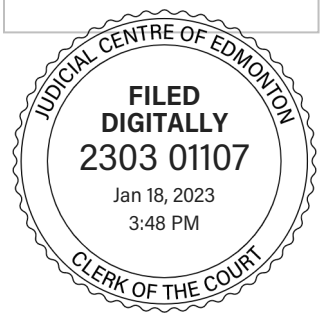
COURT FILE NUMBER	2303 00601
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ENDALE GUTAMA in his capacity as Litigation Representative of MELESSE DAHESSA GUTAMA (deceased)
DEFENDANTS	VITAL PROPERTY SERVICES INC., TIDY HOLDINGS CORPORATION, HUSSEIN CHOUFI also known as HUSS CHOUFI, and BASIMA CHOUFI
DOCUMENT	**BENCH BRIEF OF THE APPLICANT ENDALE GUTAMA in his capacity as Litigation Representative of MELESSE DAHESSA GUTAMA (deceased)**

Clerk's Stamp



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INTRODUCTION

1. The Plaintiff, Endale Gutama in his capacity as Executor of the Will of Melesse Dahessa Gutama (the "**Estate**"), is the estate of the late Melesse Gutama ("**Melesse**"), deceased. Melesse, during his life, was a resident of Edmonton, Alberta and died in Ethiopia on January 15, 2022 after an illness. Prior to his death, for a period of at least one year, Melesse lacked capacity and was incapable of managing his affairs.

   Affidavit of Endale Gutama ("**Gutama Affidavit**")
   sworn January 16, 2022 at paras 2, 3, 5 [Not Attached]
   Affidavit of Dr. Melaku Game ("**Game Affidavit**")
   sworn January 17, 2023 [Not Attached]

2. Endale Gutama ("**Endale**") has been self-appointed under Rule 2.14 of the Rules of Court as litigation representative of the Estate for the purposes of these proceedings.

   Gutama Affidavit at para 1 [Not Attached]

3. The Respondents/Defendants VITAL PROPERTY SERVICES INC. ("**VPS**") carries on business as a commercial property cleaning contractor. TIDY HOLDINGS CORPORATION. ("**THC**") carries on business as a property holding corporation. Collectively VPS and THC are referred to herein as the "**Corporations**".

   Gutama Affidavit at paras 5, 6, 19 [Not Attached]

4. Hussein Choufi also know as Huss Choufi ("**Huss**") is the other shareholder and director of each of the Corporations. To the knowledge of the Plaintiff, Basima Choufi is his wife.

   Gutama Affidavit at paras 5, 23 [Not Attached]

5. Melesse's position is that Melesse is a 50% shareholder of each of VPS and THC, in each instance holding 50% of the common voting shares of the corporation and seeks relief in this Application for the oppressive conduct of VPS, THC, Hussein Choufi (also known as Huss Choufi) ("**Huss**") and Basima Choufi by way of declaration, rectification of corporate records to list the shareholders of the Corporations as 50% of the voting shares being in the name of Melesse in each instance, and for the relief of the appointment of a Receiver-Manager over each of the Corporations.

   Gutama Affidavit, generally [Not Attached]

6. It is the position of the applicant that it is just and convenient to appoint a Receiver-Manager over each of the Corporations in these circumstances and it is necessary to do so to protect the interests of the Estate and, in fact, the interests of each of the Corporations themselves. The authority for the relief sought can be found in the *Business Corporations Act* and *Judicature Act*.

FACTUAL BACKGROUND

VITAL PROPERTY SERVICES INC.

7. VPS was incorporated in Alberta by Melesse on May 20, 2015 with the initial directors and being Melesse and Huss. The corporation did not register shareholders at the time of incorporation but did so on or about April 25, 2017 The Articles of Incorporation of VPS (which have not been amended) provide for two classes of common voting shares. The articles do not provide for non-voting shares.

   Gutama Affidavit, at para 7,9 [Not Attached]

8. The Shareholdings of VPS remained as such through December 13, 2021 whereafter, without explanation, the shareholdings of VPS were amended by way of registration of a change of shareholders to remove Melesse as a shareholder.

Gutama Affidavit at para 10-12 [Not Attached]

9. VPS had a unanimous shareholders' agreement, which governed what was to occur on the death of a shareholder: VPS was compelled to purchase the Estates shares at the fair market value of the shares as at the date of death, with payment consisting of (a) the balance received on the insurance of the life of the shareholder, immediately; and (b) the remaining balance over a period of thirty-six months, with interest. Notwithstanding this purported change of shareholders, VPS did, at least as late as May 25, 2022, consider Melesse's Estate as a shareholder and the Unanimous Shareholders Agreement to remain in force. The required provisions of the Unanimous Shareholders' Agreement have not been followed by VPS or its director and other shareholder, Huss.

Gutama Affidavit at para 13, 15, Exhibit "J"[Not Attached]

10. VPS is a beneficiary of a life insurance policy on Melesse in the amount of $400,000.00. VPS, or some party on its behalf, has made a claim under the life insurance policy.

Gutama Affidavit at para 15, 16 [Not Attached]

11. With the change of shareholders being registered by Huss, these insurance proceeds will not benefit the Estate as was intended and set out in the Unanimous Shareholders' Agreement. The purported change in shareholdings removes all shareholdings of Melesse in VPS from the record. This is a direct detriment to the Estate and there is no basis in law for such change in shareholdings being made. Furthermore, VPS (and by extension Huss) will wrongfully receive a windfall of the Estate's interest in VPS, as represented by its shares and any shareholders' loans or contributed surpluses (which balances are unknown to the Estate), with a corresponding detriment to the Estate.

TIDY HOLDINGS CORPORATION

12. THC is a holding corporation which was incorporated on or about August 2, 1984 and owns a converted residence that VPS operates a head office out of located at 12304-96 Street, Edmonton, Alberta T5G 1W5. From November 9, 2015 through to July 27, 2022 (when the overdue 2021 and the 2022 annual returns were filed by Huss) Melesse was listed as a shareholder of THC holding 50% of the voting shares in THC.

On that date, the shareholdings were updated to list as shareholders Huss and Basima Choufi. As with VPS, there is no basis for the change in shareholdings.

Gutama Affidavit at para 19-24 [Not Attached]

Game Affidavit at para 2 [Not Attached]

13. The mortgage lending on THC's real property was subject to 'creditor insurance' on the life of Melesse, which should result in the payout of the mortgage balance leaving the real property free from financial encumbrances. Huss and Basima Choufi will receive an improper windfall as a result of this improper change of shareholders, as with VPS.

Gutama Affidavit at para 31 [Not Attached]

14. With the change of shareholders being registered, these insurance proceeds will not benefit the Estate as was intended by Melesse as the purported change in shareholdings wrongfully removes all shareholdings of Melesse in THC. This is a direct detriment to the Estate, without juristic reasons.

ISSUES

A. WHO ARE THE CORRECT SHAREHOLDERS OF VPS AND THC?

B. IS THE CONDUCT OF THE DEFENDANTS OPPRESSIVE?

C. SHOULD A RECEIVER BY APPOINTED BY THIS HONOURABLE COURT IN THE CIRCUMSTANCES?

ESTATE'S POSITION

15. The Estate respectfully submits that, having regard to the totality of the circumstances, (a) the Estate is and has been, at all material times, a shareholder of each of the Corporations, holding 50% of the outstanding voting shares in each of VPS and THC; and (b) given the situation, it is just and convenient to appoint a Receiver-Manager or formal liquidator over the undertakings and property of the Corporations to protect the Estate's interests.

16. It is also the Estate's respectful submission that any relief short of a Receiver-Manager or formal liquidator does not reasonably protect the interest of the Estate in these Corporations.

LAW AND ARGUMENT

A. WHO ARE THE CORRECT SHAREHOLDERS OF VPS AND THC?

17. Section 244 of the *Business Corporations Act* ("***ABCA***") provides that where a shareholder is improperly deleted from the share register, a shareholder may apply to the Court for an order that the registers or records be rectified.

Business Corporations Act, RSA 2000 c. B-9 at s.244(1) **[TAB 1]**

18. In considering such an application, the Court may make such orders to determine the rights of the parties or requiring the registers and other records of the corporation be rectified.

Business Corporations Act, RSA 2000 c. B-9 at s.244(3) **[TAB 1]**

19. There is little case law on the application of section 244 of the ABCA; however, in *McGovern-Burke v Martineau*, this court considered a similar factual situation where one shareholder is unilaterally removed from access to the business and removed as shareholder. In that instance, the court found the unilateral changing of corporate records to be oppressive and ordered the rectification of records pursuant to section 242(3)(m) of the ABCA, which provides the same remedy to section 244.

McGovern-Burke v Martineau, 2016 ABKB 514 at para 81 and 85 **[TAB 2]**

20. In the case at bar, with respect to VPS, it is clear from VPS's own correspondence that the Estate remains a shareholder of VPS. Furthermore, in respect to VPS and THC, it is impossible for Melesse to have been party to any transaction at relevant times, given his lack of legal capacity, to have occasioned any change to his shareholdings.

Game Affidavit at para 3 [Not Attached]

21. As such, any change in either of the Corporations shareholders must have been unilaterally made without Melesse's involvement or consent. This is improper and oppressive conduct, having a lack of regard for the interests of the Estate as will be discussed *infra*.

22. It is the Applicant's position that at no point could have Melesse have concluded any transaction with his shares in the Corporations, lacking the legal capacity to do so. Accordingly, the records of the Corporations are inaccurate and the statutory rectification of these records should occur to list that the shareholders of each are the Estate as to 50% of the voting shares, and Huss, as to 50% of the voting shares.

IS THE CONDUCT OF THE DEFENDANTS OPPRESSIVE?

23. The Plaintiff is a complainant within the context of the ABCA. As such, the Plaintiff has standing to seek an oppression remedy.

Business Corporations Act, RSA 2000 c. B-9 at s.239(b) **[TAB 3]**

Business Corporations Act, RSA 2000 c. B-9 at s.242 **[TAB 4]**

24. In *BCE Inc v 1976 Debenture Holders ("**BCE**")*, the SCC enunciated a two-prong approach to the application of the oppression remedy. The SCC held that:

> In our view, the best approach to the interpretation of s. 241(2) [of the *Canada Business Corporations Act*, similar to the provisions in section 242 of the ABCA] is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.

BCE, 2008 SCC 69, at para 56 **[TAB 5]**

Canada Business Corporations Act, s. 241 **[TAB 6]**

25. Thus, in determining whether or not there is oppression in any given case, Canadian courts are required to conduct two related inquiries:
    a) Does the evidence support the reasonable expectation asserted by the claimant? and
    b) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms 'oppression', 'unfair prejudice' or 'unfair disregard'"?

BCE, 2008 SCC 69, at para 56 **[TAB 5]**

26. Expectations of shareholders vary substantially between cases and corporations, so an analysis of the reasonable expectation must be done on a case-by-case basis. The general statement regarding reasonable expectation is simply that *"[c]orporate decisions will not always satisfy all stakeholders or benefit them equally, but shareholders can expect to receive fair treatment by the corporation.*"

Berman v 905952 Alberta Ltd., 2021 ABKB 434 at paras 41 – 42 ("**Berman**") **[TAB 7]**

27. In the case at bar, the Unanimous Shareholders' Agreement of VPS expressed the reasonable expectation of the parties, which was not followed. Furthermore, with respect to THC, the reasonable expectation of the parties was set forth in their property agreement and shareholdings.

28. It is these reasonable expectation of fair treatment that brings this matter before the court.

29. If a reasonable expectation is established, the court must then determine if the expectation was breached by conduct that amounts to oppression, unfair prejudice, or unfair disregard of relevant interests. In their simplest forms, "oppression" refers to conduct that is coercive and abusive, and suggests bad faith; "unfair prejudice" refers to a less culpable state of mind but results in unfair consequences; and "unfair disregard of interests" extends to ignoring an interest, contrary to the stakeholders' reasonable expectations.

Ibid at para 45, citing with approval, BCE at para 67 **[TAB 7]**

30. The applicant submits that the conduct of Huss and the Corporations, in removing them as shareholders of the Corporations unilaterally and without authority, failing to comply with the VPS Unanimous Shareholders Agreement, and purporting to file corporate returns that were inaccurate meets the highest threshold of conduct that it coercive and abusive and, in the alternative, clearly meets the lower threshold tests of unfair prejudice and unfair disregards to the Estate's interests.

31. Unilaterally removing the Estate as a shareholder unfairly prejudices the Estate and doing so is a clear unfair disregard to its reasonable interests. These interests were committed to paper by the parties under the VPS Unanimous Shareholders Agreement and, collaterally, by way of the Property Agreement between Huss and Melesse that governed what would happen with the real property (now held by THC) in the time period prior to its transfer to THC.

Gutama Affidavit at Exhibit "J" and Exhibit "T" **[Not Attached]**

32. As such, it is submitted that a finding of oppression of Melesse is warranted in the circumstances. In making such a finding, the court is then left with the question of the appropriate remedy. The applicant submits that the only remedy appropriate in this circumstance is the court supervised winding down of the businesses of the Corporations under either a Receiver-Manager order or a liquidation order.

SHOULD A RECEIVER BY APPOINTED BY THIS HONOURABLE COURT IN THE CIRCUMSTANCES?

33. The Applicant respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver-Manager by reason of it being just, convenient and otherwise appropriate that a Receiver-Manager of the undertaking, property and assets of the Corporations be appointed.

34. The authority for such an Order is found under section 242 of the ABCA and under section 13 of the *Judicature Act*.

Business Corporations Act, RSA 2000 c. B-9 at s.242 **[TAB 4]**

Judicature Act, RSA 2000 c. J-2 at s. 13 **[TAB 8]**

35. As the court has held in *Murphy v. Cahill*, an application for the appointment of a receiver-manager of a corporation pursuant either to the oppression provisions of business corporations legislation or to the general equitable jurisdiction of a court when brought by a person other than a security holder who is the beneficiary of an instrument authorizing such an the appointment, is an application for extraordinary remedies.

2013 ABKB 335 at para 7, **[TAB 9]**

36. The applicant for such a remedy generally must generally satisfy the so-called “tripartite test” for obtaining an interlocutory injunction: the applicant must establish that there is a serious issue to be tried, that it will suffer irreparable damage if the relief is not granted, and that the balance of convenience favours the granting of the relief sought.

2013 ABKB 335 at para 7, **[TAB 9]**

37. However, where fairness dictates, and the tri-partite test may not be met, the court may still make such an Order:

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

2013 ABKB 335 at para 8, **[TAB 9]**

38. In *MTM Commercial Trust v. Statesman and Riverside Quays Ltd.* ("**MTM**"), a case concerning a receivership application under section 13(2) of the *Judicature Act*, in the creditor context, where the applicant did not have security authorizing the appointment of a receiver, Justice Romaine noted:

> As has been noted in Anderson v. Hunking, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: BG International at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

MTM, 2010 ABKB 647 at para 11 **[TAB 10]**

39. Similarly in *BG International Ltd. v. Canadian Superior Energy* ("**BG International'**), an application for a receivership was being made solely under section 13(2) of the *Judicature Act* by an applicant who did not have authority to appoint a receiver pursuant to security documents. The Alberta Court of Appeal discussed the test to appoint a Receiver under the *Judicature Act*, and held:

> In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. […] Under the Judicature Act, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties[…]. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

BG International, 2009 ABCA 127, at para 17 **[Tab 11]**

40. The Applicant respectfully submits that there are no other remedies short of the appointment of a Receiver-Manager available to the applicant that will adequately protect its interest. The balance of the interests of the parties favours the applicant and the appointment of a Receiver-Manager.

41. Specifically in the case at bar, when considering the express factors in granting a Receiver-Manager Order which, as noted, may be overridden by overarching considerations of fairness, the test is made out.

The Applicant Must Establish That There is a Serious Issue to be Tried

42. When considering this arm of the test for the appointment of a Receiver-Manager, the threshold question is whether there is a serious issue to be tried, not the higher threshold of a *prima facie* case of oppression (however, as discussed *supra*, oppression is an appropriate finding in the case at bar).

Murphy v. Cahill, 2013 ABKB 335 at para 85, **[TAB 9]**

43. The Applicant submits that there is a strong case of a serious issue to be tried made out on the evidence of the applicant. Specifically, the evidence points to:

    a) Improper changes to the share registers of each of the Corporations;

    b) Non-compliance of VPS and its director/shareholder Huss in complying with the terms of the Unanimous Shareholders' Agreement in VPS;

    c) An attempt to improperly obtain the benefit of insurance proceeds in VPS;

d) An attempt to assume control of THC and an improper benefit for Basima Choufi thereby;

e) An attempt to assume control of VPS and an improper benefit for Huss thereby; and

f) An improper attempt to obtain the benefit of insurance proceeds on the life of Melesse.

The Estate Will Suffer Irreparable Damage if the Relief is Not Granted

44. It is submitted that this factor favours the appointment of a Receiver-Manager. As in the affidavit of Endale states:

a) VPS or a party on its behalf, with the improper shareholdings listed, has applied for collection of life insurance proceeds on Melesse, if these are paid out, without the benefit of a receiver-manager in place to manage the affairs of VPS, there is a significant risk that these will not be recoverable by the Estate;

b) VPS and its director are not complying with the terms of the relevant Unanimous Shareholders' Agreement;

c) VPS is not complying with its obligations under the ABCA to provide information to the Estate;

d) Huss has attempted to recover on the creditors insurance using information he knew or ought to have known was inaccurate;

e) The Estate has no knowledge of if the THC real property is insured, having been advised of the cancellation of its property insurance;

f) Both Corporations, by their agents, are filing corporate returns that are false or inaccurate;

g) There is an effective deadlock in each of the Corporations, as in each instance the true shareholders of the Corporations are the Estate and Huss, each hold 50% of the shares and voting rights;

h) There is no trust in the management of either of the Corporation.

45. Furthermore, there is urgency in the matter.

46. There is a need for immediate corporate actions to occur to preserve the property of the Corporations (which could well be dissipated by Huss were he allowed to continue to operate the Corporations unilaterally), to secure, if necessary, or confirm insurance is in place on the real property of THC; to take steps to finalize and recover the various insurance proceeds to the overall benefit of the appropriate parties; to cause VPS to comply with the terms of its Unanimous Shareholders' Agreement in respect to buying

out the Estate, and to market the businesses of the Corporations given the effective deadlock in any management decisions being made on a go-forward basis.

47. To not grant a Receiver-Manager is to risk dissipation of the remaining value of the Corporations and to leave them without effective management. This is a significant risk of dissipation of the going concern value the Corporations as they operate collectively as a services business.

That the balance of convenience favours the granting of the relief sought.

48. It is submitted that the balance of convenience suggests an appointment of a Receiver-Manager is appropriate. As it stands, there is no effective way to manage the businesses of the Corporations, as each is a 50/50 shareholdings and the Estate does not have the requisite trust in Huss to manage the business given the confluence of events.

49. Further, if a receiver-manager were not appointed, there is a significant likelihood of a dissipation of the Corporations assets and of continued improper filings being made on account of the Corporations. Furthermore, without the oversight of a Receiver-Manager, the Estate will have no insight into the management of the Corporations, given the lack of information provided to the Estate as shareholder, despite requests for same.

50. With that said, it would be remiss to not also consider the *Paragon* factors, to which this court is well aware, in considering an application to appoint a receiver. With express reference to the factors and the Gutama Affidavit:

    a) *Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation:* In respect to this factor ,it is clear that the Estate will be irreparable prejudiced through the potential dissipation of assets, the management of the Corporations not in accordance with the relevant legislation, and the potential lack of insurance on the assets of THC that there is a significant risk of irreparable harm.

    b) *The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding the assets while litigation takes place:* The risk to the Estate is significant, although the Estate has no way of knowing the true risk (having no insight into the Corporations' finances) merely the ½ interest in the insurance proceeds that are or will be payable to the Corporations amounts to approximately $350,000.

c) *The nature of the property:* The property of VPS is an ongoing active services business, which can easily be dissipated. The property of THC is primarily land, which may well be uninsured at this time.

d) *The apprehended or actual waste of the debtor's assets:* The value of VPS is in its active services business, this can be easily compromised should the Receiver-Manager not be appointed.

e) *The preservation and protection of the property pending judicial resolution:* The property of VPS is an ongoing active services business, which can easily be compromised through mismanagement. Furthermore, given the lack of information provided to the Estate, there is the distinct possibility that assets of the Corporations could be dissipated without the Estate being made aware and, given the nature of this litigation it is prudent that a third party take possession of and preserve the Corporations and their businesses.

f) *The balance of convenience to the parties:* this is discussed in detail supra, and is not repeated here.

g) *The fact that the creditor has the right to appoint a receiver under the documentation provided for the loan*: Not applicable in this context.

h) *The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with he debtor and others:* In the case at bar, although the applicant is not a security-holder, given the lack of response of the Corporations to requests for information, the Estate expects to encounter difficulty with the debtors.

i) *The principal that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly:* this is discussed supra and is not repeated here.

j) *The consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently:* In the case at bar, a court appointment is the only way a receiver may be appointed as there is no underlying security agreements in respect to this matter.

k) *The effect of the order upon the parties:* In the case at bar, permitting a receivership order would put the shareholders on an equal, level and transparent playing field under the administration of this Honourable Court to ensure the consistent and lawful treatment of both parties, and the various creditors and other stakeholders in the Corporations.

l) *The conduct of the parties:* the Corporations have not been responsive to lawful requests for information, have not adhered to the VPS Unanimous Shareholders' Agreement and have purported to unilaterally change the registrar of corporations' records to remove the Estate as shareholder. This is conduct that suggests an independent third-party administration under the supervision of this Honourable Court is just and convenient.

m) *The length of time that the receiver may be in place:* At this time this is an unknown the applicant; however, given that the various insurance claims have been made, and that it is impossible for the Corporations to continue operating with the deadlock in ownership between the Estate and Huss once the share registers are rectified, it is likely that a liquidation will occur quickly.

n) *The likelihood of maximizing returns to the parties:* allowing the receiver-manager to be appointed will allow the Corporations to continue operations, thereby maximizing their going concern value for all stakeholders.

o) *The goal of facilitating the duties of the receiver:* As discussed, supra, the case at bar contemplates a statutory appointment, as such, the only way the duties of a receiver-manager can be carried out are by way of court appointment.

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co. 2002 ABKB 430 at para 27 **[Tab 12]**

51. The Applicant submits that those factors which this Court ought to consider in the context of appointment of a Receiver-Manager strongly indicate that the appointment of a Receiver-Manager would be appropriate and necessary. Furthermore, the over-arching fairness consideration likewise supports the appointment of a Receiver-Manager.

Alternative Relief, Appointment of a Liquidator

52. The alternative relief to appointment of a Receiver-Manager is that of the appointment of a liquidator. Such relief is not the most appropriate remedy in the circumstances.

53. Sections 215 and section 242 of the Business Corporations Act each provide for this remedy.

Business Corporations Act at section 215, **[TAB 13]**
Business Corporations Act at section 242, **[TAB 4]**

54. Where an application is brought for liquidation and dissolution on the basis of oppression under Section 215(1) of the ACBA, the applicant must comply with the requirements of Section 217 of the ACBA, which requires, inter alia, that:

    a) directors and officers must comply with certain further directives of the court including preparation of financial statements (which may or may not have been prepared), provision of shareholders' lists (which the applicant submits are inaccurate but for the relief sought in this application), and publication of formal notices by the directors of the liquidation; and

    b) a 'show cause' hearing to occur, adding expense and delay to this Action.

Business Corporations Act at section 217 **[TAB 14]**

55. However, even if oppression is not proven, Section 215(2)(b) permits a corporation to be liquidated and dissolved where it is just and equitable to do so. In dealing with such an application to wind-up a corporation, the Court of King's Bench in *Osman v Elsiddeig,* noted that "just and equitable" is a recognition that behind a corporate identity exists individuals with rights and expectations and that an order winding-up a corporation is a drastic measure:

> *[15] Ebrahimi v Westbourne Galleries Ltd, [1972] 2 All ER 492 (UK HL) is considered one of the leading cases on the "just and equitable" test in winding up applications. In that case Lord Wilberforce stated at 499-500:*
>
> > *The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure… The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the courts to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in any particular way.*
>
> *[16] The Court has wide discretion when exercising the power to grant a winding up application where it is just and equitable. This is a drastic remedy that is not to be granted lightly: see Keho Holdings Ltd v Noble, 1987 ABCA 84. The Court should not make a winding up order where equity can be achieved through other means: **Keho** at para 61; see also Scozzafava v*

Prosperi, 2003 ABQB 248 at para 60. The Court must be attuned to the circumstances of each case to determine whether it would be just and equitable to wind up the corporation.
Osman v Elsiddeig, 2019 ABKB 324 at para 19 **[TAB 15]**

56. The seminal decision on the basis for a finding of winding-up being "just and equitable" remains *Keho Holdings Ltd v Noble* wherein the Alberta Court of Appeal identified four grounds for such a finding:
    a. Deadlock in management
    b. A Business is akin to a partnership
    c. Loss of substratum
    d. Loss of confidence in management

Keho Holdings Ltd v Noble, 1987 ABCA 84 at para 41 **[TAB 16]**

57. As discussed in *Scozzafava v Prosperi*, 2003 ABKB 248, it is only necessary to show one the four grounds to obtain a liquidation order where there are no other options to allow continued operation of the corporation.

Scozzafava v Prosperi, 2003 ABKB 248 at para 60 **[Tab 17]**

58. In the case at bar, there is both a deadlock in management, and a loss of confidence in management.

Gutama Affidavit at paras 13-15, 17, 18, 22, 24,34, 37, 38 **[Not Attached]**

59. The classic case of deadlock is where there are only two equal shareholders who are at odds, as is the case at bar. The relevant question in determining whether a deadlock exists is whether the parties have a way to resolve their issues and whether they are able to work together to do so. In this instance they clearly do not.

60. The applicant submits that the evidence is there will a deadlock in management once the records are rectified and a complete lack of trust in Huss such that it is impossible that any agreement can be made to continue to operate the Corporations.

61. Given the events that have transpired during current management's operations of the Corporations after the death of Melesse, the applicant submits that there is a complete loss of confidence in management, such that such a finding is reasonably made.

62. With that said, it is submitted that the receiver-manager is a more appropriate remedy for factors including that:
    a) A receiver-manager can continue to operate the business, whereas a liquidator is required to cease to carry on business except insofar as necessary for orderly liquidation (220(1)(a));

    Business Corporations Act RSA 2000 c. B-9 at s. 220(1)(a) **[TAB 18]**

    b) A receiver-manager has better protection for environmental liabilities that are unknown to the applicant – given that the Corporations operate in the sphere of commercial cleaning there is a possibility this could be a real concern to the prospective receiver-manager or liquidator; and

    c) It would avoid delay and costs associated with a 'show cause' hearing as required by section 217 of the ABCA.

    Business Corporations Act RSA 2000 c. B-9 at s. 220(1)(a) **[TAB 14]**

CONCLUSION

63. It is submitted that it is clear that the true shareholdings of each of the Corporations are such that the Estate holds 50% of the outstanding shares of each corporation. As a consequence of the incorrect shareholders information submitted to the Registrar of Corporations, the Estate has been oppressed by the conduct of the Defendnats.

64. This Honourable Court is empowered under the *ABCA* and the *Judicature Act* to appoint a recever-manager over each of the Corporations and it is just and equitable for the Court to do so.

65. In the alternative to a receiver-manager order, this Honourable Court may make a Liquidation Order, even absent a finding of oppression; however, such an Order is inferior to a receiver-manager order given the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 18TH DAY OF JANUARY, 2023

SHAREK LOGAN & VAN LEENEN LLP

Per: _____

David Archibold, Barrister and Solicitor &

Genuino Di Pinto, Barrister and Solicitor
Counsel for ENDALE GUTAMA in his capacity
as Litigation Representative of MELESSE
DAHESSA GUTAMA (deceased), Plaintiff/Applicant

TABLE OF AUTHORITIES

Business Corporations Act, RSA 2000 c. B-9, s.244(1)	**[TAB 1]**
McGovern-Burke v Martineau, 2016 ABKB 514	**[TAB 2]**
Business Corporations Act, RSA 2000 c. B-9, s.239(b)	**[TAB 3]**
Business Corporations Act, RSA 2000 c. B-9, s.242	**[TAB 4]**
BCE Inc v 1976 Debenture Holders, 2008 SCC 69	**[TAB 5]**
Canada Business Corporations Act, RSC 1985 c 44, s.214	**[TAB 6]**
Berman v 905952 Alberta Ltd., 2021 ABKB 434	**[TAB 7]**
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Business Corporations Act, RSA 2000, C B-9, s. 215,	**[TAB 13]**
Business Corporations Act RSA 2000, C B-9, s. 217,	**[TAB 14]**
Osman v Elsiddeig, 2019 ABKB 324	**[TAB 15]**
Keho Holdings Ltd v Noble, 1987 ABCA 84	**[TAB 16]**
Scozzafava v Prosperi, 2003 ABKB 248	**[TAB 17]**

TAB 1

dismissal, the Court may order any party to the application or action to give notice to the complainant.

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

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

1981 cB-15 s235

Court order to rectify records

244(1) If the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the Court for an order that the registers or records be rectified.

(2) If the corporation is a reporting issuer, an applicant under this section shall file notice of the application with the Executive Director.

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

(a) an order requiring the registers or other records of the corporation to be rectified;

(b) an order restraining the corporation from calling or holding a meeting of shareholders or paying a dividend before the rectification;

(c) an order determining the right of a party to the proceedings to have the party's name entered or retained in, or deleted or omitted from, the registers or records of the corporation, whether the issue arises between two or more security holders or alleged security holders, or between the corporation and any security holders or alleged security holders;

(d) an order compensating a party who has incurred a loss.

RSA 2000 cB-9 s244;2021 c18 s71

TAB 2

Court of Queen's Bench of Alberta

Citation: McGovern-Burke v Martineau, 2016 ABQB 514

Date: 20160915
Docket: 1301 05701
Registry: Calgary

Between:

Shawna McGovern-Burke

Applicant

- and -

Alanna Martineau and Wine-Ohs Inc

Respondent

Docket: 1401 02859
Registry: Calgary

Between:

Shawna McGovern-Burke

Plaintiff

- and -

Wine-Ohs Inc

Defendant

Docket: 1301 09223
Registry: Calgary

Between:

McGovern-Burke Enterprises Ltd

Plaintiff

- and -

Wine-Ohs Inc

Defendant

Reasons for Decision
of the
Honourable Mr. Justice K.D. Yamauchi

I. Introduction

[1] These reasons deal with 3 separate actions involving related parties, the trials of which this Court heard over 3 days. The 3 actions, in general terms, are as follows:

(a) an action that the Applicant / Plaintiff Shawna McGovern-Burke commenced against the Respondents Alanna Martineau and Wine-Ohs Inc pursuant to section 242 of the *Business Corporations Act*, RSA 2000, c B-9 [*BCA*];

(b) an action that Ms. McGovern-Burke commenced against the Defendant Wine-Ohs Inc ("Wine-Ohs"), in which she seeks to recover shareholder loans that she allegedly made to Wine-Ohs, and expenses that she allegedly incurred on Wine-Ohs' behalf; and

(c) an action that McGovern-Burke Enterprises Ltd ("M-B Ltd") commenced against Wine-Ohs in which M-B Ltd seeks to recover payments for materials and services that M-B Ltd allegedly provided to Wine-Ohs.

II. Background

[2] Ms. McGovern-Burke and Ms. Martineau met each other in the Fall of 2011, while they worked at Talisman Energy Inc. Ms. McGovern-Burke was interested in doing something outside of her work for Talisman Energy Inc, and in or around December of 2011, she discussed this with Ms. Martineau. Ms. Martineau told Ms. McGovern-Burke that she had prepared a business plan for a wine bar and bistro. Ms. McGovern Burke thought Ms. Martineau's idea was interesting, so they met for lunch. Ms. Martineau asked Ms. McGovern-Burke to sign a non-disclosure agreement before showing her the business plan, which Ms. McGovern-Burke signed. When Ms. McGovern-Burke asked Ms. Martineau whether she wanted an investor or a partner, Ms. Martineau said that she would be open to either.

[3] Ms. Martineau's plan was to open a wine bar and bistro in the East Village in Calgary 2 or 3 years "down the road," but each would "keep their eyes open" for potential opportunities. In March of 2012, while at a dinner, Ms. McGovern-Burke learned that the space occupied by Piq Niq and Beat Niq in downtown Calgary was for sale (the "premises"). Ms. McGovern-Burke immediately contacted Ms. Martineau to advise her of the opportunity. They, along with Ms. McGovern-Burke's husband, Ron McGovern-Burke, went to look at the premises 2 days later. The main floor of the premises would meet their needs, but the basement required considerable work. Mr. McGovern-Burke is a designer and musician, who wanted to look at the premises to determine if the basement area would work as a wine bar and musical performance venue.

[4] Ms. McGovern-Burke left for a vacation shortly thereafter. The parties began costing the business and premises and, as well, explored other places in which they might be interested. Ms.

> Mr. English complained that he was not provided with copies of financial information. Surely, he simply had to ask the accountant for it if his partner was not cooperating in providing them. Mr. McPeak did not have greater rights or powers that Mr. English.

[71] This Court recognizes that the original source of the oppression remedy referred to the remedy necessary to cure "fraud on the minority." But the mere fact that the parties are equal shareholders does not answer the question whether one of the shareholders is being oppressed. The court must look at all the circumstances to determine whether oppression exists. This is why the Alberta Court of Appeal said in ***Mace*** that the oppression remedy is "not generally available" to shareholders holding an equal number of shares. It then went on to provide an exception that arose in ***Stech v Davies*** (1987), 53 Alta LR (2d) 373 (QB) [***Stech***].

[72] In the older case of ***Re Jermyn Street Turkish Baths Ltd***, [1971] 3 All ER 184 at 199, Lord Bickley said the following:

> In our judgment, oppression occurs when shareholders having a dominant power in a company, either (1) exercise that power to procure something that is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs …

[73] In ***Stech***, Egbert J found that even though the parties were equal shareholders, one of them who held the dominant position in the corporations from a management perspective, carried on the business and exercised his powers as a director of the corporations in a manner that was oppressive, unfairly prejudicial to and unfairly disregarded the interests of the other as a shareholder, director and officer of the corporations. In other words, it was not so much that they were equal shareholders, but the way in which the business and affairs of the corporations were being operated that mattered.

[74] In the case at bar, the fact that Ms. Martineau and Ms. McGovern-Burke are each fifty percent shareholders does not prevent this Court from finding oppression if one of the parties exerts dominance over the other. As all the cases have held, each case depends on the unique facts before the court.

[75] What were Ms. McGovern-Burke's reasonable expectations? Wine-Ohs' is a small, closely-held corporation. Its structure was comprised of 2 equal shareholder, who were the corporation's directors. In ***BCE***, the Supreme Court of Canada said that courts would accord more latitude to directors of small, closely-held corporations to deviate from strict formalities. In the case at bar, the directors deviated substantially from strict formalities. Wine-Ohs had no minute book, and it held no formal meetings. Ms. Martineau and Ms. McGovern-Burke operated the business through discussions. Nothing appears to have been reduced to writing. They made decisions and acted on them. Ms. Martineau argues that Ms. McGovern-Burke is not a shareholder, as there was no subscription agreement, no directors' resolutions, and no share certificate. Inasmuch as Wine-Ohs had no minute book, this Court highly doubts that any of those existed for Ms. Martineau's shares or position as a director, or that any organizing minutes or resolutions were ever prepared for Wine-Ohs before Ms. McGovern-Burke began this lawsuit.

[76] Wine-Ohs is not simply a separate legal entity that exists separate and apart from Ms. Martineau and Ms. McGovern-Burke. Ms. Martineau incorporated it, but Ms. Martineau and Ms.

one of its directors. Ms. Martineau used her position of dominance, being the operator of the business and the person who had control over the "corporate records" to squeeze Ms. McGovern-Burke out of the corporation and the business. Furthermore, the financial statements that Ms. Martineau presented to this Court do not reflect Wine-Ohs' actual financial situation. Although prepared by a certified general accountant, this Court has no doubt that this is a situation of "garbage in-garbage out." The balance sheet, and the notes thereto are simply inaccurate, and do not reflect what this Court has found.

[81] This Court has no hesitation in finding that Ms. Martineau, in her capacity as a director of Wine-Ohs, and Wine-Ohs itself have breached Ms. McGovern-Burke's reasonable expectations by unfairly disregarding her interests. This has caused her unfair prejudice. Furthermore, by taking the actions she did in changing the corporate records filed with the Alberta Registrar of Corporations before the parties had resolved their differences, Ms. Martineau has acted oppressively as against Ms. McGovern-Burke.

[82] What, then, is the remedy for these breaches? It is important to note that the wording in *BCA* s 242(2) itself helps to guide this Court, when it says, "the Court may make an order to rectify the matters complained of." Although this Court might be inclined to say that it should not "kill a fly with a sledge hammer," Farley J said it more eloquently in ***820099 Ontario Inc v Harold E Ballard Ltd*** (1991), 3 BLR (2d) 123 (Ont Gen Div) at 197, aff'd (1991), 3 BLR (2d) 113 (Ont Div Ct), where he said the following:

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party.

[83] The object of this exercise is not to destroy Wine-Ohs, or make it impossible for it to comply with any order that this Court makes. The object is, like many civil actions, to restore the parties to *status quo ante*.

[84] Ms. McGovern-Burke asks this Court to order the following:

(a) Wine-Ohs shall issue, or Ms. Martineau shall transfer, as the case may be, to Ms. McGovern-Burke shares sufficient to make her a fifty percent shareholder of Wine-Ohs (*BCA* s 242(3)(e));

(b) Ms. McGovern-Burke will be reinstated as one of Wine-Ohs' directors (*BCA* s 242(3)(f));

(c) Wine-Ohs shall provide Ms. McGovern-Burke with audited financial statements from May 1, 2012, to the present date (*BCA* s 242(3)(k)); and

(d) Wine-Ohs shall obtain a business valuation to allow for the buy-out of Ms. McGovern-Burke by either Wine-Ohs or Ms. Martineau (*BCA* s 242(3)(g).

[85] This Court orders the items that Ms. McGovern-Burke has requested in (a) and (b), above. As well, it orders that Wine-Ohs will immediately rectify its records, and those it has filed with the Alberta Registrar of Corporations, to show the issuance or transfer of the shares to Ms. McGovern-Burke and her reinstatement as a director pursuant to *BCA* s 242(3)(m).

TAB 3

(3) An inspector shall on request produce to an interested person a copy of any order made under section 231 or 232(1).

1981 cB-15 s225

Hearings by inspector

234(1) A hearing conducted by an inspector shall be heard in camera unless the Court otherwise orders.

(2) An individual who is being examined at a hearing conducted by an inspector under this Part has a right to be represented by counsel during the examination.

1981 cB-15 s226

Compelling evidence

235 A person shall not be excused from attending and giving evidence and producing books, papers, documents or records to an inspector under this Part on the grounds that the oral evidence or documents required of the person may tend to incriminate the person or subject the person to any proceeding or penalty, but no oral evidence so required shall be used or is receivable against the person in any proceedings thereafter instituted against the person under any Act of Alberta.

1981 cB-15 s227

Absolute privilege

236 Any oral or written statement or report made by an inspector or any other person in an investigation under this Part has absolute privilege.

1981 cB-15 s228

Solicitor-client privilege

237 Nothing in this Part affects the privilege that exists in respect of a solicitor and the solicitor's client.

1981 cB-15 s229

Inspector's report as evidence

238 A copy of the report of an inspector under section 232, certified as a true copy by the inspector, is admissible as evidence of the facts stated in it without proof of the appointment or signature of the inspector.

1981 cB-15 s230;1983 c20 s17

Part 19
Remedies, Offences and Penalties

Definitions

239 In this Part,

(a) "action" means an action under this Act or any other law;

(b) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) a creditor

(A) in respect of an application under section 240, or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

1981 cB-15 s231;2000 c10 s3

Commencing derivative action

240(1) Subject to subsection (2), a complainant may apply to the Court for permission to

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

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

(2) No permission may be granted under subsection (1) unless the Court is satisfied that

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,

(b) the complainant is acting in good faith, and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

TAB 4

(3) Notwithstanding subsection (2), when all the directors of the corporation or its subsidiary have been named as defendants, notice to the directors under subsection (2)(a) of the complainant's intention to apply to the Court is not required.

RSA 2000 cB-9 s240;2005 c8 s54;2014 c13 s49

Powers of the Court

241 In connection with an action brought or intervened in under section 240 or 242(3)(q), the Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order authorizing the complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;

(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

1981 cB-15 s233

Relief by Court on the ground of oppression or unfairness

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

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

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

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

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

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

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

(a) an order restraining the conduct complained of;

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

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

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

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

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

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

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

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

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

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

(l) an order compensating an aggrieved person;

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

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

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

TAB 5

BCE Inc. and Bell Canada *Appellants/Respondents on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc.

A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

BCE Inc. et Bell Canada *Appelantes/Intimées aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

[55] Other cases have focused on the broader principles underlying and uniting the various aspects of oppression: see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 45 B.L.R. 110 (Alta. C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.).

[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

[57] We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.

[58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.

[59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the

[55] D'autres décisions sont axées sur les principes plus larges qui sous-tendent et unifient les différents aspects de la notion d'abus : voir *First Edmonton Place Ltd. c. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (B.R. Alb.), mod. par (1989), 45 B.L.R. 110 (C.A. Alb.); *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (C. div. Ont.); *Westfair Foods Ltd. c. Watt* (1991), 79 D.L.R. (4th) 48 (C.A. Alb.).

[56] À notre avis, la meilleure façon d'interpréter le par. 241(2) est de combiner les deux approches exposées dans la jurisprudence. Il faut d'abord considérer les principes sur lesquels repose la demande de redressement pour abus et, en particulier, le concept des attentes raisonnables. S'il est établi qu'une attente raisonnable a été frustrée, il faut déterminer si le comportement reproché constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause au sens du par. 241(2) de la *LCSA*.

[57] En guise d'introduction aux deux volets de l'examen d'une allégation d'abus, la Cour formulera deux remarques préliminaires issues de l'ensemble de la jurisprudence.

[58] Premièrement, la demande de redressement pour abus est un recours en equity. Elle vise à rétablir la justice — ce qui est « juste et équitable ». Elle confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité : *Wright c. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (C. Ont. (Div. gén.)), p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (C.A. Alb.), p. 374; voir, de façon plus générale, Koehnen, p. 78-79. Par conséquent, les tribunaux saisis d'une demande de redressement pour abus doivent tenir compte de la réalité commerciale, et pas seulement de considérations strictement juridiques : *Scottish Co-operative Wholesale Society*, p. 343.

[59] Deuxièmement, comme beaucoup de recours en equity, le sort d'une demande de redressement pour abus dépend des faits en cause. On détermine ce qui est juste et équitable selon les

TAB 6

CANADA

CONSOLIDATION

CODIFICATION

Canada Business Corporations Act

Loi canadienne sur les sociétés par actions

R.S.C., 1985, c. C-44

L.R.C. (1985), ch. C-44

Current to December 31, 2022

Last amended on August 31, 2022

À jour au 31 décembre 2022

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Application to court re oppression

241 (1) A complainant may apply to a court for an order under this section.

Grounds

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

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

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

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

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

Powers of court

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

(a) an order restraining the conduct complained of;

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

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

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

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

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

Demande en cas d'abus

241 (1) Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.

Motifs

(2) Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

Pouvoirs du tribunal

(3) Le tribunal peut, en donnant suite aux demandes visées au présent article, rendre les ordonnances provisoires ou définitives qu'il estime pertinentes pour, notamment :

a) empêcher le comportement contesté;

b) nommer un séquestre ou un séquestre-gérant;

c) réglementer les affaires internes de la société en modifiant les statuts ou les règlements administratifs ou en établissant ou en modifiant une convention unanime des actionnaires;

d) prescrire l'émission ou l'échange de valeurs mobilières;

e) faire des nominations au conseil d'administration, soit pour remplacer tous les administrateurs en fonctions ou certains d'entre eux, soit pour en augmenter le nombre;

f) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, d'acheter des valeurs mobilières d'un détenteur;

g) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, de rembourser aux détenteurs une partie des fonds qu'ils ont versés pour leurs valeurs mobilières;

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

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

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 243;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and

(n) an order requiring the trial of any issue.

h) modifier les clauses d'une opération ou d'un contrat auxquels la société est partie ou de les résilier, avec indemnisation de la société ou des autres parties;

i) enjoindre à la société de lui fournir, ainsi qu'à tout intéressé, dans le délai prescrit, ses états financiers en la forme exigée à l'article 155, ou de rendre compte en telle autre forme qu'il peut fixer;

j) indemniser les personnes qui ont subi un préjudice;

k) prescrire la rectification des registres ou autres livres de la société, conformément à l'article 243;

l) prononcer la liquidation et la dissolution de la société;

m) prescrire la tenue d'une enquête conformément à la partie XIX;

n) soumettre en justice toute question litigieuse.

Duty of directors

(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 191(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

Devoir des administrateurs

(4) Dans les cas où l'ordonnance rendue en vertu du présent article ordonne des modifications aux statuts ou aux règlements administratifs de la société :

a) les administrateurs doivent se conformer sans délai au paragraphe 191(4);

b) toute autre modification des statuts ou des règlements administratifs ne peut se faire qu'avec l'autorisation du tribunal, sous réserve de toute autre décision judiciaire.

Exclusion

(5) A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.

Exclusion

(5) Les actionnaires ne peuvent, à l'occasion d'une modification des statuts faite conformément au présent article, faire valoir leur dissidence en vertu de l'article 190.

Limitation

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

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

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

Limitation

(6) La société ne peut effectuer aucun paiement à un actionnaire en vertu des alinéas (3)f) ou g) s'il existe des motifs raisonnables de croire que :

a) ou bien elle ne peut, ou ne pourrait de ce fait, acquitter son passif à échéance;

b) ou bien la valeur de réalisation de son actif serait, de ce fait, inférieure à son passif.

TAB 7

Court of Queen's Bench of Alberta

Citation: Berman v 905952 Alberta Ltd, 2021 ABQB 434

Date: 20210602
Docket: 1901 13773
Registry: Calgary

Between:

Stephanie Joy Berman

Plaintiff

- and -

905953 Alberta Ltd., Boulevard Investments Corp., Richard Daniel Bland Berman, and Harold Sicherman

Defendants

Reasons for Decision
of the
Honourable Mr. Justice D.A. Labrenz

Introduction

[1] Ms. Berman applies for oppression remedies against the defendants, alleging that they have engaged in a course of conduct designed to harm her interests in two corporate entities. The defendants include Ms. Berman's former spouse, Mr. Berman, along with Mr. Sicherman who was Mr. Berman's business partner for many years. The remaining defendants are the two corporations Mr. Berman and Mr. Sicherman jointly own and use to manage and develop real estate in Calgary.

> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.
>
> ...

[41] Oppression is an equitable remedy that gives the court a broad discretion to ensure the fair treatment of corporate stakeholders: ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69 at para 58. The goal of the legislation is to settle internal corporate disputes premised upon equitable principles, as opposed to reliance on strict legal rights: ***Keho Holdings Ltd v Noble***, 1987 ABCA 84, at para 19.

[42] In order for a complainant to establish oppression or unfairness, a two-part test must be met: first, that a reasonable expectation has been breached; and second, that the breach amounts to "oppression," "unfair prejudice" or "unfair disregard": ***BCE*** at para 68.

What is a reasonable expectation?

[43] Determining whether a stakeholder's expectation is reasonable or not can be complicated. Stakeholders may have different reasons for entering into a relationship with a corporation and those reasons can conflict. Corporate decisions will not always satisfy all stakeholders or benefit them equally, but shareholders can expect to receive fair treatment by the corporation: ***BCE*** at para 64.

[44] Beyond this general statement concerning "fair treatment", whether or not an expectation is reasonable will depend on a number of factors. Cases will always be fact-specific, but the following relevant factors have emerged from the jurisprudence: 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 agreements; and, the fair resolution of conflicting interests between corporate stakeholders: ***BCE*** at para 72.

Oppression or unfair treatment

[45] If a reasonable expectation is established, the next step is to establish whether the expectation was breached by corporate conduct that amounted to oppression, unfair prejudice and unfair disregard. The meaning of these terms was discussed in ***BCE***, at para 67:

> ... Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. ...

[48] Section 215 permits a corporation to be wound-up even if oppression is not proven, in those circumstances where it is just and equitable to do so. The principles relating to this remedy were outlined succinctly in ***Osman v Elsiddeig***, 2019 ABQB 324, by Master Smart of this Court. The remedy permits the court to look behind the corporate structure where necessary, however, a court-imposed winding-up is considered to be a drastic measure. In this regard, Master Smart states the following at paras 15-16:

> Ebrahimi v Westbourne Galleries Ltd, [1972] 2 All ER 492 (UK HL) is considered one of the leading cases on the "just and equitable" test in winding up applications. In that case Lord Wilberforce stated at 499-500:
>
> > The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. **The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure...** The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the courts to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in any particular way.
>
> The Court has wide discretion when exercising the power to grant a winding up application where it is just and equitable. **This is a drastic remedy that is not to be granted lightly: see Keho Holdings Ltd v Noble, 1987 ABCA 84. The Court should not make a winding up order where equity can be achieved through other means: Keho at para 61; see also Scozzafava v Prosperi, 2003 ABQB 248 at para 60.** The Court must be attuned to the circumstances of each case to determine whether it would be just and equitable to wind up the corporation.
>
> [Emphasis added]

[49] There are four potential grounds to that can justify imposition of the ‘just and equitable’ remedy for dissolution:

1. Deadlock in management;
2. Business is akin to a partnership;
3. Loss of substratum; or
4. Loss of confidence in management.

Scozzafava v Prosperi, 2003 ABQB 248, at paras 45-46; ***Osman*** at para 17.

[50] This section will be discussed in further detail later in my decision.

TAB 8

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

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

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

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

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

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

TAB 9

Court of Queen's Bench of Alberta

Citation: Murphy v. Cahill, 2013 ABQB 335

Date: 20130816
Docket: 1203 04666
Registry: Edmonton

Between:

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

Applicant

- and -

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

Respondents

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

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Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TAB 10

Court of Queen's Bench of Alberta

Citation: MTM Commercial Trust v. Statesman Riverside Quays Ltd., 2010 ABQB 647

Date:20101012
Docket: 1001 09828
Registry: Calgary

Between:

MTM Commercial Trust and Matco Investments Ltd.

Applicants

- and -

Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Master Builders Inc.

Respondents

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] By Originating Notice filed July 8, 2010, the Applicants MTM Commercial Trust and Matco Investments Ltd. (collectively, "Matco") applied for:

(a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");

(b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");

the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

[7] Statesman, however, does not agree that it should continue to be bound by its undertaking not to recommence construction in the long term and submits that the application for a receiver should be dismissed and the Court should authorize Statesman to carry on with the financing and development of the Project as soon as possible.

[8] Matco applied for the appointment of a receiver pursuant to certain provisions of the *Alberta Rules of Court*, certain provisions of the *Business Corporations Act*, R.S.A. 2000, c. B-9 and Section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

[9] Given the acknowledgement by Matco that a receiver is not necessary as long as construction on the project does not recommence, it is not necessary to analyze the law with respect to the appointment of a receiver, except to recognize that Matco's concession in that regard is consistent with the principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant. The potentially devastating effects of granting the receivership order must always be considered, and, if possible, a remedy short of receivership should be used: *BG International Ltd. v. Canadian Superior Energy Inc.*, [2009] CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v. Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.).

[10] While the conduct of a debtor's business rests in the receiver upon appointment and thus the Applicants would be protected from further alleged breaches if a receivership order was granted, they acknowledge that the cessation of construction that occurred as a result of the voluntary undertaking served the same purpose and is an adequate remedy in their view. The question, therefore, becomes less whether a receiver should be appointed and more whether the voluntary undertaking to cease construction should be replaced by a court-imposed injunction restraining Statesman from further construction on the Project pending the resolution of matters between the parties.

[11] As has been noted in *Anderson v. Hunking* [2010] O.J. No. 3042 at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

TAB 11

In the Court of Appeal of Alberta

Citation: BG International Limited v. Canadian Superior Energy Inc., 2009 ABCA 127

Date: 20090407
Docket: 0901-0048-AC
Registry: Calgary

Between:

BG International Limited

Respondent
(Plaintiff)

- and -

Canadian Superior Energy Inc.

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Whole of the Interim Orders by
The Honourable Madam Justice B.E.C. Romaine
Dated the 11th day of February, 2009
Filed on the 11th day of February, 2009
(Docket: 0901-02012)

Memorandum of Judgment

The Court:

[1] This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

[2] The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

[3] There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

[4] When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

[5] The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

[15] The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in ***Royal Bank of Canada v. W. Got & Associates Electric Ltd.,*** [1999] 3 S.C.R. 408 without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

[16] We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

[17] In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in ***Swiss Bank Corp. (Canada) v. Odyssey Industries Inc***. (1995), 30 C.B.R. (3d) 49 (Ont. C.J. G.D.) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

[18] The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that

TAB 12

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

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

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

[24] The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

[25] I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp***., 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

[28] In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry : ***Bank of Nova Scotia v. Freure Village on Clair Creek***, [1996] O.J. No. 5088, paragraph 12.

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

TAB 13

Other grounds for liquidation and dissolution pursuant to court order

215(1) The Court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,

(a) if the Court is satisfied that in respect of a corporation or any of its affiliates

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

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

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

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, or

(b) if the Court is satisfied that

(i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or

(ii) it is just and equitable that the corporation should be liquidated and dissolved.

(2) On an application under this section, the Court may make any order under this section or section 242 it thinks fit.

(3) Section 243 applies to an application under this section.

1981 cB-15 s207

Application for court supervision

216(1) An application to the Court to supervise a voluntary liquidation and dissolution under section 212(8) shall state the reasons, verified by an affidavit of the applicant, why the Court should supervise the liquidation and dissolution.

(2) If the Court makes an order applied for under section 212(8), the liquidation and dissolution of the corporation shall continue under the supervision of the Court in accordance with this Act.

1981 cB-15 s208

TAB 14

Show cause order

217(1) An application to the Court under section 215(1) shall state the reasons, verified by an affidavit of the applicant, why the corporation should be liquidated and dissolved.

(2) On an application under section 215(1), the Court may make an order requiring the corporation and any person having an interest in the corporation or a claim against it to show cause, at a time and place specified in the order but not less than 4 weeks after the date of the order, why the corporation should not be liquidated and dissolved.

(3) On an application under section 215(1), the Court may order the directors and officers of the corporation to furnish to the Court all material information known to or reasonably ascertainable by them, including

(a) financial statements of the corporation,

(b) the name and address of each shareholder of the corporation, and

(c) the name and address of each creditor or claimant, including any creditor or claimant with unliquidated, future or contingent claims, and any person with whom the corporation has a contract.

(4) A copy of the order made under subsection (2) must be published as directed in the order and served on the Registrar and each person named in the order.

(5) Publication and service of an order under this section must be effected by the corporation or by any other person and in any manner the Court may order.

RSA 2000 cB-9 s217;2021 c18 s55

Powers of the Court

218 In connection with the dissolution or the liquidation and dissolution of a corporation, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any one or more of the following:

(a) an order to liquidate;

(b) an order appointing a liquidator, with or without security, fixing a liquidator's remuneration or replacing a liquidator;

TAB 15

Court of Queen's Bench of Alberta

Citation: Osman v Elsiddeig, 2019 ABQB 324

Date: 20190503
Docket: 1703 05091
Registry: Edmonton

Between:

Ebtihal Osman and Stony Medical Clinic Inc.

Plaintiffs/Respondents

- and -

Awatif Elsiddeig, Tamer Abdou, EMedical Inc., Egypharm Ltd., Stony Drugstore Inc., and Inglewood Medical Ltd.

Defendants/Applicants

Reasons for Decision
of
L.A. Smart, Master, Court of Queen's Bench of Alberta

Introduction

[1] This is an application to liquidate and dissolve Stony Medical Clinic Inc. (Stony Medical).

[2] Stony Medical was incorporated on November 28, 2013. The Applicant, Dr. Awatif Elsiddeig, and the Respondent, Dr. Ebtihal Osman, agreed they would each be 50% owners and directors of Stony Medical. Both parties practiced medicine at the clinic.

The Law

Business Corporations Act

[12] Dr. Elsiddeig first relies on s 214 of the *ABCA*:

> **Dissolution by court order**
>
> **214(1)** The Registrar or any interested person may apply to the Court for an order dissolving a corporation if the corporation has
>
> > (a) failed for two or more consecutive years to comply with the requirements of this Act with respect to the holding of annual meetings of shareholders…

[13] An "interested person" includes a shareholder: *ABCA*, s 206.1(a).

[14] Further, Dr. Elsiddeig relies on s 215 for an order for liquidation and dissolution:

> **Other grounds for liquidation and dissolution pursuant to court order**
>
> **215(1)** The Court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,
>
> …
>
> if the court is satisfied that
>
> > …
> >
> > (ii) it is just and equitable that the corporation should be liquidated and dissolved.

Case Law

The Just and Equitable Test

[15] ***Ebrahimi v Westbourne Galleries Ltd***, [1972] 2 All ER 492 (UK HL) is considered one of the leading cases on the "just and equitable" test in winding up applications. In that case Lord Wilberforce stated at 499-500:

> The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure… The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the courts to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one

> individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in any particular way.

[16] The Court has wide discretion when exercising the power to grant a winding up application where it is just and equitable. This is a drastic remedy that is not to be granted lightly: see ***Keho Holdings Ltd v Noble***, 1987 ABCA 84. The Court should not make a winding up order where equity can be achieved through other means: ***Keho*** at para 61; see also ***Scozzafava v Prosperi***, 2003 ABQB 248 at para 60. The Court must be attuned to the circumstances of each case to determine whether it would be just and equitable to wind up the corporation.

[17] In Alberta, the leading case on the "just and equitable" test is ***Keho***. There the Alberta Court of Appeal considered four grounds for winding up a corporation under the "just and equitable" rule:

1) Deadlock in management;

2) Loss of confidence in management;

3) The business is akin to a partnership; or

4) Loss of substratum.

[18] It is not necessary that more than one of those grounds be established to grant a winding up order: ***Scozzafava*** at para 60.

[19] A classic state of deadlock consists of a situation where there are only two equal shareholders who are at odds: ***Keho*** at para 52. Dispute alone does not result in a deadlock: ***Iverson v Westfair Foods Ltd*** (1996), 183 AR 286 at para 82 (QB). To determine whether the disputing parties are deadlocked, it is relevant to consider whether the parties have a way in which to resolve their issues and whether they are able to work together to do so: see ***Scozzafava*** at paras 48, 51.

[20] ***Ebrahimi*** established that a corporation may be wound up under the just and equitable test if an applicant established that the corporation is in fact a partnership based on mutual trust and confidence that has completely broken down. The Alberta Court of Queen's Bench in ***Scozzafava*** at paras 52 and 54 expanded on this:

> As has already been indicated, the Court in *Keho*, refers to *Ebrahimi* as "a leading authority on the use of the just and equitable" rule and quotes Lord Wilburforce where he indicates that "something more" than a purely commercial relationship is required to exist to make out a partnership analogy. He suggests that the relationship must be "an association formed or continued on the basis of a personal relationship, involving mutual confidence."
>
> … …
>
> The Prosperi Brothers refer in their materials to *Re Pe Ben Pipelines Ltd*, [1978] AJ No 654 (Alta TD), where the Court commented on the "partnership analogy," at para 13:
>
> > It now seems quite clear that, on the authority of cases such as *Re Yenidje Tobacco Co Ltd*, [1916] 2 Ch 426, it is not necessary to

TAB 16

In the Court of Appeal of Alberta

Citation: Keho Holdings Ltd. v. Noble, 1987 ABCA 84

Date: 19870427
Docket: 18698
Registry: Calgary

Between:

Keho Holdings Ltd. and Howard H. Oliver

Appellants
(Respondents)

- and -

**Shirley F. Noble, Victor B. Erdman,
Bernard J. Klinkhammer and Edmond L. Green,
W. Fraser Noble and David K. Erdman**

Respondents
(Applicants)

The Court:

**The Honourable Chief Justice Laycraft
The Honourable Mr. Justice Haddad
The Honourable Mr. Justice Irving**

**Reasons for Judgment of The Honourable Mr. Justice Haddad
Concurred in by The Honourable Chief Justice Laycraft
Concurred in by The Honourable Mr. Justice Irving**

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE MEDHURST DATED THE 9TH DAY OF OCTOBER, 1986 FILED THE 22ND DAY OF OCTOBER, 1986

COUNSEL:

R.A. Low., Esq., for the Appellants

J.C. Crawford, Esq., for the Respondents

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE HADDAD

[1] An order granted in chambers pursuant to the *Business Corporations Act,* S.A. 1981. c. B-15, s.207(1) directed that the appellant corporation Keho Holdings Ltd. be liquidated and dissolved. This appeal is taken from that order.

[2] To facilitate an appreciation of the factual base upon which the respondent relied to satisfy the requirements of the statute to obtain this order I will quote the whole of s.207 before I outline the facts.

> "207(1) The Court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,
>
> (a) if the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (i) any act or omission of the corporation or any of its affiliates effects a result,
>
> (ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, or
>
> (b) if the Court is satisfied that
>
> (i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or
>
> (ii) it is just and equitable that the corporation should be liquidated and dissolved.
>
> (2) On an application under this section, the Court may make any order under this section or section 234 it thinks fit.
>
> (3) Section 235 applies to an application under this section."

FACTS.

> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one. or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence -- this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company -- so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analagous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves."

[41] The respondents rely on four grounds as justification for liquidation under the just and equitable rule. They are:

(a) deadlock in management

(b) loss of confidence in management;

(c) loss of substratum; and

(d) a partnership analogy.

DEADLOCK IN MANAGEMENT.

[42] The respondents contend deadlock on the ground that as shareholders comprising approximately 34 per cent, of the issued shares they have been excluded from representation on the board of directors. That reasoning eludes me. They also assert deadlock because they are in a position to prevent the passing of a special resolution - a resolution requiring 66 2/3 per cent, of the outstanding shares to succeed. I do not perceive this to be deadlock in management. In my view the principles to be extracted from the authorities dealing with deadlock have no application to that setting. In his article "Compulsory Winding-Up - The 'Just and Equitable' Rule" (1966-67) 5 Alta. Law Review 135 at 149-50. David Huberman expressed with clarity the principle of deadlock:

TAB 17

Scozzafava v. Prosperi, 2003 ABQB 248

Date: 20030314
Action Nos. 0203 23331; 0203 19432;0203 19433

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

BETWEEN:

ANGELO SCOZZAFAVA

Plaintiff

- and -

MARIO PROSPERI

Defendant

MEMORANDUM OF DECISION
of the
HONOURABLE MADAM JUSTICE DONNA C. READ

APPEARANCES:

Scott J. Hammel
Miller Thomson
for the Plaintiff

Greg Harding, Q.C
Field Atkinson Perraton
for the Defendant

Preliminary Matters:

[1] Two groups of business persons joined together in a corporation in 1985 to sell garden statuary in Edmonton. Unhappy differences have arisen between them, so unhappy that a total of four lawsuits have been started between the two groups, both in Alberta and in

[59] The Prosperi Brothers argue that they have lost confidence in Maria Gardella who, as managing director, had day to day control of the corporation and who unilaterally made significant decisions without consulting the Prosperi Parties. I am unable to conclude, based on the affidavit evidence before me, whether this lack of confidence is justified or not. Each side accuses the other of wrongdoing.

[60] *Keho* does not suggest that more than one of the four grounds are necessary to grant a winding-up order under the "fair and equitable" rule. It does, however, say that the court should not make such an order where equity can be achieved by other means or remedies.

[61] As I have said earlier, I have concluded that Henri Edmonton is deadlocked and that there is no means and reasonable possibility that this deadlock can be ended. Likely, as well, the partnership analogy and the loss of substratum theory operate.

[62] The Scozzafava Parties argue that even if that is correct, the corporation continues to be profitable. As a consequence, they argue, the more appropriate remedy would be for Mr. Scozzafava's shares in the Henri Edmonton to be purchased by Mario Prosperi. This is also the relief requested in their Statement of Claim in the Oppression Action.

[63] Requiring Mr. Prosperi to purchase Mr. Scozzafava's shares is not an appropriate remedy in my view. Mr. Prosperi does not wish to purchase these shares or to continue to operate Henri Edmonton in the long term. The Prosperi Brothers have attempted to terminate the License Agreement and clearly wish to have the Prosperi Parties cease doing business with Henri Edmonton. It is apparent from the evidence that there is little or no possibility that Henri Edmonton can continue to do business if the License Agreement is terminated given its terms which, among other things, likely disable Henri Edmonton from even continuing to use the 'Henri' name after the agreement is terminated and from continuing to sell Henri US designs and from manufacturing and selling any substantially similar designs. The substratum of the business will simply have disappeared with the termination of the License Agreement. I have concluded, therefore, that to make the order requested by the Scozzafava Parties under sections 215 and 242 of the Business Corporations Act, would not be just and equitable. Rather it would have the effect of granting the very relief requested by the Scozzafava Parties in the Oppression Action without requiring them to prove their case at trial and would require the Prosperi Brothers to purchase all of the shares in a corporation when what the Prosperi Parties seek is to cease their business relationship with that corporation.

[64] In my view, the "just and equitable" order that I should make here is to order that Henri Edmonton be wound up. The Prosperi Brothers have suggested that Mr. Thomas Klaray of PriceWaterhouseCoopers Inc. be appointed as liquidator and say that he had already consented to act. In their written materials, they provided a form of order setting out the powers and obligations of the liquidator and the form appears reasonable.