhara dated July 10, 2017 ("Reasons") at para. 6, Appeal Record ("AR"), p.68
[2] Affidavit #1 of Peter Lacey, sworn November 7, 2016("Lacey #1"), at para. 2, AAB p.96
[3] Reasons at para. 14, AR, p.70; Affidavit #4 of Brendan MacMillan, sworn November 22, 2016 ("MacMillan#4) at para. 10, AAB p.438
[4] Reasons at para. 16, AR, p.70

elected as a Director of Purcell and currently is Purcell's President. Mr. Radford also has an indirect interest in the Purcell debt held by CuVeras.

5. At the time of the hearing, the appellant Brendan MacMillan was Purcell's President, sole Director and Officer. Mr. MacMillan resigned from these positions on or around July 19, 2017, shortly after the release of Justice Masuhara's Reasons for Judgment. Mr. MacMillan is also the principal of the appellants Highlands Pacific Partners LLP ("HPP") and Highlands Pacific LLC ("Highlands").[5]

The History of Purcell

6. Purcell was established on December 9, 2014 as a result of insolvency proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") conducted before Madame Justice Fitzpatrick.[6]

7. The Stanfield Group, effectively controlled by Ross Stanfield, was the predecessor company to Purcell and in the business of developing the mine property. In the mid-1990s, Mr. Stanfield began raising funds to develop the mine by selling preferred, non-voting shares and sometimes common shares in the Stanfield Group companies. From the mid-1990s until 2010, Mr. Stanfield raised over $220 million from approximately 3,500 individual investors.[7]

8. On May 26, 2011, the Stanfield Group sought and obtained creditor protection under the CCAA and an initial order was granted. Interim financing was needed in order to proceed with development work and maintain minimal operations at the mine. This financing was ultimately provided by CuVeras which was appointed as the interim lender.[8]

9. At the time the Plan was approved, a group of investors, including Mr. Lacey, Mr. Radford and Mr. MacMillan, invested approximately $11 million in CuVeras. As

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[5] Reasons at paras. 11-13, AR, p.69
[6] Reasons at paras. 8 and 17, AR, p.69-70; *Bul River Mineral Corporation (Re)*, 2015 BCSC 113 ["*Bul River*"]
[7] Reasons at para. 18, AR, p.70
[8] Reasons at para. 20 AR, p.71

consideration, they received unsecured notes in CuVeras. This was done to "create a financial facility and secure the appointment of CuVeras as DIP Lender" to the Stanfield Group.[9] Mr. MacMillan, through his private holding company, Highlands, was made manager of CuVeras. Mr. Lacey was the sole member of CuVeras.[10]

10. As interim lender, CuVeras was entitled to a note payable by Purcell in the amount of $12,009,795 (the "CuVeras Note"). As part of the Plan Compromise and Arrangement (the "Plan"), investors in CuVeras also received shares of Purcell. The CuVeras Note was issued by Purcell on December 9, 2014 and had a stated maturity date of December 9, 2016. CuVeras was granted a first priority security interest over the assets of Purcell.[11]

11. Mr. Lacey has been involved in the CCAA proceedings since the fall of 2011 when his group advanced funds to repay the first interim lender (prior to CuVeras). He was then instrumental in organizing the CuVeras investor group and funding CuVeras' sponsorship of the Plan.[12]

12. Highlands was issued 69,000 common shares in Purcell. HPP received 95,257 "success fee" shares pursuant to the Plan.[13]

13. Justice Fitzpatrick approved the Plan by an order dated November 18, 2014. The Amalgamation was effective December 9, 2014.[14] Up until his resignation in July 2017, Mr. MacMillan was the only person to ever serve as Officer and/or Director of Purcell.

Events Leading up to Disclosure of Dec. 9, 2014 and April 25, 2016 Resolutions

14. On June 2, 2015, in one of his few shareholder communications, Mr. MacMillan sent an email to shareholders attaching a Purcell newsletter. Among other things, the

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[9] Reasons at para. 24, AR, p.72
[10] Reasons at para. 25 AR, p.72
[11] Affidavit #3 of Brendan MacMillan, sworn Nov. 18, 2016 ("MacMillan #3"), Exhibit H, AAB, p.287
[12] Reasons at para. 20, AR, p.71
[13] Reasons at para. 12, AR, p.69
[14] Reasons at para. 28, AR, p.73

newsletter reaffirmed the plan to appoint a full Board of Directors and an operational CEO. The newsletter also provided an equity valuation for Purcell of $20 million. The newsletter made no mention of the December 9, 2014 Resolutions (as defined below) regarding the excessive compensation Mr. MacMillan gave himself.[15]

15. On April 25, 2016, the Ministry of Energy advised Purcell that its *Mine Act* permit application had been suspended. This permit is necessary to mine and produce ore at the mine.[16] The suspension extended significantly the timetable for developing the mine and, as found by Justice Masuhara, negated any urgency for funding at the level and on the terms that Mr. MacMillan negotiated with himself under the April 25, 2016 Resolutions.[17]

16. In late June 2016, Mr. Lacey as the sole member of CuVeras, signed a written consent to remove Highlands as the manager for CuVeras. This follows Mr. Radford learning that "Mr. MacMillan as its de facto manager allowed CuVeras to be struck-off the registrar for failure to make its regulatory filings and to pay associated sustaining fees". As a result, 1974315 Alberta Ltd. ("197"), a privately held company controlled by a group of shareholders supportive of Mr. Radford and Mr. Lacey, was appointed manager of CuVeras. Subsequently, 197 paid the fees and penalties to reinstate CuVeras. The company was revived effective August 15, 2016.[18]

17. In July 2016, Mr. Radford and Mr. Lacey delivered a requisition representing approximately 15% of the issued and outstanding shares in Purcell to Mr. MacMillan for a general meeting of shareholders to increase the number of directors to seven and elect a slate of directors.[19] At this point Purcell had never held its first annual general meeting or a shareholders meeting of any kind.

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[15] Reasons at paras. 31-32, AR, p.74
[16] Reasons at para. 35, AR, p.74
[17] Reasons at para. 142(b), AR, p.110
[18] Reasons at para. 47, AR, p.76
[19] Reasons at para. 48, AR, p.77

18. Pursuant to section 182 of the British Columbia *Business Corporations Act* ("BCBCA") and Article 10 of Purcell's Articles[20], a meeting was required to be held on or before June 9, 2016 which was the date within 18 months after the Company was formed through an amalgamation. Mr. MacMillan failed to call a shareholders meeting within this statutory mandated time frame.[21]

19. Only in response to this demand did Mr. MacMillan call a meeting for November 10, 2016.[22] In his letter to shareholders accompanying the notice of meeting, Mr. MacMillan failed to refer to the December 9, 2014 or April 25, 2016 Resolutions.[23]

20. On August 23, 2016, Mr. Radford filed a Petition (Docket S167697) and sought an order requiring disclosure and an expedited meeting date at a different location. While Justice Morellato did not change the date and location of the meeting, she did order the disclosure of financial information by no later than October 24, 2016.[24]

21. While Mr. MacMillan was refusing to provide any financial information, he continued to mismanage Purcell. Deficiencies in his management included the non-payment of employees, contractors and bills, a lien against the mine site for lack of payment, the failure to file tax returns, and the failure to pay for the renewal of mineral claims.[25]

22. On September 23, 2016, Mr. Radford's lawyer wrote to Purcell requesting a list of shareholders. On October 6, 2016, Purcell's lawyers shared an undated copy of a shareholders list. On October 14, 2016, Mr. Radford's lawyer responded by advising Purcell that the list provided was undated contrary to s.49(4) of the BCBCA and that Mr. Radford intended to bring an application for a supplemental shareholders list.[26]

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[20] Affidavit of Shakaira John sworn November 6, 2016 ("John #1"), Exhibit "A", (Articles of Purcell attached as Exhibit "A" to the Affidavit of Reg Radford sworn August 19, 2016 which is attached as Exhibit "A" to John Affidavit #1), AAB p.40.
[21] Reasons at para. 50, AR, p.77
[22] Reasons at para. 50 AR, p.77
[23] Reasons at para. 142(a), AR, p.110
[24] Reasons at para. 49 and 55, AR, p.77-78
[25] Reasons at para. 47, AR, p.76-77
[26] Reasons at para. 54, AR, p.78; Affidavit of Peter Lacey sworn Nov. 7, 2016 ("Lacey #1") at paras. 10-11, AAB, p.98

23. Then, remarkably, on October 21, Purcell advised that the shareholders list provided on October 6, 2016, did not reflect the issuance of 3 million shares to Mr. MacMillan, which shares were purportedly authorized to be issued pursuant to a Director's consent resolution of Purcell dated April 25, 2016 (the "Share Issuance"). This was the first time the Company disclosed the Share Issuance. No further details of the Share Issuance were provided at this time.[27]

24. On October 24, 2016, pursuant to Justice Morellato's oral reasons for judgment (and on the last day permitted under those reasons) Purcell disclosed limited financial information on its website (the "October 2016 Disclosure"). Mr. MacMillan had refused all previous requests to disclose the Company's financial information.[28]

25. Justice Masuhara found that the initial disclosure of the list of shareholders, which did not disclose the issuance of 3 million shares to Mr. MacMillan, the refusal to provide financial information to key shareholders, the failure to call a shareholder meeting, and the failure to disclose key resolutions, evidenced a lack of candour and obfuscation on the part of Mr. MacMillan. Such conduct was oppressive and/or unfairly prejudice and in violation of the Respondents' reasonable expectations.[29]

The April 25, 2016 Resolutions

26. The notes to the October 2016 Disclosure disclosed the details of the Share Issuance as well as a series of other acts and instances of self-dealing taken pursuant to Directors' resolutions dated April 25, 2016 (the "April 25, 2016 Resolutions"). The April 25, 2016 Resolutions were entered into by Mr. MacMillan with himself (the sole Director and Officer), without any independent or outside consultation. They were also entered into at a time when Mr. MacMillan knew that Mr. Lacey and Mr. Radford were trying to bring about a change in leadership.[30]

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[27] Reasons at para. 54, AR, p.78; Lacey #1 at para 12, AAB, p.98-99, John #1, Exh. F, Appeal Book of the Respondents, Reg Radford and Peter Lacey ["RAB"], p.69
[28] Reasons at para. 55, AR, p.78; Lacey #1 at paras. 13-15, AAB, p.99; John #1, Exh. G, AAB, p. 77; John #1, Exh. H, RAB, p. 71
[29] Reasons at para. 142(h),(j) and (k), AR, p.113
[30] Reasons at para. 35, AR, p.74; MacMillan Affidavit #4 at para. 100

27. The April 25, 2016 Resolutions were produced by Mr. MacMillan for the first time as part of this legal proceeding.[31] Despite being dated April 25, 2016, Mr. MacMillan deposed that the terms of the resolutions were settled on "approximately May 27, 2016".[32] The April 25, 2016 Resolutions are actually the recorded Minutes of a Board Meeting at which Mr. MacMillan was the sole attendee, despite an acknowledgment in the Minutes that Mr. MacMillan was conflicted as he had "an interest in the various transactions which are the subject of the meeting."[33]

28. Justice Masuhara found Mr. MacMillan's decision to approve the non-arms length transactions in the April 25, 2016 Resolutions in the face of a clear conflict of interest "as acknowledged in his own Minutes of Meeting"[34], and his failure to disclose the April 25, 2016 Resolutions to be oppressive and/or unfairly prejudicial, in violation of Mr. Radford and Mr. Lacey's reasonable expectations.[35]

Details of the Oppressive Share Issuance

29. In the October 2016 Disclosure, Mr. MacMillan disclosed that by his resolution dated April 25, 2016, he purported to issue to himself 3 million shares of the Company for $0.10/share as partial payment for the purported accrued and unpaid compensation payments that were due to him under a December 9, 2014 resolution wherein Mr. MacMillan purported to cause Purcell to pay him a compensation package, as detailed below.[36] The existence of the December 9, 2014 resolution was also disclosed to shareholders for the first time in the October 2016 Disclosure.

30. At the time of the Plan in December 2014, Purcell's shares were valued at $10/share.[37] According to his own evidence, Mr. MacMillan unilaterally decided that a price of

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[31] Affidavit of Brendan MacMillan #3 sworn November 18, 2016 ("MacMillan #3"), Exh.X, AAB at p.355
[32] Reasons at para. 36, AR, p.74
[33] MacMillan Affidavit #3", Exh. X, AAB, p.356
[34] Reasons at 142(c), AR, p.111
[35] Reasons at para. 142(c) and (h), AR, p.111, 113
[36] Reasons at para. 38, AR, p.75; John #1, Exh. G, AAB, p.77
[37] Reasons at para. 70, AR, p.84; Lacey #1 at para. 17, AAB, p.100; Affidavit #1 of Timothy Stewart, sworn November 14, 2016 ("Stewart #1"), at para.4, AAR, p.111

$0.10/share was appropriate to use when issuing himself the shares that gave him complete control of the Company. In October 2015, approximately 6 months before the Share Issuance, Purcell issued shares to investors at a price between $5-$5.50/share. Approximately 5 months prior to that, Mr. MacMillan had provided shareholders with an equity valuation for Purcell of $20 million in the June 2, 2015 newsletter.[38]

31. Justice Masuhara admitted and considered in his assessment of the merits a last minute "Valuation Report" delivered by the Appellants on November 24, 2016. Among other things, the report was only delivered in draft and failed to provide a reference date for the assessed fair market value of the mine or for the valuation of the shares. Justice Masuhara found that the report was not a fairness opinion.[39]

32. Prior to the Share Issuance, there were approximately 2.4 million shares issued and outstanding in Purcell.[40] As a result of the Share Issuance, Mr. MacMillan more than doubled the number of shares outstanding and became the majority and controlling shareholder of Purcell. Mr. Lacey and Mr. Radford were not only diluted in a manner which, among other things, destroyed Mr. Lacey's status as the largest shareholder, but importantly, they were improperly denied the opportunity to win the vote, as their proposed slate was overwhelmingly poised to do.[41]

33. In his Petition materials, Mr. MacMillan stated that he issued the shares to himself because he would not lend money to Purcell without owning more than 50% of Purcell. Regardless of Mr. MacMillan's personal views as to the terms he required to lend money, he did not provide shareholders, including the Respondents, who were critical in ensuring the survival of the Company in the CCAA process, with *any* input into his decision to give himself over 50% of the Company. Mr. MacMillan never offered anyone else the opportunity to purchase shares for $0.10/share.[42]

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[38] Reasons at paras. 31-32, AR, p.74
[39] Reasons at paras. 85, 89, 97 and 142(f), AR, p.93-95, 112
[40] Reasons at para. 39, AR, p.75
[41] Reasons at paras. 73-74, AR, p.85-86
[42] Affidavit #3 of Peter Lacey sworn Nov. 24, 2011 ("Lacey #3") at para. 7, RAR at p.82

Mr. MacMillan Issued the Shares to Himself to Win the Vote

34. Shareholders of Purcell were "concerned", "alarmed", "disturbed" and "bewildered" that Mr. MacMillan issued himself these 3 million shares at $0.10/share without disclosure or consultation.[43] In the weeks leading up to the shareholders meeting scheduled for Nov. 10, 2016, Mr. MacMillan advised several shareholders that he issued the 3 million shares to himself to win the vote.

35. On October 22, 2016, Mr. MacMillan called Timothy Stewart, a shareholder in Purcell, seeking his support. Mr. Stewart's evidence was that Mr. MacMillan made no mention of the Share Issuance. When Mr. Stewart found out about the Share Issuance 3 days later, he texted Mr. MacMillan: "Ouch you didn't mention you gave yourself 3,000,000 shares I guess we all get screwed with that one. Hope you know what your [sic] doing?".[44]

36. After sending the text message, Mr. Stewart immediately received a telephone call from Mr. MacMillan. Mr. MacMillan attempted to assure him "that he had to self-assign the 3 million shares to stop the dissidents from winning the vote at the shareholders meeting, and that, 'man to man', he would never exercise the shares." Mr. MacMillan referred to Mr. Radford and Mr. Lacey as "idiots" and "stupid". Mr. Stewart found Mr. MacMillan's statements hard to believe, particularly in light of the fact that he hid the existence of the shares from him in the first place.[45]

37. George Rouault, another Purcell shareholder, deposed that on November 7, 2016, Mr. MacMillan told him "'man to man' that he only issued those shares to himself so he could win the vote against Lacey and Radford." Mr. Rouault also deposed that Mr. MacMillan told him that "he didn't know why he had 'given that asshole Lacey 10% of

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[43] Affidavit #1 of Timothy Hewison, sworn November 14, 2016 ("Hewison #1") at para.11, AAR, p.126; Stewart #1 at para.6, AAR, p.112; Affidavit #1 of George Rouault sworn Nov. 14, 2016 ("Rouault #1") at para 9, AAR at p.108.

[44] Reasons at paras. 67-69, AR, p.83; Stewart #1 at para. 6, Exh. A at RAR, p. 112 and 118

[45] Reasons at para. 69, AR, p.83; Stewart #1 at para. 7, AAR p.112

the Company'" and that he would never use the shares. It appeared to Mr. Rouault that he was only acting in his own self-interest.[46]

38. Justice Masuhara found that Mr. Stewart and Mr. Rouault's evidence was corroborated by Ms. Schumacher, a shareholder sympathetic to Mr. MacMillan, who in an email of November 18, 2016 stated:[47]

> "When it recently became apparent that the smear campaign by the dissidents was meeting with some success [MacMillan] was advised that issuing voting shares in lieu of receiving past wages could likely successfully ward off the hostile takeover. *That is the reason he issued the shares.* I can also tell you that it is 1.975 million not 3 million. *The shares are to be used to help us block the hostile takeover* and ensure that 95% of our company is not being sold off."[48] [emphasis added]

39. It appeared that Ms. Schumacher was getting her message and information from Mr. MacMillan. Among other things, she included in her email details of the Executive Employment Agreement Mr. MacMillan entered into on November 7, 2016, and which was only disclosed for the first time as part of Mr. MacMillan's evidence provided on November 8, 2016.

40. In his own evidence, Mr. MacMillan states that by April 25, 2016, he thought that Mr. Lacey and Mr. Radford were going to try and "take control of Purcell". Mr. MacMillan acknowledges "that to the extent that the Share Issuance put [him] in a position to prevent Reid and Boyle from teaming up with Radford and Lacey to take control of Purcell", he considered that to be in the best interests of Purcell.[49]

41. Mr. MacMillan further claimed that "control was only temporary" and that he told shareholders that he "needed to be able to vote the shares at the meeting of Purcell's shareholders to save the Company". He claims he told shareholders that it was "not [his] intention to keep the economic value of the shares".[50] Mr. MacMillan appeared to

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[46] Reasons at para 70, AR, p.84; Rouault #1 at paras. 6-7, AAR p.108
[47] Reasons at para. 71, AR, p.85
[48] Lacey #3 at para. 12, Exh. A at RAR, p.83 and 90
[49] Affidavit #4 of Brendan MacMillan sworn November 22, 2016 ("MacMillan #4"), at para. 100, AAR p.456
[50] MacMillan #4 at paras. 104 and 107, AAR, p.457

be claiming that he told shareholders that he was planning on cancelling the shares after he won the vote and remained in control.

42. Justice Masuhara found that Mr. MacMillan's statements to other shareholders that he only issued shares to defeat opposing shareholders evidences a lack of corporate purpose as well as an improper motive.[51] Justice Masuhara found the Share Issuance to be an oppressive and/or unfairly prejudicial act and set it aside.[52]

Mr. MacMillan Secretly Grants Himself a Grossly Inflated Compensation Package

43. The October 2016 Disclosure disclosed for the first time that pursuant to a resolution made by Mr. MacMillan as the sole Director dated as of December 9, 2014, Mr. MacMillan caused Purcell to purportedly grant himself a compensation package including a base fee of US$40,000 and an additional US$8,000 per week for every week after December 9, 2014 that he served as President. For all amounts not paid to him immediately, Mr. MacMillan caused Purcell to purportedly agree to pay him interest at the rate of 18% per year or the highest amount allowable by law (the "December 9, 2014 Resolutions"). Mr. MacMillan never clarified whether it was the lessor or the greater of these two interest rates. Regardless of the length of his service, the minimum amount he would receive under this compensation package was US$800,000.[53]

44. The December 9, 2014 Resolutions also provided that any unpaid compensation would become a secured obligation of Purcell with priority over all other payables, to be paid immediately upon the appointment of any other Officers or Directors, or on the discontinuance of Mr. MacMillan's tenure with Purcell.[54] According to the October 2016 Disclosure, the 3 million shares formed "partial payment" for unpaid compensation owed to Mr. MacMillan. Mr. MacMillan claimed an additional US$1,517,802 was owing to him and was secured against the assets of Purcell in

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[51] Reasons at para. 142(g), AR, p.112
[52] Reasons at para. 144(c), AR, p.111
[53] Reasons at para. 30, AR, p.73
[54] Reasons at para. 30, AR, p.73

priority to other previously secured debt, including that owed to Mr. Lacey and Mr. Radford through their interest in CuVeras. [55]

45. The US$8,000/week Mr. MacMillan purported to grant himself pursuant to the December 9, 2014 Resolutions was in addition to the "base fee" of $US40,000 and weekly payment of US$8,000 Highlands (Mr. MacMillan) was purportedly entitled to receive pursuant to the Plan for its role as manager of CuVeras. Therefore, Mr. MacMillan was purporting to be entitled to a "base fee" of US$80,000 and an additional $US16,000 per week, despite the fact that CuVeras has no business other than managing its investment in Purcell.[56]

46. Based on Mr. MacMillan's evidence and the previously undisclosed compensation arrangements, it is now apparent that between his success fee of $2.338 million (the "HPP Note" as referred to in Mr. MacMillan's Affidavit #4), his Purcell compensation under the December 9, 2014 resolutions, and his CuVeras compensation, Mr. MacMillan was claiming to be entitled to nearly $8 million in total. This is a grossly inflated amount which on its own wipes out the majority of the real money put into Purcell by CuVeras as the DIP Lender. By giving himself priority over the Company's assets, Mr. MacMillan would be first in line for this claim, before everyone else.

47. While Mr. MacMillan was secretly trying to grant himself an entitlement to this outrageous compensation package, he was telling shareholders that he was not being compensated for his work at the mine other than a success fee from the CCAA proceedings. Shareholders have been "shocked" and "astounded" to learn that contrary to these representations, Mr. MacMillan had decided to pay himself a salary of US$8,000 per week (or US$16,000/week if the CuVeras compensation is considered) to oversee a mothballed mine.[57]

Mr. MacMillan Purports to Grant Priority to His Security Interests in the Company

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[55] John #1, Exh. G, AAB, p. 77
[56] Reasons at para. 26-27, AR, p.73
[57] Reasons at paras. 69-70, AR, p.83-84

48. The October 2016 Disclosure also revealed for the first time that pursuant to the April 25, 2016 Resolutions, Mr. MacMillan attempted to cause Purcell to grant a first priority security interest over its assets to secure some of the obligations owed to himself and Highlands.[58]

49. In addition to the Share Issuance described above, as part of the April 25, 2016 Resolutions, Mr. MacMillan alone approved a series of transactions, including:

    a. an agreement by Highlands to make available a credit facility of up to $15 million to Purcell on a senior and secured basis (the "Highlands Loan"). In connection with the Highlands Loan, Mr. MacMillan as sole director approved Purcell's execution of a promissory note in Highlands' favour providing that the Highlands Loan ranks senior to any other debt of the company, except for the compensation payments discussed below (the "Highlands Senior Note"). The Highlands Loan had an annual interest rate of 10% and was repayable on Dec. 8, 2016.[59]

    b. execution of a promissory note evidencing Purcell's indebtedness to Mr. MacMillan personally for past compensation in the amount of $US1,453,802 (the "Compensatory Note"). The Compensatory Note was also given a first priority security interest over the assets of Purcell.[60]

    c. amending the CuVeras Note of $12,009,795 at 10% interest issued pursuant to the Plan by, among other things, delaying its maturity date from December 2016 to December 2029 (the "Amended CuVeras Note"). In addition, CuVeras' first priority status granted under the Plan was unilaterally subordinated by Mr. MacMillan behind the obligations in the Compensatory and Highlands Senior Notes.[61]

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[58] Reasons at para. 40, AR, p.75
[59] Reasons at para. 37, AR, p.75
[60] Reasons at para. 38 and 40, AR, p.75
[61] Reasons at para. 40, AR, p.75

d. amending the maturity date of the HPP Note from December 9, 2016 to December 9, 2018 (the "Amended HPP Note").[62]

50. The Highlands Senior Note, Compensatory Note, Amended CuVeras Note and Amended HPP Note were entered into pursuant to a priority agreement dated April 25, 2016 (the "Priority Agreement"). Mr. MacMillan purported to act for and sign the Priority Agreement on behalf of himself, Highlands, HPP, Purcell and CuVeras

51.. Mr. MacMillan did not tell anyone about the Priority Agreement until he was forced to as part of the October 2016 Disclosure.

52. Justice Masuhara found that the suspension of Purcell's mine permit application extended significantly the timetable for the mine and negated any urgency for funding at the level and on the terms that Mr. MacMillan negotiated with himself. In concluding that the actions taken by Mr. MacMillan under the April 25, 2016 Resolutions were oppressive and/or unfairly prejudicial, Justice Masuhara rejected Mr. MacMillan's capital requirement justification, finding that it "cannot sanitize the lack of probity" and self-dealing.[63]

53. Justice Masuhara found that Mr. MacMillan's conduct in entering into the Priority Agreement with himself and failing to disclose it until long after the fact, his failure to notify CuVeras of its priority being subordinated, and his failure to cause Purcell to protect CuVeras' rights in breach of the CuVeras Note was oppressive and/or unfairly prejudicial in violation of the Respondents' reasonable expectations.[64] The Appellants' argument that Mr. MacMillan did in fact notify CuVeras that its priority was subordinated and on that basis Justice Masuhara made a "palpable and overriding error"[65] rests on the sophistry that Mr. MacMillan was signing on behalf of all parties and completely ignores the fact that Mr. MacMillan didn't tell anyone about the transaction until forced to by the Court.

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[62] Reasons at para. 40, AR, p.75
[63] Reasons at para. 142(b), AR, p.110
[64] Reasons at para.142(a) and (i), AR, p.110, 113
[65] Appellants' Factum at para. 39

54. Based on his factual findings, Justice Masuhara set aside "any security or priority of security Mr. MacMillan caused Purcell to grant to him, to Highlands or any corporation under his control or direction, and particularly any agreement, resolution or other instrument which purportedly gave priority to Mr. MacMillan, Highlands or any company under his control or direction over any already existing secured debt or other secured instrument."[66]

Mr. MacMillan's Cover Up

55. In his fourth affidavit, Mr. MacMillan conceded that the compensation he negotiated with himself was "based on my mistaken view of my compensation entitlement". Justice Masuhara found this to be an "acknowledgment of his overreach in conduct."[67]

56. On October 13, 2016, Mr. MacMillan acknowledged that the amounts he was claiming were excessive. He advised Purcell's counsel that he did not intend to rely on the Compensatory Note and claimed that he was *only* entitled to an additional $871,982.40 plus accrued interest pursuant to the December 9, 2014 Resolutions.[68]

57. In the October 2016 Disclosure, Mr. MacMillan advised that he had appointed Michael Moretti, a shareholder in Purcell with whom Mr. MacMillan was involved in other investment enterprises, to act as an Attorney for the Company to exercise the authority to renegotiate Mr. MacMillan's entitlement to compensation.[69]

58. On November 8, 2016, on the same day as the Petition in this proceeding was filed, and with full knowledge of the claims being made against him, Mr. MacMillan produced, as an exhibit to an affidavit filed in support of his position on the Respondents' application for interim relief, an "Executive Employment Agreement" dated November 7, 2016 between himself and Purcell (the "EEA").[70]

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[65] Reasons at para. 144(g), AR, p.114
[67] Reasons at paras. 57 and 142(d), AR, p.79, 111; MacMillan #4 at para. 101, AAR, p.456
[68] Reasons at para. 52, p.78
[69] Reasons at paras. 59-60, p.79-80
[70] Reasons at para. 75, p.86

59. Among other things, Mr. MacMillan stated in the EEA that he intended to give back 1,025,000 shares of the 3 million shares he purported to issue himself and that he was issuing the remaining 1,975,000 shares to himself at $0.20/ share, not $0.10/ share. While this in itself is an acknowledgment of Mr. MacMillan's misconduct, it still left Mr. MacMillan and Mr. Moretti with approximately 51.8% of Purcell's shares; enough to carry a simple majority vote, such as the election of Purcell's Directors.[71]

60. The EEA also included a "change of control" provision which had the effect of entitling Mr. MacMillan to a payment of 18 months' salary upon any change to the Board of Directors. This was done after Mr. MacMillan had received the requisition for a shareholders meeting, and the Petition and Notice of Application for interim relief calling for a change to the Company's Board of Directors. The effect of this term was that if the Respondents were successful, Mr. MacMillan claimed to be entitled to an immediate payout of approximately $US400,000.[72]

61. Justice Masuhara was highly critical of Mr. MacMillan's appointment of Mr. Moretti:[73]

> ...I characterize the appointment of an attorney as a last minute attempt by Mr. MacMillan to unfairly obtain effective control over Purcell and protect his personal interests, things he knew could not be sustained under the April 25, 2016 Resolutions. The appointment was in my view a continuation of Mr. MacMillan's oppressive and/or unfairly prejudicial conduct.
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> ...
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> There is no real assessment of Mr. MacMillan's performance by Mr. Moretti. The materials raise considerable concerns regarding Mr. MacMillan's management of Purcell, not the least of which being Mr. MacMillan's self-dealing, and were not considered.

62. Based on his findings with respect to the improper appointment of Mr. Moretti, Justice Masuhara ordered that the EEA be set aside.[74]

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[71] Reasons at para. 65, p.82; Affidavit of Brendan MacMillan sworn Nov. 18, 2016 ("MacMillan #2), Exh. "MB", AAR, p.145
[72] Reasons at para. 66, AR, p.83; MacMillan #2, Exh. M, AAR, p.146
[73] Reasons at paras. 142(e) and (f), AR, p.111-112
[74] Reasons at para. 144(g), AR, p.114

Events Leading Up to the Hearing of the Petition

63. As of November 8, 2016, approximately 571 Purcell shareholders proxies representing at least 1,212,295 common shares had appointed Mr. Radford and/or Ellwood Thompson (a nominee of the Respondents) as their proxyholder to vote at the November 10, 2016 shareholders meeting. By contrast, the Company had received 216 proxies in favour of management representing 500,345 shares to be voted in favour of Mr. MacMillan, including 163,061 shares from Mr. Moretti, 68,000 shares from Highlands LLC and 95,257 shares from Highlands Pacific Partners LLP. Outside of Mr. Moretti and Highlands, only approximately 175,000 shares were in favour of Mr. MacMillan.[75] It was clear that without the Share Issuance, Mr. MacMillan was going to lose control of Purcell.

64. On November 9, 2016, pursuant to an urgent interim application brought by Mr. Lacey and Mr. Radford in the within proceeding, Justice Johnston gave Oral Reasons for Judgment ordering the shareholders meeting scheduled for November 10, 2016, to be adjourned and held instead within 30 days following a decision on the Petition.[76] The Petition was heard on November 28 and 29, 2016.

Subsequent Events

65. This section of the factum is in response to paragraph 27 of the Appellants' factum, which refers to events not in the record.

66. On or around July 19, 2016, shortly after the release of Justice Masuhara's Reasons for Judgment, Mr. MacMillan resigned as the sole Director and Officer of Purcell. On August 7, 2017, the shareholders meeting was held and a new slate of Directors, including Mr. Radford was elected to the Board of Purcell. Mr. Radford was also appointed as Purcell's President. To date, and despite several reasonable requests by Purcell, Mr. MacMillan has refused to return Company records in his possession

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[75] Reasons at paras. 72-73, AR, p.85-86
[76] Reasons at para. 75, AR, p.86

and control, including information relevant to the Company's required filings with the Ministry of the Environment, unless he is paid on an hourly basis without a cap.

67. At the time of the hearing of the Petition, Mr. MacMillan had filed a lawsuit in the State of New York (subsequent to this Petition being commenced) on behalf of himself, Highlands and HPP seeking to, among other things, recover amounts he claimed were owing to Highlands for managing CuVeras and a declaration that the Priority Agreement is valid and enforceable.[77] This claim has since been discontinued on consent; the Appellants submission that Justice Masuhara's order setting aside any security or priority of security Mr. MacMillan granted himself "allowed the petitioners and CuVeras to bypass the New York Action" is wrong.[78] Following his New York action, Mr. MacMillan, on behalf of himself, Highlands and HPP, started another separate proceeding in Delaware in which CuVeras has asserted a counterclaim. Mr. MacMillan has not taken steps to move this proceeding forward.

PART 2 - ISSUES ON APPEAL

68. Did Justice Masuhara exercise his broad discretion in a reasonable manner:

    a. in finding that the Appellants' conduct was oppressive and/or unfairly prejudicial and violated Mr. Radford and Mr. Lacey's reasonable expectations?

    b. in making certain orders to rectify the Appellants oppressive and/or unfairly prejudicial conduct.

69. As set out below, the answer to these two questions is yes. As a result, this appeal should be dismissed.

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[77] Reasons at para. 58, AR, p.79
[78] Appellants' factum at para. 60

PART 3 - ARGUMENT

Standard of Review

70. Whether conduct amounts to oppression is a question of mixed fact and law. In the absence of an extricable legal error, a finding of oppression is reviewable on the standard of a palpable and overriding error.[79]

71. The Alberta Court of Appeal has confirmed that "[f]act findings are the crucial foundation for the legal analysis" required to determine whether unfair conduct rises to the level of oppression.[80] Fact findings are entitled to a high degree of deference.[81] In the case at bar, Justice Masuhara engaged in a "fact-intensive examination" of a "significant volume of materials" in arriving at his conclusion that Mr. MacMillan engaged in conduct that was oppressive and/or unfairly prejudicial.[82] Justice Masuhara's decision is entitled to a high degree of deference.

Reasonable Expectations Existed

72. The Supreme Court has described the concept of "reasonable expectations" as follows:[83]

> "...the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations."

73. While not exhaustive, the Supreme Court has identified the following factors as being useful in determining whether a reasonable expectation exists: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and

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[79] *Khela v. Phoenix Homes Ltd.*, 2015 BCCA 202 at paras. 37-38 ; *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at para. 64 ["*Jaguar*"]
[80] *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 at para. 2 ["*Shefsky*"]
[81] *Shefsky* at para. 3
[82] Reasons at para. 6, AR, p.68
[83] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 56 and 62 ["*BCE*"]

agreements; and the fair resolution of conflicting interests between corporate stakeholders.[84]

74. Justice Masuhara properly considered several relevant factors in arriving at his conclusion that Mr. Radford and Mr. Lacey established the expectations asserted and that such expectations were reasonably held.[85]

Reasonable Expectations Were Violated

75. In determining whether the reasonable expectations of Mr. Radford and Mr. Lacey were violated, it is necessary to consider the intended purpose and scope of the oppression remedy. The oppression remedy has been described as the "broadest, most comprehensive and most open-ended shareholder remedy in the common law world."[86] The oppression remedy "is inspired by the principles of equity: it gives courts a broad jurisdiction to enforce "not just what is legal but what is fair."[87] Actual unlawfulness is not required to invoke the oppression remedy; the court will look beyond legality to what is fair in the circumstances. Courts considering claims for oppression are "instructed to engage in fact-specific, contextual inquiries looking at 'business realities, not merely narrow legalities'".[88]

76. Justice Masuhara found that Mr. Radford and Mr. Lacey's reasonable expectations were violated by conduct that considered cumulatively was oppressive and/or unfairly prejudicial.[89] This conduct, highlighted by repeated instances of abusive self-dealing and non-disclosure, are set out in detail at paragraph 142 of the Reasons.[90]

77. The most egregious instance of self-dealing by Mr. MacMillan was the $0.10 Share Issuance which he never even paid for – they were "paid" by the debt created by the

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[84] *BCE* at para. 72
[85] Reasons at paras. 120, 139-140, AR, p.102, 108
[86] S.M. Beck, "Minority Shareholders' Rights in the 1980s" in *Corporate Law in the 80s* (1982), 311, at p. 312 as quoted in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at para. 48 ["*Peoples*"]
[87] *Mennillo v. Intramodal Inc.*, [2016] S.C.C. 51 at para 8 ["*Mennillo*"].
[88] *Wilson v. Alharayeri*, 2017 SCC 39 at para. 23 ["*Alharayeri*"]
[89] Reasons at para. 141
[90] Reasons at para. 142, AR, p.110

oppressive transactions described above. As noted by Justice Masuhara, Mr. MacMillan has testified that by this time he was aware that Mr. Radford and Mr. Lacey were trying to effect a change in leadership of the Company.[91] The evidence from other shareholders, including one found to be sympathetic to Mr. MacMillan, was overwhelming that Mr. MacMillan only issued the shares to maintain control of the Company in the face of a challenge to his leadership by the Respondents.[92]

78. One indication of oppressive conduct in the management of the affairs of a company is where the directors have used their powers to issue further shares in a manner which allows them to maintain control of the company.[93] The issuance of shares of the company must be for the benefit of the company and must not be for the purpose of manipulating or maintaining control of the company; directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control over the affairs of the company. A shareholder who treats the company treasury as if it were his or her own will be found to have acted oppressively.[94]

79. Justice Masuhara identified the significant and undisclosed compensation packages and priority of security interests Mr. MacMillan decided to award himself as part of the December 9, 2014 and April 25, 2016 Resolutions as additional instances of self-dealing which lacked a proper business purpose.[95] The appropriation of management fees in disregard of the interests or expectations of other shareholders may constitute oppression, especially where the payment of such fees is coupled with a failure to provide financial information and hold shareholder meetings.[96]

80. Not only was Mr. MacMillan's after the fact attempt to cover his tracks by appointing Mr. Moretti further clear evidence of his wrongdoing, but, as noted by Justice Masuhara it does not undo the fact of his self-dealing. Justice Masuhara found that

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[91] Reasons at para. 35, AR, p.74
[92] Reasons at paras. 69-71, AR, p.83-85
[93] *Popat v. MacLennan*, [2014] B.C.S.C. 2363 at para. 11.
[94] *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, [2016] BCCA 258 at para 68 ["*CSA*"]; *Bernard v. Valentini*, (1978) O.J. No. 3264 at para. 9.
[95] Reasons at para. 142(a), AR, p.110
[96] *CSA* at paras 68; *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.* [2014] BCSC 1197 at para 278., reversed in part on appeal.

the appointment itself, coming just before the shareholders meeting, was unfairly prejudicial, and that the appointment and resulting actions "cannot be viewed in isolation of the actions leading up to them."[97]

81. The Appellants appear to be suggesting at paragraph 37 of their factum that Mr. MacMillan acted properly because he disclosed his conflict of interest in his various self-dealing transactions to himself in his various capacities as principal of Purcell, Highlands, HPP and personally. This argument was rightfully rejected.

82. It was entirely reasonable for Justice Masuhara to determine on the facts of this case that Mr. MacMillan was not entitled to rely on the business judgment rule.[98] The law is clear that where directors engage in self-dealing or activities that lack a proper business purpose, they cannot rely on the business judgment rule to shield their improper conduct.[99] It is submitted that this is especially so where the actions are undertaken by a sole director without any independent oversight.

83. The December 9, 2014 and April 25, 2016 Resolutions which Mr. MacMillan relies on in support of the Share Issuance, compensation package and priority of security are nothing more than Mr. MacMillan entering into agreements with himself. There was no consideration of the Company's best interests by disinterested Directors. Rather, Mr. MacMillan, in an irreconcilable conflict of interest, was self-dealing with utter disregard for, and in fact to specifically defeat, the interests of Mr. Radford and Mr. Lacey. His actions, which were not voluntarily disclosed, were the antithesis of fair treatment and transparency.

Mr. Radford and Mr. Lacey Suffered Separate and Distinct Harm

84. A major thrust of the Appellants' argument is that Justice Masuhara made *errors of law and palpable and overriding errors of fact* in finding that Mr. Radford and Mr. Lacey

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[97] Reasons at para. 142(e), AR, p.111
[98] Reasons at para. 142(e), AR, p.111
[99] *Ernst & Young Inc.* v. *Essar Global Fund Ltd.*, 2017 ONSC 1366 at para. 123; *Palmer v. Carling O'Keefe Breweries of Canada Ltd.*, [1989] O.J. No. 32 at paras. 44-45;

suffered separate and distinct harm. However, Justice Masuhara dealt with this issue head-on and clearly explained the factual underpinning of his conclusion that Mr. Radford and Mr. Lacey suffered a separate and distinct harm such that the oppression remedy was available to them.

85. The Appellants argue that this matter had to be brought as a derivative action and could not be brought pursuant to the oppression remedy. As a starting point, it has been recognized by the courts that the derivative action and the oppression remedy are not mutually exclusive. There are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression remedy.[100] In *Jaguar*, this court held that "a shareholder need not be the only shareholder oppressed in order to claim oppression, nor suffer a different harm than the corporation does, but it must show peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly."[101]

86. The Appellants' characterization of the "separate and distinct" principle misconceives the cases in this area. The requirement for "separate and distinct" harm relates to harm suffered by a shareholder (or stakeholder) "separate and distinct" from the corporation itself (and therefore from all shareholders indirectly) so as to not collapse the distinction between oppression and derivative actions and offend the rule in *Foss v. Harbottle*.[102] Justice Newbury made this clear when she said: [103]

> In this province, the relationship between the two actions has been resolved by the principle that where a petitioner under s. 227 complains of a wrong (usually breach of fiduciary duty) to the corporation, an oppression action is unlikely to be appropriate unless he or she suffered some loss or damage "separate and distinct from" the indirect effect of the wrong suffered by all shareholders generally...

87. In other words, an oppression claim may not be available to redress wrongs suffered solely by the corporation, that is the domain of the derivative action; however, it remains a powerful and essential remedy for shareholders who have personal claims

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[100] *Rea v. Wildeboer,* 2015 ONCA 373 at para. 26 ["*Rea*"]
[101] *Jaguar* at para. 179
[102] *Jaguar* at paras. 181-183; *CSA* at para. 72
[103] *CSA* at para. 72

against those who have violated their reasonable expectations in an oppressive or unfairly prejudicial manner. The interpretation urged upon this court by the Appellants would seriously undermine the purpose of the oppression remedy and set back shareholder rights in this country as it would mean that where a corporation or its directors cheat all of its shareholders their only remedy is to have the corporation sue itself.

88. In any event, that is not the case here as Mr. MacMillan, who was a shareholder through Highlands and HPP, used his control of Purcell to try to cheat some of the other shareholders; a classic case where the oppression remedy is available to protect the oppressed. While the Respondents do not accept the Appellants' characterization of the law of oppression, even if it is accepted by the Court, there is ample evidence to support Justice Masuhara's findings that Mr. Radford and Mr. Lacey did in fact suffer harm that was unique vis-à-vis all of the other shareholders, including by virtue of the fact that they suffered harm which was not suffered by Mr. MacMillan and his holding companies. Justice Masuhara made this point in finding that the Appellants' position did not "consider the negative effect on the holdings of shareholders *other than Mr. MacMillan*." [emphasis added][104] In the words of this Court, shareholders other than Mr. MacMillan, Highlands and HPP suffered a "peculiar prejudice distinct from the alleged harm suffered by *all shareholders generally*."[105] [emphasis added]

89. The Appellants concede that the "judge correctly identified this threshold and the relevant legal principles."[106] Instead, their major complaint focuses on Justice Masuhara's findings of fact and application of those findings, areas which deserve significant deference.

90. Justice Masuhara found that the Respondents' suffered harm that was separate and distinct by virtue of the fact that their position or influence, and particularly Mr. Lacey's as the largest shareholder of Purcell, was negated by the actions of Mr. MacMillan.[107]

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[104] *Reasons* at para. 116, AR, p.101
[105] *Jaguar* at para. 179
[106] Appellants' Factum at para. 46
[107] Reasons at para. 111, AR, p.99

In order to properly appreciate Mr. Radford and Mr. Lacey's "position or influence" in the Company, it is necessary to look back at their critical role in the creation of Purcell.

91. Mr. Lacey was involved in the CCAA proceedings since the fall of 2011 when his group bought out the first interim lender and then created CuVeras to serve as the DIP lender for Purcell.[108] In determining that the Plan was fair and reasonable, Justice Fitzpatrick recognized the "years of steady and persistent efforts by the various participants, including Mr. Hewsion, Mr. MacMillan and Mr. Lacey, in what were sometimes difficult and uncertain circumstances."[109] In the CCAA proceedings, Mr. MacMillan himself acknowledged the substantial efforts of Mr. Lacey in bringing forth the Plan.[110] It is undisputed that Mr. Lacey played a critical role in the creation of Purcell; it is not far-fetched to say that without him Purcell would not exist in its current form.

92. In addition to his $200,000 investment in Purcell, Mr. Radford has taken a leadership role in trying to bring about a change of leadership in Purcell. His activities included, approaching Mr. Reid and Ms. Boyle for help in providing financial and organizational support for Purcell, delivering a requisition to Mr. MacMillan to call a shareholders meeting, filing a Petition seeking to expedite the meeting date and compel disclosure of financial information, and being put forward as a director on the dissident slate.[111] When Mr. MacMillan stopped paying certain employees and failed to pay for the renewal of certain mineral claims, Mr. Radford stepped in to pay the employees (along with Mr. Reid) and renew the mineral claims.[112]

93. Mr. MacMillan himself acknowledges the unique standing of Mr. Radford and Mr. Lacey vis-à-vis other shareholders. His evidence was that by April 25, 2016, he was aware that Mr. Radford and Mr. Lacey were trying to "take control of Purcell" and that the Share Issuance was aimed at stopping this from happening.[113] This is what he told

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[108] Reasons at para 20, AR, p.71
[109] *Bul River* at para. 91
[110] *Bul River* at para. 74
[111] Reasons at para. 33, 48, 49; AR, p.74, p.77-78
[112] Reasons at para. 47; AR, p.76; Hewison #1 at paras.5 and 9, AAB at pg.124-125; Affidavit of Rick Henderson sworn Nov. 14, 2016 at para. 6, AAB at pg. 117
[113] MacMillan #4 at para. 100; Reasons at para. 35, AR, p.74

other shareholders, often referring to Mr. Radford and Mr. Lacey in a derogatory manner.[114]

94. By making such comments to other shareholders, Mr. MacMillan was trying to damage Mr. Radford and Mr. Lacey's reputations. In trying to resuscitate the Stanfield Group through the CCAA Process and eventually succeeding through the creation of Purcell, Mr. Lacey in particular put his significant reputation and standing in the business community to use (and at risk). It was largely through his efforts that sufficient financing was raised and that the stakeholders in Purcell were provided with the chance to recover value through the Plan where otherwise no recovery would be made.[115] Mr. Lacey's reputation was uniquely at risk, not only through Mr. MacMillan's crude words, but through his oppressive conduct.

95. Prior to the Share Issuance, Mr. Lacey was the largest shareholder in Purcell. The evidence of the proxy votes is clear that Mr. Lacey and Mr. Radford were poised to achieve a leadership change in Purcell.[116] It is clear that Mr. MacMillan's oppressive conduct was aimed, at least in part, in denying Mr. Radford and Mr. Lacey their "position or influence" in the Company. It is submitted that this finding is amply supported by the evidence; on these issues, Justice Masuhara was correct. This harm alone is sufficient to establish the availability of the oppression remedy to Mr. Radford and Mr. Lacey.

96. Justice Masuhara also found that separate and distinct harm relates to Mr. Radford and Mr. Lacey's position as stakeholders in CuVeras.[117] Contrary to the Appellants' submission, Justice Masuhara did not err in referring to Mr. Radford's interest in CuVeras; Mr. Radford, directly or indirectly, was part of the group that invested in CuVeras for the sole purpose of financing Purcell.[118] This harm was suffered as a result of several oppressive acts, including the granting of excessive compensation,

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[114] Reasons at paras.69 and 70, AR, p.83-84; Rouault #1 at paras. 6-7, AAR p.108
[115] *Bul River* at paras. 20, 74, 91
[116] Reasons at paras. 72-73, AR, p.85
[117] Reasons at para. 114, AR, p.100
[118] John #1, Exh. A: Affidavit of Reg Radford sworn Aug. 19, 2016 at paras. 12 and 70, AAB at pg. 12 and 21; BM#4 at para. 8, AAB, p.437

particularly where Purcell has no income or revenue, and the subordination of and extension of maturity date of the CuVeras Note without notice and or disclosure.[119]

97. Reasonable expectations of an aggrieved party must be considered in light of all relevant circumstances.[120] Oppressive conduct which harms not only the company (and therefore the indirect interests of all shareholders), but the direct interests of a minority shareholder as a creditor of the company has been found to constitute separate and distinct harm.[121] It is well established and unchallenged that the oppression remedy is available to protect the interests of various stakeholders, including creditors.[122]

98. In looking at all of the relevant circumstances in this case, the interplay between Mr. Radford and Mr. Lacey's interest in Purcell through CuVeras and their interest as equity shareholders cannot be ignored. Pursuant to the Plan, CuVeras investors, including, Mr. Radford and Mr. Lacey, received shares in Purcell equal in value to the percentage outstanding on the DIP Facility on the Effective Date (as defined in the Plan). Mr. Lacey also received "success fee" shares for his instrumental role in creating CuVeras and Purcell.[123]

99. The fact that Mr. Radford and Mr. Lacey were both shareholders of Purcell and stakeholders of Purcell through their interest in CuVeras does not disentitle them to the oppression remedy. Harm done to the interest they hold in Purcell through their interest in CuVeras, which was found to be clearly established on the facts, remains a viable personal claim by them under the oppression remedy. The Appellants position that the judge was precluded from considering this harm belies the equitable nature

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[119] Reasons at para. 114 and 115, AR, p.100
[120] *Hui v. Hoa*, 2015 BCCA 128 at para. 51
[121] *Jaguar* at para. 31 referring to *Rea* and *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111
[122] *D.C. Jensen Enterprises Ltd. v. Sand Dollar Enterprises Ltd.*, 2017 BCSC 185 at paras. 56-57; *BCE Inc.* at para. 45
[123] MacMillan #3, Exh. G (see, for example, s.2.3 and 3.2 of the Plan of Compromise and Arrangement attached as Schedule "A" to Justice Fitzpatrick's Order dated Nov. 18, 2014); MacMillan #3, Exh.A, (Securities Purchase Agreement is Exh. A to the Assignment and Assumption Agreement)

and broad scope of the oppression remedy.[124] It ignores the fact that that in considering claims for oppression, the court engages in fact-specific, contextual inquiries looking at "business realities, not merely narrow legalities."[125]

The Remedies Granted Were Reasonable

100. Section 227 of the *BCBCA* gives the Court very broad discretion in the manner in which it can fashion a remedy.[126] The trial court may make any order "it thinks fit" to rectify the oppressive conduct.[127] Section 227(3) enumerates a non-exhaustive list of the types of orders available under the oppression remedy, including orders varying or setting aside transactions and resolutions and orders for an accounting.[128] Justice Masuhara acted in accordance with these principles in granting relief which sought to rectify Mr. MacMillan's oppressive and/or unfairly prejudicial conduct.[129]

101. Justice Masuhara set aside the Share Issuance, the compensation packages Mr. MacMillan gave himself through the December 9, 2014 Resolutions and April 25, 2016 Resolutions, the EEA he purported to "negotiate" with Mr. Moretti, and the priority of security he granted to himself. Setting aside these transactions such that (i) Mr. MacMillan could not vote the additional shares he granted himself at the shareholders meeting, (ii) Mr. MacMillan could not pay himself excessive and undisclosed compensation, (iii) Mr. MacMillan could not enjoy the benefit of the flawed and oppressive appointment of Mr. Moretti, and (iv) could not jump the priority cue in violation of the Company's obligations, served to rectify the oppression.

102. The Appellants spend considerable energy suggesting that Justice Masuhara *erred in law and in principle* by ordering that these oppressive transactions be set aside. This submission is wrong. The power to grant these orders is explicitly granted under s.227(3) of the *BCBCA* and the courts are clear that the exercise of such power

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[124] *BCE* at para. 133; *Alharayeri,* at para. 23
[125] *Alharayeri* at para. 23
[126] *Naneff v. Con-Crete Holdings Ltd.*, [1995] O.J. No. 1377 at para. 22 ["*Naneff*"]
[127] *Alharayeri* at para. 1
[128] *BCBCA* at s.227(3)(i) and (j)
[129] Reasons at para. 144, AR, p.113

is deserving of significant deference, to be interfered with only where it is not aimed at rectifying the oppression. There is no requirement that Mr. MacMillan, having refused to disclose these secret self-dealings until forced to by Court Order, now gets a "do-over" by putting the transactions to a shareholder vote. In any event, based on the proxy calculations which were before the court, it is clear that these transactions would not have been approved by the shareholders.

103. A close look at the evidence (or lack thereof) before Justice Masuhara, also reveals that the Appellants' submission that he erred by granting "partial rescission" is without merit. Despite tendering 4 separate affidavits in this proceeding, Mr. MacMillan failed to put forward any solid evidence that Highlands had in fact advanced $400,000 to Purcell. Despite knowing this issue was central to the complaints, Mr. MacMillan tendered no records to support his bald statement that "[s]ince May 2016, Highlands has advanced over C$400,000 to Purcell under the Highlands Loan"[130] and provides no explanation for this conspicuous absence. There is no explanation as to how this money was spent over 6 months on a company which had its mine permit application suspended, no operations and employees who were no longer being paid. Tellingly, Justice Masuhara found that "[t]o date, Highlands *apparently* has advanced approximately $400,000" [emphasis added].[131] Based on the record before him, Justice Masuhara refused to make the factual finding that these monies had been advanced and such finding is entitled to significant deference. It was entirely reasonable for the judge not to order Purcell to pay back Mr. MacMillan or Highlands any monies.

104. In addition to Mr. MacMillan's deficient evidence, Justice Masuhara found that Mr. MacMillan acted oppressively and/or in an unfairly prejudicial manner by granting himself (through Highlands) a first priority security interest in exchange for the Highlands Loan. If it is found that Justice Masuhara erred in law and in principal by

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[130] Affidavit of Brendan MacMillan #1 sworn Nov. 8, 2016 ["BM #1"] at para. 25
[131] Reasons at para. 44, AR, p.76

failing to account for the approximately $400,000, it is submitted that at most, Mr. MacMillan's entitlement to these monies is that of an unsecured creditor.

105. There is similarly no merit to the Appellants' submission that Justice Masuhara erred in ordering an accounting and repayment with respect to any monies improperly paid to Mr. MacMillan. This type of remedy is expressly contemplated in s.227(3)(l) of the *BCBCA*. Justice Masuhara made clear findings of oppression with respect to the non-disclosure and lack of transparency with respect to Mr. MacMillan's handling of Purcell's finances, as well as with respect to the excessive nature of the compensation packages he purported to grant himself. To this day, Mr. MacMillan has refused to provide new management with the details of his financial maneuvering. The Appellants' argument that an order directing repayment of ill-gotten funds to the Company is an inappropriate remedy in this claim is a red herring. Shining a light on Mr. MacMillan's self-dealing by ordering an accounting seeks to rectify Mr. MacMillan's malfeasance and is an entirely appropriate exercise of the judge's discretion in the circumstances.

PART 4 - NATURE OF ORDER SOUGHT

106. The respondents, Mr. Radford and Mr. Lacey, seek an Order:

a. Dismissing the appeal;

b. Costs of the appeal; and,

c. Costs of the proceedings in the court below.

107. All of which is respectfully submitted.

Dated at the City of Toronto, Ontario, this November 23, 2017

Joseph Groia and David Sischy, Lawyers for the Respondents, Reg Radford and Peter Lacey

APPENDIX: ENACTMENTS

Business Corporations Act, [SBC 2002] Chapter 57

Complaints by shareholder

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

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

(a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

(b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

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

(a) directing or prohibiting any act,

(b) regulating the conduct of the company's affairs,

(c) appointing a receiver or receiver manager,

(d) directing an issue or conversion or exchange of shares,

(e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,

(h) directing a shareholder to purchase some or all of the shares of any other shareholder,

(i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,

(j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

(k) varying or setting aside a resolution,

(l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

(n) directing correction of the registers or other records of the company,

(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(p) directing that an investigation be made under Division 3 of this Part,

(q) requiring the trial of any issue, or

(r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

(5) If an order is made under subsection (3) (g), (i) or (m), the company must pay to a person the full amount payable under that order unless there are reasonable grounds for believing that

(a) the company is insolvent, or

(b) the payment would render the company insolvent.

(6) If reasonable grounds exist for believing that subsection (5) (a) or (b) applies,

(a) the company is prohibited from paying the person the full amount of money to which the person is entitled,

(b) the company must pay to the person as much of the amount as is possible without causing a circumstance set out in subsection (5) to occur, and

(c) the company must pay the balance of the amount as soon as the company is able to do so without causing a circumstance set out in subsection (5) to occur.

(7) If an order is made under subsection (3) (o), Part 10 applies.

LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd., [2016] BCCA 258	21, 23	76, 77, 84
1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd. [2014] BCSC 1197	21	77
BCE Inc. v. 1976 Debentureholders, 2008 SCC 69	19, 27, 28	70, 71, 95, 97
Bernard v. Valentini, (1978) O.J. No. 3264	21	76
Bul River Mineral Corporation (Re), 2015 BCSC 113	2, 25, 26	6, 89, 92
D.C. Jensen Enterprises Ltd. v. Sand Dollar Enterprises Ltd.	27	95
Ernst & Young Inc. v. Essar Global Fund Ltd., 2017 ONSC 1366	22	80
Jaguar Financial Corporation v. Alternative Earth Resources Inc., 2016 BCCA 193	18, 23, 24, 27	68, 83, 84, 86, 95
Hui v. Hoa, 2015 BCCA 128	27	95
Khela v. Phoenix Homes Ltd., 2015 BCCA 202	18	68
Malata Group (HK) Ltd. v. Jung, 2008 ONCA 111	27	95
Mennillo v. Intramodal Inc., [2016] S.C.C. 51	20	73
Naneff v. Con-Crete Holdings Ltd., [1995] O.J. No. 1377	28	98
Palmer v. Carling O'Keefe Breweries of Canada Ltd.	22	80
Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68	20	73

Popat v. MacLennan, [2014] B.C.S.C. 2363	21	76
Rea v. Wildeboer, 2015 ONCA 373	23, 27	83, 95
Shefsky v. California Gold Mining Inc., 2016 ABCA 103	19	69
Wilson v. Alharayeri, 2017 SCC 39	20, 28	73, 97, 98

This is **Exhibit "D"** referred to in Affidavit #1 of **Susan Danielisz**, sworn before me at Vancouver, British Columbia, on July 12, 2018.

A Commissioner for taking Affidavits
for British Columbia

COURT OF APPEAL FILE NO. CA44587

COURT OF APPEAL

ON APPEAL FROM the judgment of the Honourable Mr. Justice Masuhara of the Supreme Court of British Columbia pronounced July 10, 2017

BETWEEN:

Reg Radford and Peter Lacey

Respondents
(Petitioners)

AND

Brendan MacMillan, Highlands Pacific LLC and Highlands Pacific Partners LLP

Appellants
(Respondents)

AND

Purcell Basin Minerals Inc.

Respondent
(Respondent)

FACTUM OF THE RESPONDENT, PURCELL BASIN MINERALS INC.

Counsel for the Appellants
Brendan MacMillan, Highlands Pacific LLC
and Highlands Pacific Partners LLP

Andrew I. Nathanson
Jennifer Francis

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3

Phone: 604-631-3131
Fax: 604-631-3232

Counsel for the Respondents
Reg Radford and Peter Lacey

Joseph Groia
David Sischy

Address for service in British Columbia:
Getz Prince Wells LLP
Barristers and Solicitors
#530-55 Burrard Street
Vancouver, BC V6C 2G8
Phone: 604-605-4291
Fax: 604-685-9798

Counsel for the Respondent
Purcell Basin Minerals Inc.

Dana Prince

Getz Prince Wells
Barristers and Solicitors
#530-55 Burrard Street
Vancouver, BC V6C 2G8

Phone: 604-605-4291
Fax: 604-685-9798

INDEX

CHRONOLOGY

Purcell adopts the chronology as set out in the factum of the Respondents, Reg Radford and Peter Lacey.

OPENING STATEMENT

Justice Masuhara found that the Appellants, and specifically Mr. MacMillan, engaged in conduct that was oppressive and/or unfairly prejudicial to the reasonable expectations of Mr. Radford and Mr. Lacey. Mr. MacMillan conducted himself in this fashion as the sole Director and Officer of Purcell. On this appeal, Purcell does not dispute Justice Masuhara's findings and accepts the relief awarded by the court below.

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PART 1 - STATEMENT OF FACTS

1. Purcell Basin Minerals Inc. ("Purcell" or the "Company") adopts the Statement of Facts as set out in the Factum of the Respondents, Reg Radford and Peter Lacey.

PART 2 - ISSUES ON APPEAL

2. Purcell agrees that the issues on this appeal are as set out in the Factum of the Respondents, Reg Radford and Peter Lacey.

PART 3 - ARGUMENT

3. Purcell does not dispute the findings of Justice Masuhara as set out in his Reasons for Judgment.[1] Given these findings, Purcell accepts the relief awarded by the court below.

PART 4 - NATURE OF ORDER SOUGHT

4. The respondent, Purcell, seeks an Order:

    a. Dismissing the appeal; and,

    b. Costs of the appeal;

5. All of which is respectfully submitted.

Dated at the City of Vancouver, British Columbia, this November 24, 2017

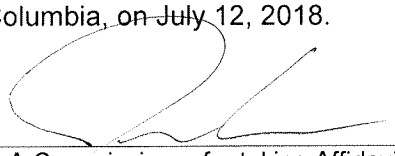
Dana Prince, Lawyer for the
Respondent, Purcell Basin Minerals Inc.

[1] Appeal Record, p.65

APPENDIX: ENACTMENTS

LIST OF AUTHORITIES

This is **Exhibit "E"** referred to in Affidavit #1 of **Susan Danielisz**, sworn before me at Vancouver, British Columbia, on July 12, 2018.



A Commissioner for taking Affidavits
for British Columbia

Court of Appeal File No. CA44587

COURT OF APPEAL

ON APPEAL FROM: the judgment of the Honourable Mr. Justice Masuhara of the Supreme Court of British Columbia pronounced July 10th, 2017

BETWEEN:

REG RADFORD AND PETER LACEY

RESPONDENTS
(PETITIONERS)

AND:

BRENDAN MACMILLAN, HIGHLANDS PACIFIC LLC AND HIGHLANDS PACIFIC PARTNERS LLP

APPELLANTS
(RESPONDENTS)

AND:

PURCELL BASIN MINERALS INC.

RESPONDENT
(RESPONDENT)

APPELLANTS' REPLY TO THE FACTUM FILED BY THE RESPONDENTS RADFORD AND LACEY

Counsel for the Appellants Brendan MacMillan, Highlands Pacific LLC and Highlands Pacific Partners LLP:

ANDREW I. NATHANSON
JENNIFER FRANCIS

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3

Phone: +1 604 631 3131
Fax: +1 604 631 3232

Counsel for the Respondents Reg Radford and Peter Lacey:

JOE GROIA
DAVID SISCHY

Address for service in British Columbia:
Getz Prince Wells LLP
Barristers and Solicitors
#530 - 55 Burrard Street
Vancouver, BC V6C 2G8

Phone: 604 605 4291
Fax: 604 685 9798

Counsel for the Respondent Purcell Basin Minerals Inc.:

DANA PRINCE

Getz Prince Wells
Barristers and Solicitors
#530 - 55 Burrard Street
Vancouver, BC V6C 2G8

Phone: 604 605 4291
Fax: 604 685 9798

APPELLANTS' REPLY

1. The appellants make the following submissions in reply to the factum of the respondents Radford and Lacey.

Reply to Respondents' Opening Statement and Statement of Facts

2. In paragraph 31 of their factum, Radford and Lacey mistakenly assert that the Valuation Report was only delivered in draft and that the chambers judge found it was not a fairness opinion. The judge made these findings about the separate Mercer report relied on to support the fairness of MacMillan's executive compensation as part of the Moretti Agreements, and not the Valuation Report.[1] The Valuation Report was a signed, written statement of expert opinion.[2] Radford and Lacey did not provide any direct evidence on the value of Purcell's shares and, as the judge observed, they did not seek the ability to file a responsive report or raise an argument on prejudice.[3]

3. Similarly, in reply to paragraph 30 of Radford and Lacey's factum, the judge did not find that at the time of the December 2014 Plan of Arrangement (the "Plan"), Purcell's shares were valued at $10 per share. As Fitzpatrick J. observed in approving the Plan, the value of the shares was uncertain and without access to funding and a successful program that took the Mine to production, "all of the stakeholders who receive Purcell shares will receive nothing".[4]

4. In reply to the Opening Statement the judge did not find that MacMillan "looted" Purcell. The judge referred to evidence from MacMillan and Moretti that MacMillan had not received any compensation for his service as President of Purcell, but did not make any findings in this regard.[5] Similarly, contrary to the section beginning at paragraph 55 of the respondents' factum, the judge did not make any finding that MacMillan engaged

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[1] Reasons, para. 142(f), AR p. 112.

[2] AAB, pp. 652-656, Glanville #1 and Valuation Report (signed).

[3] Reasons, paras. 88, 93-97, AR pp. 94-95.

[4] *Re Bul River Mineral Corporation* 2015 BCSC 113 at paras. 57 and 62.

[5] Reasons, paras. 43, 56, 61(q) and (r) and 72, AR, pp. 76, 78-79, 81, 85.

in what the respondents characterise as a "cover up". When the petition was heard, the operative agreements were the Moretti Agreements. As the judge found, Moretti's appointment and mandate were disclosed to shareholders two weeks prior to the Moretti Agreements being made.[6] The judge found that Moretti's appointment was a continuation of MacMillan's oppressive conduct, but this resulted from his erroneous conclusion that the shareholders were entitled to approve MacMillan's compensation.[7]

5. In paragraphs 45 and 46 of their factum, the respondents make much of MacMillan's compensation entitlement, said to be worth "nearly $8 million in total". In this amount, they include the value of the HPP Note, which related to the period prior to December 2014 and which was contained in the Plan[8] approved by shareholders and Fitzpatrick J.; MacMillan's compensation under the December 9, 2014 Resolutions, since abandoned; and the compensation CuVeras agreed to pay to Highlands, not MacMillan, and pursuant not to the Plan, but rather under an agreement between those parties. Radford and Lacey's position here, to which the judge gave effect in his order, is that MacMillan is entitled to no compensation for his more than two and a half years of service as Purcell's President. This order was, as the appellants have submitted, one that is punitive, inequitable and which goes beyond remedying the prejudice found to the respondents' reasonable expectations.

Reply to respondents' Arguments concerning Distinct Harm

6. In their factum, Radford and Lacey spend considerable effort seeking to support the judge's conclusion that they suffered the separate and distinct harm necessary to ground a personal claim for oppression as shareholders of Purcell, including arguments different than those accepted by the judge, some of which were not made below.

7. In paragraph 88 of their factum, Radford and Lacey argue that the requirement of distinct harm is satisfied because they suffered harm not suffered by Highlands and

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[6] Reasons, paras. 56 and 65, AR, pp. 78 and 82; appellants' factum, para. 17.

[7] Appellants' factum, paras. 37-38 and 66.

[8] AAB, pp. 711-712, 722-723, Plan ss. 2.3, 2.6 and 6.1.

HPP, who were also shareholders. The law requires the complaining shareholder to have suffered some loss "'separate and distinct from' the indirect effect of the wrong suffered by all shareholders generally".[9] In other words, to maintain a personal claim for oppression as shareholders, Radford and Lacey had to demonstrate harm which was distinct from the class of all shareholders who could claim injury, and not just show they were in a position different from that of the alleged wrongdoer. If the test required only harm separate from the wrongdoer, that would defeat the purpose of the requirement, which is to distinguish personal claims for oppression from derivative claims for injury to the corporation.

8. As a further basis for satisfying the requirement of distinct harm, Radford and Lacey invoke their "critical role in the creation of Purcell" and their efforts to "achieve a leadership change in Purcell".[10] As their factum acknowledges, however, Lacey's role in the CCAA proceedings lay in helping to create CuVeras and, through CuVeras, extending the DIP financing to allow the restructuring to proceed. The argument made in paragraph 94 that Lacey "put his significant reputation and standing ... at risk" is not grounded in any findings made by the judge. It is a new argument on appeal. Lacey's reputation is not an interest qua shareholder protected by the oppression remedy. This argument ignores that if Lacey expended reputational capital to raise "sufficient financing" to rehabilitate the Stanfield Group, he did so in his capacity as a shareholder or creditor of CuVeras. These arguments are simply repackaged variations on the respondents' theme of seeking to advance claims for, and based on, the interests of CuVeras. This they may not do.

9. In reply to paragraphs 92-93 and 95 of the respondents' factum, Radford and Lacey's desire to be involved in management also fails to satisfy the separate and distinct harm requirement. The respondents argue that Lacey and Radford were

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[9] *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.* 2016 BCCA 258 ("*CSA Building Sciences*") at para. 72, application for leave to appeal dismissed [2016] S.C.C.A. No. 383, additional reasons 2017 BCCA 13.

[10] Respondents' factum, paras. 92-95.

"poised to achieve a leadership change in Purcell". Leaving aside that Lacey was not a nominee for director, the respondents' interests in affecting control or, in Radford's case, serving as a director and now as President of a widely-held corporation which they had never before managed, were not interests qua shareholder that are protected by the oppression remedy.[11] Where a complaining shareholder is also seeking control of the corporation, "courts distinguish between a shareholder's complaint qua shareholder and a shareholder's complaint qua bidder".[12] In *Icahn Partners*,[13] this Court left the validity of this conclusion for another case, but the principle was affirmed in *Jaguar Financial*. This is also an example of the application of the principle explained by D. Smith J. (as she then was) in *Walker v. Betts*, that "an applicant shareholder must establish harm to his interests as a shareholder, as distinct from his interests as a director, officer or employee".[14]

10. The respondents' arguments also overlook the nature of the prejudice and harm they actually alleged. The Share Issuance resulted from the "egregiously inflated, improper and unapproved compensation package" they claimed MacMillan arranged. If these were wrongs, they were wrongs to Purcell. The respondents' petition acknowledges this, saying that the Share Issuance and MacMillan's compensation were "not in the best interests of the Company and constitute a breach of MacMillan's fiduciary duties to Purcell's shareholders".[15]

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[11] *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at para. 188.

[12] *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2010 BCSC 1347, (2010), 75 B.L.R. (4th) 212 at para. 179, appeal dismissed *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228; see additional authorities cited at para. 50.

[13] *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228 at paras. 86-89.

[14] *Walker v. Betts*, 2006 BCSC 128 at para. 81.

[15] AR, pp. 14-15, Petition, Part 3, paras. 9-10.

11. Similarly, MacMillan's treatment of CuVeras did not harm the respondents distinctly, personally and qua shareholder. Radford and Lacey's reliance on Radford's "indirect" interest in CuVeras (an acknowledgment Radford himself did not in fact have one); the "interplay" between their interests as shareholders and their "interest in Purcell through CuVeras"; and the alleged "[h]arm done to the interest they hold in Purcell through their interest in CuVeras"[16] amply demonstrate that their complaints of unfair treatment of CuVeras are not theirs to make, are not personal shareholder claims, and cannot qualify as separate and distinct harm.

12. In reply to paragraph 97 of the respondents' factum, it is not "well-established" in British Columbia that the s. 227 oppression remedy is available to protect the interests of creditors. The respondents fail to refer to the recent decision of this Court on the subject, where Frankel J.A. found it unnecessary to decide whether a creditor can bring an oppression claim.[17] The point is, however, academic since the respondents are not CuVeras, and no authority supports their ability to bring an oppression claim on its behalf, or to treat harm to its interests as if they were their own.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia, the 8th day of December, 2017.

Andrew I. Nathanson
Counsel for the Appellants
Brendan MacMillan, Highlands Pacific LLC and Highlands Pacific Partners LLP

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[16] Respondents' factum, paras. 96, 98 and 99.

[17] *Finness Yachting Inc. v. Menzies*, 2016 BCCA 360 at para. 46.

LIST OF AUTHORITIES

NO. S-186120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

- AND -

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57 AND THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9

- AND -

IN THE MATTER OF
PURCELL BASIN MINERALS INC.,
BUL RIVER MINERAL CORPORATION,
GALLOWAI METAL MINING CORPORATION,
JAO MINE DEVELOPERS LTD., and
STANFIELD MINING GROUP OF CANADA LTD.

PETITIONERS

AFFIDAVIT #1 OF SUSAN DANIELISZ

CASSELS BROCK & BLACKWELL LLP
Barristers & Solicitors
2200 – 885 West Georgia Street
Vancouver, B.C. V6C 3E8
Telephone: (604) 691-6100
Facsimile: (604) 691-6120

File No. 51777-1

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