In the Court of Appeal of Alberta

Citation: Shefsky v California Gold Mining Inc, 2016 ABCA 103

2016 ABCA 103 (CanLII)

Date: 20160414
Docket: 1503-0001-AC
Registry: Edmonton

Between:

Martin Shefsky and 2350183 Ontario Inc.

Appellants
(Applicants)

- and -

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

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment of The Honourable Mr. Justice Costigan and The Honourable Madam Justice Schutz

Dissenting Memorandum of Judgment of The Honourable Mr. Justice Slatter

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 28th day of November, 2014
Filed on the 16th day of December, 2014
(2014 ABQB 730; Docket: 1303 17979)

2016 ABCA 103 (CanLII)

Memorandum of Judgment of The Honourable Mr. Justice Costigan and The Honourable Madam Justice Schutz

2016 ABCA 103 (CanLII)

The Majority:

Overview

[1] This is an appeal from the dismissal of the appellants' oppression application. This appeal engages the analytical framework applied to oppression claims and remedies stipulated by the Supreme Court of Canada in ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69, [2008] 3 SCR 560.

[2] Not all unfair conduct rises to the level of oppression for which a court may grant a remedy; what may be oppressive in one factual context may not be oppressive in a slightly different factual context. Fact findings are the crucial foundation for the legal analysis that must follow, because within such fact findings the hearing court identifies the interests that merit relief, and within such fact findings the court assesses the nature of the impugned conduct and its effect. "The evidence is also critical to the court's determination of the appropriate remedy in the event that oppression is found": David S. Morritt, Sonia L. Bjorkquist & Allan D. Coleman, *The Oppression Remedy* [Toronto: Canada Law Book, 2015] at 1-10-1-11.

[3] Although this reviewing Court may have assessed the evidence differently, we have identified no juridically permissible basis upon which to interfere with the chambers judge's decision. Fact findings are entitled to a high degree of deference. The parties were well aware of the limitations of the summary procedure they chose and we are satisfied from our review of the entire record that the chambers judge was entitled to find the facts and apply the law as he did; accordingly, the appeal is dismissed, for the reasons that follow.

Background

[4] Detailed background information can be found in the decision of the special chambers judge: ***Shefsky v California Gold Mining Inc***, 2014 ABQB 730 [***Decision***].

[5] In brief, this was a fight for control of the Board of Directors of California Gold Mining Inc (CGMI), a public corporation involved in mineral exploration. The appellants Martin Shefsky and his solely owned holding company, 2350183 Ontario Inc, alleged that the respondents breached Mr. Shefsky's reasonable expectations that he would control the corporation if he raised at least $5,000,000 in investments for CGMI. In particular, he would be entitled to name three of five directors on the board and would retain control through the shares owned by him and the investors he introduced to CGMI. The appellants assert that the respondents engaged in oppressive conduct, including a secret placement of shares that diluted Mr. Shefsky's voting power and refusing to allow Mr. Shefsky to appoint a third member to the board when his initial nominee, Mr. Cohen, refused to accept the position.

2016 ABCA 103 (CanLII)

Decision Below

[6] The chambers judge set out the uncontested facts, the facts that he found could be inferred from the affidavit evidence and documents, and the contested facts, before defining the issues, undertaking a legal analysis and setting out his conclusions. During the two-day special chambers hearing – which hearing was preceded by important interlocutory motions – the sole issues before the chambers judge were:

(i) whether the newly-elected Board of Directors of CGMI ought to be replaced by a Board selected by Mr. Shefsky;

(ii) whether shares ought to be offered to Mr. Shefsky and his designees on the same terms as what the appellants refer to as the "Secret Private Placement" (which also is the terminology used by the chambers judge in his Decision and which phrase we will continue to use as an aid to comprehension); and,

(iii) whether the Court should give control of CGMI to Mr. Shefsky?

[7] The chambers judge reviewed a substantial volume of affidavits, documents and transcripts from cross-examinations on numerous affidavits.

[8] The chambers judge specifically noted the admonition about conflicting evidence in ***Charles v Young***, 2014 ABCA 200 at paras 4-5, 577 AR 54 and the cases cited therein, and to that end reviewed "the extensive materials to ensure that I make findings based on uncontested facts or, where there are contested facts, on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties": ***Decision*** at para 6. The chambers judge identified facts, and drawn inferences, and noted many of the instances where the evidence conflicted.

[9] After citing the culture shift embedded in ***Hyrniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87, and this Court's endorsement of same in ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108 at para 15, 572 AR 317, the chambers judge noted that the parties chose a chambers procedure knowing the limitations of affidavit evidence, and were aware of the implications of such a decision. Further, the chambers judge noted that the parties expressed a desire to avoid the expense and complication of trial if possible because most, if not all, of the witnesses were in Ontario, some of the lawyers are from Ontario, and because matters in issue were relatively time-sensitive.

[10] The chambers judge identified the alleged reasonable expectations that Mr. Shefsky contended merited oppression relief:

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

[11] As to the first expectation, the chambers judge determined that even though Mr. Shefsky did not raise $5,000,000 by the deadline specified in the Term Sheet, and despite the dispute about whether to count certain investors, Mr. Shefsky had a reasonable expectation that the Term Sheet would be extended and honoured: ***Decision*** at paras 81-103.

[12] As to the second expectation, the chambers judge concluded that Mr. Shefsky had a reasonable expectation that he would be permitted to appoint a director other than Mr. Cohen when the latter refused to take the position: ***Decision*** at paras 104-108. However, he declined to find that Mr. Shefsky had an ongoing right to name a new director after the April 2013 shareholders' meeting because Mr. Shefsky had never taken steps to appoint a new director (which finding of fact is strenuously disputed by the appellants). Since Mr. Shefsky had not taken steps to appoint a new director, the chambers judge decided that Mr. Shefsky was asserting a "purely hypothetical breach of expectations" and concluded that "[w]hile the actions of the Board suggest that its members agreed that Shefsky could nominate a third person to the Board, thus giving rise to both a subjective and objective expectation, Shefsky never tried to act on that expectation and therefore it was never breached": ***Decision*** at paras 109-121.

[13] As to the expectation of control of CGMI, the chambers judge found as a fact that Mr. Shefsky did not have a reasonable expectation that he had sufficient shareholders' support to control CGMI, at any time: ***Decision*** at paras 122-126.

[14] In the result, the chambers judge dismissed the appellants' motion for oppression.

Applicable Legislation

[15] The oppression remedy is located in the Alberta *Business Corporations Act*, RSA 2000, c B-9, in particular sections 239 and 242:

> **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,

2016 ABCA 103 (CanLII)

(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.

2016 ABCA 103 (CanLII)

[16] A complainant within the categories mentioned may apply to the court for an oppression remedy:

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

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

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

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

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

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

(a) an order restraining the conduct complained of;

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

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

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

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

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

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

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

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

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

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

(l) an order compensating an aggrieved person;

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

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

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

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

(q) an order granting permission to the applicant to

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

2016 ABCA 103 (CanLII)

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

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

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

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

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

RSA 2000 cB-9 s242; 2014 c13 s49

Grounds of Appeal

[17] Although the appellants list numerous grounds of appeal in their factum, the only issues on which they provided written and oral argument can be summarized as follows:

(a) the chambers judge erred by mischaracterizing the appellants' argument about the Secret Private Placement as being loss of control rather than loss of the opportunity to gain control;

(b) the chambers judge erred by limiting their complaint about the Secret Private Placement to being an issue about control and failing to consider that regardless of control, the appellants had a reasonable expectation that the Secret Private Placement would not proceed in the circumstances; and

(c) the chambers judge erred by concluding that the issue of Mr. Shefsky's reasonable expectation that he would be permitted to appoint a third director to the Board was moot because Mr. Shefsky did not propose a replacement nominee for Mr. Cohen.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

Standard of Review

[18] Issues of jurisdiction and the test for oppression are questions of law, and should be reviewed on a standard of correctness: ***Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta***, 2015 ABCA 101 at para 33, 382 DLR (4th) 150; ***McRoberts v Whissell***, 2006 ABCA 388 at para 4, 2006 CarswellAlta 1689.

[19] The application of a legal test to a set of facts is a question of mixed fact and law. Whether conduct amounts to oppression is a question of mixed fact and law and is therefore reviewable for palpable and overriding error. The same standard is applicable to whether a party possessed reasonable expectations, which is a question of fact: ***1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd***, 2014 ABCA 386 at para 24, 35 BLR (5th) 1.

[20] Normally, when reviewing a decision that omits an issue, an appeal court is left with two options: (1) direct a new trial on the issue; or (2) review the record and attempt to arrive at a conclusion with respect to the missed issue: ***Adeco Exploration Company Ltd v Hunt Oil Company of Canada Inc***, 2008 ABCA 214 at para 49, 437 AR 33.

[21] The imposition of a remedy for oppression is discretionary, and deference should be accorded to it unless an error in principle has been made or the decision is otherwise unjust: ***Naneff v Con-Crete Holdings Ltd*** (1995), 23 OR (3d) 481 at 487, 23 BLR (2d) 286 (CA).

Analysis

The Supreme Court of Canada's Analytical Framework in *BCE*

[22] A court's broad equitable jurisdiction under the oppression remedy is subject to three governing principles.

- First: not every expectation, even if reasonably held, will give rise to a remedy because there must be some wrongful conduct, causation and compensable injury in the claim for oppression: ***BCE*** at paras 68, 89-94.
- Second: not every interest is protected by the statutory oppression remedy. Although other personal interests may be connected to a particular transaction, the oppression remedy cannot be used to protect or advance, directly or indirectly, these other personal interests. "[I]t is only their interests as shareholder, officer or director as such which are protected": ***Naneff v Con-Crete Holdings Ltd*** at para 27. Furthermore, "the oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation": ***Stahlke v Stanfield***, 2010 BCSC 142 at para 23, aff'd 2010 BCCA 603 at para 38, 305 BCAC 18.
- Third: courts must not second-guess the business judgment of directors of corporations. Rather, the court must decide whether the directors made decisions

> which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions. Provided the directors acted honestly and reasonably, and made a decision in a range of reasonableness, the court must not substitute its own opinion for that of the Board. If the directors have chosen from one of several reasonable alternatives, deference is accorded to the Board's decisions: ***Stahlke*** at para 22; ***Pente Investment Management Ltd v Schneider Corp*** (1998), 42 OR (3d) 177 at para 36, 44 BLR (2d) 115 (CA); ***BCE*** at para 40.

2016 ABCA 103 (CanLII)

[23] In ***BCE*** the Supreme Court underlines that the stakeholder's actual expectations are not conclusive; rather, reasonableness implies that the analysis is objective and contextual. "In the context of whether it would be 'just and equitable' to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": ***BCE*** at para 62.

[24] ***BCE*** at para 68 stipulates a two-step inquiry in an oppression claim:

1. Does the evidence support the reasonable expectation asserted by the claimant?

2. Does the evidence establish that the reasonable expectation was

   (a) violated by conduct, and

   (b) falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[25] It is essential that the complainant establish wrongful conduct, causation and compensable injury: ***BCE*** at para 90.

[26] ***BCE*** at paras 72-83 sets out some useful factors the court may consider in determining whether a reasonable expectation exists, including:

- general commercial practice
- the nature of the corporation
- the relationship between the parties
- past practice
- steps the claimant could have taken to protect himself
- any representations and agreements, and
- the fair resolution of conflicts between corporate stakeholders

2016 ABCA 103 (CanLII)

[27] As the chambers judge states in para 75 of his decision:

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

[28] The chambers judge goes on to state that oppression has been described as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" related to the conduct of the corporations' affairs. That is, "a wrong of the most serious sort": ***Decision*** at para 76.

[29] Unfair prejudice is described in ***BCE*** at para 93 as conduct that is less serious than oppression and includes such things as:

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

[30] Unfair disregard is described as the least serious of the three, and it includes favoring a director by failing to properly prosecute claims, improperly reducing dividends, or failing to deliver a claimant's property: ***BCE*** at para 94.

[31] With all this in mind, each specific ground of appeal is discussed below.

Did the chambers judge err by mischaracterizing the appellants' argument about the Secret Private Placement as being loss of control rather than loss of the opportunity to gain control?

[32] The chambers judge found that there is no evidence the appellants ever had control of CGMI. This finding is supported by the evidentiary record and is fatal to the suggestion that Mr. Shefsky had a reasonable expectation that he could control CGMI, or that this alleged expectation was defeated by the Secret Private Placement.

[33] The appellants now assert that the special chambers judge did not properly characterize their submissions regarding the Secret Private Placement. They say their argument was not that the

Secret Private Placement was oppressive because it resulted in Mr. Shefsky losing control of CGMI, but rather because it resulted in him losing the opportunity to gain control of the company. The appellants acknowledge that it was not a certainty that Mr. Shefsky would win control. However, they argue that the issuance of the Secret Private Placement diluted his shares and ensured that he could not win a shareholder vote. The appellants essentially argue that the Secret Private Placement resulted in the loss of a chance for control of CGMI.

[34] However, the appellants' argument about their expectation as summarized above was not clearly articulated before the chambers judge. The transcript of the hearing below shows that the appellants' arguments focused on Mr. Shefsky's expectation that he would control CGMI once he raised the funds specified in the Term Sheet, and the issue of control underlies the appellants' entire case including their requested remedies; the chambers judge cannot be faulted for characterizing the appellants' expectation in the manner he did. In addition to establishing that their expectations were reasonable, the onus is on the claimants to identify the particular expectations that they allege have been violated: ***BCE*** at para 70.

[35] The respondents rely on ***Quan v Cusson***, 2009 SCC 62 at paras 36-37, [2009] 3 SCR 712 to urge us not to entertain a new issue raised for the first time on appeal because they say the interests of justice do not require it and there is not a sufficient evidentiary record.

[36] We do not agree the appellants are raising a new issue for the first time on this appeal. Despite the fact that their position was not clearly articulated before the chambers judge, the record shows that the appellants did make submissions effectively stating that insofar as Mr. Shefsky was concerned, the true intention of the Secret Private Placement was to dilute his shares and prevent him from winning a proxy war that, absent the Secret Private Placement, would have been a possibility. This issue was sufficiently canvassed on the record such that this Court can address it on appeal.

[37] The essential difficulty with Mr. Shefsky's position is that a finding of oppression requires objective evidence that there has been oppression. A mere speculation or hope or, as the respondents put it, an "aspirational belief" is insufficient to form the foundational evidence for this type of extraordinary action and remedy. The ability of the disappointed or aggrieved to avail themselves of the oppression action and its remedies must be carefully circumscribed so as not to expand the legal right to mere aspirations or disappointments. This is why wrongful conduct, causation, and compensable injury must all be established by the claimant in an oppression claim: ***BCE*** at para 90. An expectation based on a loss of an opportunity, without proof that such opportunity was more than merely speculative, is insufficient to ground an oppression claim because causation and compensable injury have not been established.

[38] In our view, the chambers judge did not err in failing to find that the loss of an opportunity to gain control of CGMI was a reasonable expectation violated by the Secret Private Placement.

2016 ABCA 103 (CanLII)

Did the chambers judge err by limiting the appellants' complaint about the Secret Private Placement to being an issue about control and failing to consider that regardless of control, the appellants had a reasonable expectation that the Secret Private Placement would not proceed in the circumstances?

[39] Aside from the issue of control, the appellants argue that the Secret Private Placement was also oppressive because of the circumstances in which it occurred; they allege it involved the issuance of shares to a select group of investors that did not include Mr. Shefsky, at a price below market value, without Mr. Shefsky's knowledge but after he had advised the other Board members that he intended to call a shareholders' meeting for the purpose of electing a new slate of directors, and in the context of what the appellants allege was a significantly better offer from Mr. Caland.

[40] The difficulty with this argument is that the appellants have failed to identify any specific expectation, apart from the expectation of control, which was violated by these actions. The appellants submit that a shareholder does not need to prove control in order to establish that the act of issuing shares to a select group of investors well below market value is oppressive, and that every shareholder, including Mr. Shefsky, has a reasonable expectation that directors will not do this. However, the oppression remedy is a personal claim and requires the complainant to identify a personal interest that is alleged to have been violated. It is not sufficient to allege that shareholders generally have an expectation that directors generally will not act oppressively. Such assertions are contrary to the analytical framework set out in ***BCE***.

[41] In ***Rea v Wildeboer***, 2015 ONCA 373 at paras 34-35, the distinction between a generalized expectation and a personal claim that potentially attracts the oppression remedy is clearly set out:

> The oppression remedy is not available – as the appellants contend – simply because a complainant asserts a "reasonable expectation" (for example, that directors will conduct themselves with honesty and probity and in the best interests of the corporation) and the evidence supports that the reasonable expectation has been violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard". The impugned conduct must be "oppressive" of or "unfairly prejudicial" to, or "unfairly disregard" *the interests of the complainant*: OBCA, s. 248(2). No such conduct is pled here.
>
> That the harm must impact the interest of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as a part of the collectivity of stakeholders as a whole – is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*. The legislative response was to create *two* remedies, with two different rationales and two separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

[42] We agree that the cases cited in support of Mr. Shefsky's claim that he had some other reasonable expectation that was violated are distinguishable. In contradistinction to ***Legion Oils Ltd v Barron*** (1956), 2 DLR (2d) 505, 17 WWR 209 (AB SC-TD), ***Keho Holdings Ltd v Noble***, 1987 ABCA 84, 38 DLR (4th) 368 and ***Smith v Hanson Tire Company Ltd***, [1927] 3 DLR 786, 21 Sask LR 621 (CA), in the case at bar Mr. Shefsky did not have an articulated reasonable expectation that was violated by the Secret Private Placement. Moreover, oppression cases are highly fact-specific and what may be oppressive or improper in the case of a closely-held private corporation is not necessarily oppressive in the context of a publicly-held corporation: ***BCE*** at para 59.

[43] In any event, the chambers judge did not find that the Secret Private Placement was below market value, nor was there any evidentiary foundation for that assertion. Indeed, the determination of market value for a junior mining company in the context of a private placement (as opposed to a sale of a small block on the stock market) would require expert evidence. The pricing of shares issued through the Secret Private Placement was made in accordance with the rules established by the TSX Venture Exchange. On August 12, 2013 CGMI's lawyers filed for a price reservation at a price of $0.05, which was approved by the TSX Venture Exchange as an acceptable price in light of prevailing market prices.

[44] In connection with the requirement to raise additional funds, there was evidence accepted by the chambers judge that in the aftermath of the COO's termination, it was necessary for CGMI to raise additional funds in order to redo the geological reports and other work that the directors determined had been done improperly. As is a common occurrence in junior mining companies, as admitted by Mr. Shefsky, the Board of CGMI decided to turn to existing shareholders to try to raise these funds. There is no reason that Mr. Shefsky was entitled to prevent the corporation from offering additional shares to investors. The directors were entitled to make decisions in the best interests of the corporation, including raising additional capital, which may adversely affect the interests of particular stakeholders.

[45] Absent any evidence to the contrary, the timing, source and pricing of this financing was solely a matter of business judgment. We agree that a board of directors is entitled to substantial deference and we are loath to step into the discretionary purview of the Board absent any evidence which would lead us to a contrary view. We agree that based upon the unassailable findings of the chambers judge and our review of the record, the decision of the CGMI Board to engage in the Secret Private Placement was reasonable and entitled to judicial deference.

[46] Even if Mr. Shefsky and other shareholders had a claim for loss of value of their shares due to the Secret Private Placement, that claim belonged to the corporation. In ***Alvi v Misir*** (2004), 73 OR (3d) 566, 50 BLR (3d) 175 (SCJ), Cameron J. determined that a claim brought by shareholders for loss of value of their shares was a claim that belonged to the corporation. He stated at para 57 that directors cannot owe statutory fiduciary duties and duties of care to shareholders if they are already owed to the corporation without placing the directors in an intolerable conflict of interest

and explained that "[s]uch parallel duties would create untenable and unreasonable conflicts" that would render impossible the jobs of directors and officers.

[47] The Supreme Court of Canada has adopted a similar analysis in ***BCE*** at para 66:

> The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[48] Put simply, Mr. Shefsky's interests in not having his shares diluted by the Secret Private Placement were not interests that the directors of the corporation were obliged to consider. In fact, Mr. Shefsky's sole interests were diametrically opposed to the interests of the corporation and its directors' attempts to raise additional funding for this junior mining company so that exploration could continue after Mr. Moeller's departure. Mr. Shefsky's only reasonable expectation in these circumstances was that the directors would act in the best interests of the corporation, and there is no evidence to suggest that they did not do so.

[49] Moreover, it was entirely reasonable and open to the Board of CGMI to reject the deal offered by Mr. Caland for reasons that were before the chambers judge as reflected in the minutes of the director's meeting of September 10, 2013. Notwithstanding the rejection of Mr. Caland's offer, there is further evidence upon which the chambers judge did decide that the CGMI Board was open to the possibility of both doing the Secret Private Placement and Mr. Caland's deal, but Mr. Shefsky indicated that the deals were mutually exclusive and that to accept Mr. Caland's offer would require rejection of the other financing.

[50] The chambers judge was not persuaded that the Board's purpose in approving the Secret Private Placement was to dilute Mr. Shefsky's ownership; rather, the chambers judge found that the Secret Private Placement was intended to raise money to replace the money that had been wasted on the improper exploration work done by the COO. Even if the effect was dilutive, Mr.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

Shefsky's only reasonable expectation was that the directors act in the best interests of the corporation, despite that so acting may not have coincided with Mr. Shefsky's personal interests. As ***BCE*** makes clear, the directors owe fiduciary obligations to the corporation only, and when particular shareholder interests do not coincide with the best interests of the corporation, the directors are nonetheless duty bound to protect the interests of the corporation above all else.

[51] Assuming that there was some evidence to support Mr. Shefsky's theory that the CGMI Board was acting to buttress the existing management slate of directors through the Secret Private Placement, contrary to Mr. Shefsky's personal interests, that is insufficient. Mr. Shefsky is required to prove that the Board's actions were contrary to the best interests of the corporation. Directors are entitled to consider who is seeking control and why. If the Board believes there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper: ***Teck Corp Ltd v Millar*** (1972), 33 DLR (3d) 288 at para 99, [1973] 2 WWR 385 (BCSC); ***Icahn Partners LP v Lions Gate Entertainment Corp***, 2011 BCCA 228 at para 83, 333 DLR (4th) 257.

[52] Accordingly, we see no reviewable error in the chambers judge's articulation and application of the binding law, or in his findings of fact or inferences drawn based upon the evidentiary record that was before him. This ground of appeal is dismissed.

Did the chambers judge err by concluding that the issue of Mr. Shefsky's reasonable expectation that he would be permitted to appoint a third director to the Board was moot because Mr. Shefsky did not propose a replacement nominee for Mr. Cohen?

[53] The chambers judge did not find it necessary to decide whether Mr. Shefsky had a continuing right after the April 2013 annual meeting to appoint a third member to the Board of CGMI because Mr. Shefsky did not attempt to exercise this asserted right, and therefore any reasonable expectation he may have had in this regard was never breached.

[54] The appellants argue that it was an error for the chambers judge to rely on this narrow technicality, rather than considering all the circumstances of the alleged oppression. Moreover, the appellants contend that Mr. Shefsky did in fact nominate a third director to the Board, in a letter from his lawyer dated October 2, 2013. Implicit in their argument is the assumption that Mr. Shefsky had a continuing right to appoint a third member to the Board up until the January 2014 annual shareholders' meeting, when a different management slate of board members was elected.

[55] The respondents suggest that there are three fatal problems with the appellants' position:

(i) It mischaracterizes the reasonable expectation that was actually found by the chambers judge in this case;

(ii) Mr. Shefsky's expectations did not arise in his capacity as a shareholder, director, or officer of CGMI and therefore are not protected by the oppression remedy; and

(iii) Mr. Shefsky's expectation, if it did exist, was not disregarded in an oppressive manner.

[56] Each of these contentions is addressed separately below.

(i) Mischaracterization of the reasonable expectation that was actually found by the chambers judge in this case

[57] The chambers judge found that Mr. Shefsky had not attempted to exercise his right to appoint a third member of the Board of CGMI. In April 2013, the slate of directors was duly elected by the shareholders, so the relevant period of time for complaint by Mr. Shefsky was between April 2013 and the January 2014 annual shareholders' meeting.

[58] Contrary to the appellants' suggestion, the chambers judge did not make a finding that Mr. Shefsky had a continuing right to appoint a third member to the Board up until the January 2014 annual shareholders' meeting. As noted above, the chambers judge found it unnecessary to decide this point, and the evidence does not support the appellants' position. Rather, the record shows that any reasonable expectation Mr. Shefsky may have had to appoint a third member to the Board was extinguished by the April 2013 annual meeting, because any expectation to control the composition of the Board past this date is inconsistent with the corporation's public statements, its statutory disclosure obligations, and the basic rights of its shareholders as a whole to choose the board of directors of their publicly-traded company.

[59] Prior to the April 2013 annual meeting, Mr. Shefsky had an opportunity to comment on the draft circular but did not propose any changes to the slate which listed Messrs. Shefsky, Brandolini, Churchill, Cronin and Cinq-Mars as the management slate of directors. Indeed, at the April 2013 meeting Mr. Shefsky voted for the slate nominated and set out in the circular.

[60] As the respondents point out, if there had in fact been an arrangement whereby Mr. Shefsky retained a unilateral power after the April 2013 shareholders' vote to compel one of the elected directors to resign in favor of an unidentified nominee of his choice, that would have been contrary to the voting shareholders' wishes and would be material information requiring disclosure in the circular. Failure to disclose would constitute an offence under s 122(1)(b) of the Ontario *Securities Act*, RSO 1990, c S-5, the commission of which would clearly not be in the corporation's best interests.

[61] Moreover, the Board has a fiduciary interest to act in the best interests of the corporation, which includes an obligation not to fetter its discretion absent a unanimous shareholders' agreement: ***820099 Ontario Inc v Harold E Ballard Ltd*** (1991), 3 BLR (2d) 113 at 123 at paras 102-103 (Ont Gen Div), aff'd (1991), 3 BLR (2d) 123 (Ont Div Ct). The expectation alleged by Mr. Shefsky is inconsistent with his own obligations as a director, and is not reasonable.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

(ii) Mr. Shefsky's expectations did not arise in his capacity as shareholder, director, or officer of CGMI and therefore are not protected by the oppression remedy

[62] The respondents suggest that there is doubt about the correctness of the chambers judge's analysis of Mr. Shefsky's alleged expectations arising from the Term Sheet.

[63] In particular, they submit that the chambers judge erred in principle in finding that the oppression remedy protects Mr. Shefsky's expectation to appoint Mr. Cohen (or his replacement), when that expectation arose in Mr. Shefsky's capacity as a financier or underwriter of CGMI, and not as a shareholder, officer or director.

[64] In this branch of their argument, the respondents note that the oppression remedy protects the interests of a "complainant" within the meaning of s 239(b) of the Alberta *Business Corporations Act*, which includes security holders, creditors, officers and directors. The statute does not protect the interests of those acting as financiers, underwriters or investment dealers for or on behalf of a corporation.

[65] Simply put, where harm is alleged to have been done to a complainant's interests in a capacity outside of the scope of s 239(b), the oppression remedy is not engaged so as to protect these interests outside the scope of the legislation: Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 265-267.

[66] In particular, ***Rogers Communications Inc v MacLean Hunter Ltd*** (1994), 2 CCLS 233 (Gen Div) makes clear that in a position *qua* bidder, relief cannot be obtained under the applicable legislation; rather, it is only in the position *qua* shareholder that there can be a claim of oppression. Looking at matters as a whole in that case, the court concluded that Rogers' complaint arose in its position as a bidder and not as a shareholder: ***Rogers*** at para 9.

[67] The same point is made by the British Columbia Supreme Court in ***Icahn Partners LP v Lions Gate Entertainment Corp***, 2010 BCSC 1547 at paras 179-83, 15 BCLR (5th) 132, aff'd 2011 BCCA 228, 333 DLR (4th) 257, and in ***Stahlke*** at para 23 where it stated: "The oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation."

[68] We agree that Mr. Shefsky's reasonable expectation to appoint a third director found in the Term Sheet, or grounded in the various representations that were made by Mr. Churchill to Mr. Tomlinson, were not made by, or to, Mr. Shefsky in his capacity as a shareholder, director or officer of CGMI. We note that the initial version of the Term Sheet was signed on or about October 19, 2012, well before Mr. Shefsky became an officer (in December of 2012), a shareholder (in February of 2013) or a director (in April of 2013).

[69] We also agree with the respondents' contention that the October 19, 2012 Term Sheet – replaced by the December 12, 2012 Term Sheet but with no change to material terms – is simply a

2016 ABCA 103 (CanLII)

sui generis contract made between CGMI and Mr. Shefsky in his capacity as a potential financier, promoter or underwriter in relation to the $5,000,000-8,000,000 private placement to be arranged for CGMI.

[70] The respondents further argue that prospective shareholders do not have standing under the oppression remedy. The requirement that a complainant actually be a shareholder at the time of the oppression complained of is logical, since the question whether a complainant shareholder has sustainable grounds of oppression that brings the shareholder within the ambit of the oppression remedy "requires a time-related factual nexus between the complainant and the oppression complained of": ***Ford Motor Co of Canada Ltd v Ontario Municipal Employees Retirement Board*** (2004), 41 BLR (3d) 74 at para 246, [2004] OTC 53 (SCJ), rev'd (but not on this point) (2006), 263 DLR (4th) 450 (CA), leave to appeal to SCC refused (2006), 267 DLR (4th) ix.

[71] Although this is a legally correct proposition, we find that in October of 2012 Mr. Shefsky possessed a legal entitlement to acquire shares. He had acquired an option, a right of first refusal, to shares and his subscription (and that of other accredited investors) was to be reflected in a formal subscription agreement to be entered into prior to December of 2012. In other words, Mr. Shefsky's acceptance of the Term Sheet conferred upon him the right to perform confirmatory due diligence and exercise his option in respect of the "Issue", defined in the Term Sheet as "[p]rivate placement of units (each unit consisting of one common share . . . in the Capital of the Company and three-quarters one Common Share purchase warrant, each whole warrant . . . being exercisable for one Common Share) of the Corporation (the "Units") (together, the "Offering")" at a price of $0.10 per Unit.

[72] What the Term Sheet did not do, however, was confer upon Mr. Shefsky a right to enjoin any further share placements. Quite simply, an existing shareholder cannot complain about subsequent share offerings even if it has the effect of diluting that complaining shareholder's shares, provided the share offering is done in the best interests of the corporation. And, no shareholder has the right to acquire additional shares and no corporation is obliged to offer additional shares to existing shareholders. When a corporation offers its shares for sale, an individual can decide whether to accept the offer. But, it is not the case that a shareholder or putative shareholder can demand that shares be sold to him personally. There are good corporate business judgment reasons why a corporation may not, in fact, wish to sell shares to a certain individual or entity, either because of regulatory issues or because the directors do not believe that the putative purchaser's participation in the corporation would serve the best interests of the corporation. In this corporate exercise of business judgment, this Court will not and should not lightly interfere.

[73] We reject the respondents' assertion that because the Subscription Agreement contains an "entire agreement" clause that governs the relationship of Mr. Shefsky *qua* shareholder, the effect of the entire agreement clause is that it supersedes any prior understanding between Mr. Shefsky *qua* shareholder and CGMI. Since the Subscription Agreement does not contain any reference to

2016 ABCA 103 (CanLII)

the management provisions in the revised Term Sheet upon which Mr. Shefsky bases his claim, the respondents submit that is the end of the matter. We disagree. Similarly, we disagree that Mr. Shefsky's role as CEO, as governed by the terms of the Consulting Agreement between CGMI and 2350183 Ontario Inc, is a complete answer to Mr. Shefsky's oppression claim, despite that the Consulting Agreement also contains an "entire agreement" clause. Put another way, the fact that neither the Subscription Agreement nor Consulting Agreement contain a reference to any expectation or right on behalf of Mr. Shefsky to control the composition of CGMI's Board is not determinative. Rather, we must consider the entire context, not merely the discrete contracts made between the appellants and some of the respondents.

[74] The essential difficulty with Mr. Shefsky's invocation of the oppression remedy in respect of the Term Sheet, however, is that he attempts to gain access to the court's equitable oppression remedy jurisdiction for a *personal* claim that arises pursuant to the provisions of the Term Sheet: his *personal* claim for breach of contract. At its core, the Term Sheet is a commercial agreement negotiated at arm's-length by sophisticated parties. That commercial agreement must not be rewritten by a court importing notions of "just and equitable". It would be dangerous territory, indeed, and an improper conflation of contract law and equitable oppression principles to suggest that the latter can come to the aid of a claim for breach of any contractual promises made to Mr. Shefsky in his personal capacity. See, for example, ***JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd***, 2008 ONCA 183 at para 60, 234 OAC 59.

[75] The legal and jurisdictional boundaries which circumscribe, and delineate, resort to an oppression remedy must be firmly set. A party aggrieved, whether by having made an imprudent, or incomplete, or improvident personal bargain, cannot be permitted to seize an oppression remedy and, thus, gain an equitable remedy that was never in the contemplation of the contracting parties.

[76] In summary, Mr. Shefsky and 2350183 Ontario Inc's claims derivative of the provisions of the Term Sheet are contractual in nature. These claims fall outside the legal and jurisdictional boundaries of an oppression remedy.

(iii) Mr. Shefsky's reasonable expectation, if it did exist, was not disregarded in an oppressive manner

[77] Assuming the appellants had proven that their reasonable expectations were unmet, they must go farther to prove that those reasonable but unmet expectations were violated by conduct that falls within the terms 'oppression', 'unfair prejudice' or 'unfair disregard' of a relevant interest. This proposition is made abundantly clear in ***BCE*** at para 68. See also ***Rea v Wildeboer*** at paras 34-35.

[78] On appeal, the parties conceded that the chambers judge had articulated correctly the principles of law and, in particular, that he was required to consider the meaning of "oppression" and "unfair prejudice" and "unfair disregard".

[79] In his decision at paras 76-77 the chambers judge correctly notes:

> [76] Oppression has been described as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" related to the conduct of the corporations affairs: "a wrong of the most serious sort" (at para 92). Unfair prejudice is conduct that is less serious than oppression, and includes such things as:
>
> > . . . squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm . . . (at para 93)
>
> [77] The Supreme Court went on to describe unfair disregard as the least serious of the three, and noted that it included favouring a director by failing to properly prosecute claims, improperly reducing dividends, or failing to deliver a claimant's property.

[80] The chambers judge found that the appellants had not met their persuasive burden of showing that they had suffered oppression, unfair prejudice or unfair disregard because Mr. Shefsky did not name a replacement, seek to call, or actually call a shareholders' meeting himself, or propose a different slate of directors. The appellants challenge the trial judge's finding in this regard on the basis of an October 2, 2013 letter from the appellants' lawyer to the respondents.

[81] A demand letter emanating from counsel's office does not amount to Mr. Shefsky naming a replacement, seeking to call, or actually calling a shareholders' meeting himself, nor does it equate to Mr. Shefsky proposing a different slate of directors. The October 2, 2013 letter from WeirFoulds says as follows:

> Mr. Shefsky demands:
>
> (a) that one of Michael Churchill, Kevin Cinq-Mars or Patrick Cronin immediately resigns from the board so that his place can be taken by Charlie Cohen who is prepared to accept the nomination; and
>
> (b) that the September Placement be immediately unwound.

[82] After making the demands cited, the letter abruptly concludes: "If we have not received a positive response by October 11, 2013 our client intends to commence immediate legal proceedings against you, and to seek any appropriate injunction or mandatory order."

2016 ABCA 103 (CanLII)

[83] The reader of the demand letter would appreciate that the demand to replace one of the duly elected directors within 9 days, without any notice or regard to the shareholders of the corporation, would expose the corporation to significant jeopardy. The law requires that all shareholders be notified of material information. Mr. Shefsky's assertion of a right to appoint a third director was certainly material information. The demand letter from the lawyer was not copied to all other shareholders; thus, it cannot in any sense amount to notification that would have satisfied the reasonable expectations of the other shareholders, which may not have comported with Mr. Shefsky's personal interests, or with the best interests of the corporation.

[84] We find that the demand letter does not meet the requisite degree of proof required of Mr. Shefsky to meet his burden of controverting evidence on the record that he did not – within the corporate governance structure – name a replacement, seek to call, or actually call a shareholders' meeting, or propose a different slate of directors. Compliance with that which was demanded, within a 9-day period, would not have been in the best interests of CGMI.

[85] We conclude that the October 2, 2013 letter is not an exercise of Mr. Shefsky's right to appoint a third member of the Board of Directors, nor is it sufficient evidence to controvert the chambers judge's finding that Mr. Shefsky took no steps to appoint a third director. Further, there is no evidence that Mr. Shefsky's expectation that he could appoint a third director to the Board was violated in a manner that was oppressive, unfairly prejudicial, or that unfairly disregarded his protected interests.

Conclusion

[86] In conclusion, and for the foregoing reasons, the appeal is dismissed.

Appeal heard on February 5, 2016

Memorandum filed at Edmonton, Alberta
this 14th day of April, 2016

Costigan J.A.

Schutz J.A.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

Dissenting Memorandum of Judgment
of the Honourable Mr. Justice Slatter

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[87] The issue on this appeal is whether the appellants Shefsky and 2350183 Ontario Inc. are entitled to a remedy for oppressive conduct arising from the way the business of California Gold Mining Inc. was conducted.

Facts

[88] California Gold Mining is a junior mining company listed on the TSX-Venture Exchange. In 2012 it was managed and controlled by its president and CEO, Michael Churchill; its chairman Patrick Cronin; a director, Kevin Cinq-Mars; a major shareholder, R.W. Tomlinson; and other associates of theirs. This original group can conveniently be described as the "Incumbent Group".

[89] California Gold Mining had unsuccessfully attempted to raise money to purchase a gold mining property in Mariposa County, California. The company's financial advisor, Haywood Securities, introduced Shefsky as a person who might be able to assist in raising the necessary funds.

[90] In October 2012, California Gold Mining and Shefsky signed a Term Sheet respecting the raising of funds to purchase the Mariposa property. The essential terms were that Shefsky would attempt to raise between $5 million and $8 million via a private placement of shares by November 30, 2012. If he was successful, certain changes would be made to the management structure of the company:

- two existing board members would resign in favour of Shefsky and his nominee, Charlie Cohen;
- Nuno Bandolini, another ally of the appellants, would be appointed to the board, provided he invested at least $100,000;
- Churchill would resign as CEO, but remain as president, and Shefsky would be appointed as CEO;
- the Chief Operating Officer would resign in favour of Eric Moeller.

The expectation was that Shefsky would nominate three members of a five-person board, and Shefsky and Moeller would essentially control the day-to-day operations: reasons, para. 105.

2016 ABCA 103 (CanLII)

[91] Shefsky was unable to raise the funds by the original deadline of November 30, 2012, and the deadline was extended to December 31. All of the money was actually raised by February, 2013, when the private placement closed. The chambers judge found that nobody involved considered time to be "of the essence", and all were content that the funds were actually raised. There was ample evidence about the words and conduct of the parties to support the inference that Shefsky had complied with the fundraising pre-conditions of the Term Sheet.

[92] At some point a dispute arose as to whether Shefsky was entitled to credit for all of the $5 million raised. It was suggested that Shefsky was not entitled to credit for subscriptions from incumbent shareholders, or subscriptions that had been solicited by other members of the Board, or for units given to Haywood Securities for services rendered. Shefsky took the position that he had raised $5 million, or alternatively that the Term Sheet merely required that $5 million be raised for the private placement, regardless of the exact motivation for any specific investment. It is unclear whether this issue was only raised later, after the eventual falling out of the various groups. The chambers judge found (reasons, paras. 60, 102-3) ". . . it was objectively reasonable for Shefsky to conclude that his obligations under the Term Sheet had been met . . .".

[93] However, once Shefsky had raised the necessary funds, there was some resistance among the Incumbent Group to the agreed changes to the Board. None of the incumbents were keen to resign, and the suggestion was made that the deal had "morphed significantly" from what was originally contemplated. Further, Cohen was unexpectedly unable to serve on the Board, and Shefsky could not immediately find a replacement. There were various discussions about the final makeup of the Board, with Shefsky continuing to assert his right to nominate three members of a five-person board.

[94] In March 2013, when the time came to send out the management information circular for the April Annual General Meeting, Shefsky had still not identified a replacement for Cohen. As a result, the slate of directors proposed by management was Churchill, Shefsky, Bandolini, Cronin and Cinq-Mars. The appellants voted in favour of that slate. As a result, the appellants cannot complain that the election of these directors was in any way oppressive. On the other hand the record does not support an inference that Shefsky had abandoned his long-term right to appoint three members of a five-member board. The chambers judge declined to make a finding of fact about whether there were conversations about one board member resigning when a replacement for Cohen was identified: reasons, para. 36.

[95] Problems in the relationship started to appear. None of the incumbent directors was eager or willing to resign in favour of Shefsky's nominee. Moeller was terminated in July, allegedly for shortcomings in the performance of his work. Shefsky had some concerns about his own employment contract. There was evidence on the record that Shefsky continued to raise the topic of calling another shareholders meeting to restructure the composition of the Board.

[96] Matters came to a head in August of 2013. California Gold Mining's lawyers were instructed to file a price reservation with the TSX-V for a private placement with a share price of

2016 ABCA 103 (CanLII)

$0.05. This was below both the recent trading range and the book value of the company. At the Board meeting on August 21, 2013, Churchill made a general statement about seeking financing in the short term. Shefsky again expressed a desire to call a shareholders meeting to reconstitute the Board. Churchill approached the Incumbent Group and its supporters to subscribe to a proposed new private placement. The appellants were neither informed of the impending private placement, nor were they invited to participate. On September 9, 2013, a notice was sent to the Board members indicating that a vote would be held the next day to authorize the private placement, which by this point had been fully subscribed. This was the first time that Shefsky and Bandolini became aware of what they accurately describe as the Secret Private Placement.

[97] The Secret Private Placement contemplated the issuance of 15,860,000 units at $0.05 a unit, for gross proceeds to California Gold Mining of $793,000. Shefsky immediately contacted Pierre Caland, an investor, and persuaded him to finance a competing private placement. Within 48 hours, Shefsky was able to present to the Board a "Bought Deal" which contemplated the issuance of about 14,286,000 units at $0.07 a unit, for gross proceeds to California Gold Mining of approximately $1 million. In other words, the Bought Deal generated more capital for the company, through less dilution of the shareholdings.

[98] The Board raised a number of technical objections to the Bought Deal. It refused even a 48-hour adjournment of the meeting to allow Shefsky to address some of their concerns. The Secret Private Placement was approved, thereby diluting the shareholdings of the appellants and their supporters. The next week, Cinq-Mars proposed an equivalent private placement for the appellants' supporters in the sum of $793,000. Churchill, however, would not permit a further private placement for any more than $304,454. That obviously would not neutralize the dilution resulting from the Secret Private Placement. That, combined with the apparent repudiation of the overall arrangement in the Term Sheet by the Incumbent Group, caused Shefsky to decline the offer. Given all that had happened, it was now abundantly clear that the Incumbent Group was not going to implement the provisions of the Term Sheet which would have given Shefsky control of the Board.

[99] The appellants then commenced this litigation, alleging that the affairs of California Gold Mining had been conducted in an oppressive manner that unfairly disregarded their interests.

The Reasons of the Chambers Judge

[100] After reviewing the evidence and the facts, and stating the law with respect to oppression, the chambers judge identified the following issues:

1. What reasonable expectations are alleged by Shefsky? The chambers judge concluded at para. 79 that the applicants had asserted three:

    a. The Term Sheet would be honoured;

b. Shefsky would be permitted to appoint a director to replace Cohen; and

c. Shefsky would have control of California Gold Mining.

2. Were these expectations reasonable?

a. The Term Sheet

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

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

b. Appointment of a director to replace Cohen

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

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

c. The expectation of control.

3. If any reasonable expectations were breached, did any actions of the respondents constitute oppressive conduct?

4. If oppressive conduct was found, what is the appropriate remedy?

In summary, the chambers judge found (reasons at para. 127) that the applicants had established the first two reasonable expectations: that the Term Sheet would be honoured, and that Shefsky would be allowed to appoint a third member to the Board. The chambers judge concluded, however, that those two expectations were not violated. He found that the third expectation, that of "retaining control", was not reasonable, because Shefsky never had control.

[101] The chambers judge found that the first expectation, respecting the honouring of the Term Sheet, was established on the record. Even considering the dispute about who brought in some of the subscribers, Shefsky could reasonably expect that he had met his obligation of raising $5 million: reasons at para. 103. The record showed that the parties did not regard time as being "of the essence", and the fact that a small amount of the money was raised after December 31 was not significant.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

[102] With respect to the second expectation, the chambers judge found that Shefsky had a reasonable expectation that he could appoint a third member to the Board. He was not limited to appointing only Cohen, and Shefsky was entitled to find a replacement when Cohen was unable to accept the appointment: reasons at para. 108. However, this expectation was not breached. Shefsky voted for the slate in the 2013 management circular, and never thereafter named a replacement director: reasons at para. 114. Whether one of the existing directors would have resigned in favour of this nominee was therefore moot. Further, Shefsky did not prove that if he had nominated a replacement, a majority of the shareholders would have elected that nominee.

[103] The chambers judge found that the third expectation, that Shefsky would retain control of the Board, was not reasonable since he never had control to start with. Shefsky had not brought forward affidavits from a majority of the shareholders indicating that they would vote for him, an absence of evidence that the chambers judge found to be fatal: reasons at paras. 119, 123, 126. Thus, any expectation that Shefsky had about control was unreasonable.

[104] Given these conclusions, it was not necessary for the chambers judge to decide the third issue (whether any of the conduct was oppressive) nor the fourth issue (the appropriate remedy): reasons at para. 127.

Issues and Standards of Review

[105] The formulation of the core standards of review is set out in ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235:

(a) conclusions on issues of law are reviewed for correctness: ***Housen*** para. 8,

(b) findings of fact, including inferences drawn from the facts are reviewed for palpable and overriding error: ***Housen*** paras. 10, 23; ***H.L. v Canada (Attorney General)***, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and

(c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": ***Housen*** para. 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: ***Housen*** paras. 33, 36.

The standard of review for findings of fact and of inferences drawn from the facts is the same, even when the judge heard no oral evidence: ***Housen*** at paras. 19, 24-25; ***Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.***, 2015 ABCA 406 at para. 9.

[106] The appellants allege a number of errors. Firstly they argue that the chambers judge mischaracterized the third complaint as being limited to "a reasonable expectation of control". They argue that in the whole context, they had a reasonable expectation that the Incumbent Group

would not proceed with the Secret Private Placement, which itself was an oppressive act that unfairly disregarded their interests. This issue engages a mixed question of fact and law. The facts surrounding the Secret Private Placement are not materially in dispute; the remaining issue is whether they can reasonably amount in law to oppressive conduct.

[107] Secondly, error is alleged in the finding that any question about the reasonable expectation of nominating three directors out of five was moot. This is essentially a finding of fact.

[108] Thirdly, it is alleged that the chambers judge erred in requiring that the appellants bring forth direct evidence from shareholders that they would support Shefsky by voting their shares as he recommended. This is primarily a question of the weight of the evidence, which is only reviewable for palpable and overriding error.

The State of the Record

[109] The chambers judge unfortunately declined to make key findings of fact on some issues. He concluded that the law prevents a chambers judge from making findings on disputed evidence. He thus decided at para. 6 to resolve contested factual issues only "on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties." The reluctance of the chambers judge to draw inferences from the evidence before him leaves gaps in the record that require the necessary inferences to be drawn on appeal.

[110] There are admittedly cases that point out the dangers of attempting to resolve disputed issues, especially those that rely on findings of credibility, based on conflicting affidavits and documents that would support either party's position. An example is ***Charles v Young***, 2014 ABCA 200 at para. 4, in which the chambers judge attempted to decide whether the respondent was the adult interdependent partner of the deceased. But the record before the court will never be perfect or complete, even after a trial. Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the disputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability).

[111] ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87, a summary judgment case, pointed out the need to make greater use of summary procedures for deciding disputes. Rules that saw the trial as a default method of proving disputed facts should be moderated:

> 4 In interpreting these [new summary judgment] provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

2016 ABCA 103 (CanLII)

The mere fact that there might be some conflicting evidence on the record did not mean that a "fair and just adjudication" was not possible.

[112] The cases where it was impossible to resolve disputed factual issues in chambers tend to be more extreme. One category is cases that depend almost entirely on credibility, without any collateral documentation to support either side: ***Nieuwesteeg v Barron***, 2009 ABCA 235 at paras. 9-10, 460 AR 329; ***Haluschak v Stokowski*** (1990), 104 AR 10 at paras. 23-25, 39 CPC (2d) 8 (Master). In these cases, sometimes there has not even been cross-examination on the affidavits: ***Montgomery v Riviere***, [1989] AJ No 958 (CA); ***Guimond v Sornberger*** (1980), 25 AR 18 at para. 20, 13 Alta LR (2d) 228 (CA); ***Burton v Burton*** (1987), 84 AR 338 at para. 15, 12 RFL (3d) 113 (CA). As another example, in ***Schmidt v Wood***, 2013 ABCA 138, which involved an application for contempt, it could not be seen from the record with clarity what the underlying order actually required, never mind whether the respondent had complied. Some issues are particularly unsuited to resolution on a paper record: ***Achtem v McConnell***, [1986] AJ No 207 (CA) (the *bona fides* of a party); ***Barter v Barter*** (1996), 42 Alta LR (3d) 221 at para. 8 (CA) (best interests of a child with special medical needs).

[113] Not every piece of disputed evidence requires a trial. For example, a "bare denial" or bald allegation does not raise a triable issue: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 11, [2008] 1 SCR 372; ***Goldman v Devine***, 2007 ONCA 301 at para. 23; ***R. Floden Services Ltd. v Solomon***, 2015 ABQB 450 at para. 23, 24 Alta LR (6th) 76; ***Confederation Trust Co. v Alizadeh***, [1998] OJ No 408 (QL) (Gen Div). Nor does a self-serving affidavit unsupported by other evidence: ***Guarantee Co. of North America v Gordon Capital Corp.***, [1999] 3 SCR 423 at pp. 436-37. Nor does evidence that flies in the face of the balance of the record: ***Dagher v Glenn***, 2016 ABCA 38 at paras. 30-2; ***Pioneer Exploration Inc. (Trustee of) v Euro-Am Pacific Enterprises Ltd.***, 2003 ABCA 298 at para. 25-6, 27 Alta LR (4th) 62; ***Rogers Cable TV Ltd. v 373041 Ontario Ltd.*** (1994), 22 OR (3d) 25 (Gen Div); ***Klein v Wolbeck***, 2016 ABQB 28 at para. 26; ***Pizza Pizza Ltd. v Gillespie*** (1990), 75 OR (2d) 225 at p. 253 (Gen Div). Whether there is truly a "genuine issue requiring resolution at a trial" requires a nuanced balancing of the weight and perceived reliability of the evidence, the importance of the issue, the likelihood of there being a better record at trial, and any other relevant considerations.

[114] Where the parties decide, for whatever reason, that they do not wish to suffer the expense or delay of a full trial, a chambers judge should still attempt to resolve the dispute, if possible. It is important to note that the *Business Corporations Act*, RSA 2000, c. B-9, contemplates that oppression disputes will be decided "on application". Section 242(3)(p) includes as a possible remedy "an order requiring the trial of any issue", which demonstrates that a trial is not the presumptive forum for oppression litigation. Rigid rules preventing the reconciliation of inconsistent evidence in a chambers setting are inconsistent with this approach.

[115] As the chambers judge noted at para. 9:

2016 ABCA 103 (CanLII)

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

This is the proper approach, but it should not be constrained by artificial or formalistic rules stating that any issue of fact disputed on the record cannot be resolved in chambers. As noted in ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108 at para. 15, 94 Alta LR (5th) 301: "Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication."

2016 ABCA 103 (CanLII)

The Oppression Remedy

[116] The *Business Corporations Act* provides a remedy to any "complainant" (defined to include any security holder, creditor, director, officer or "other proper person") who has been the subject of oppressive conduct with respect to the business of the corporation. The scope of the remedy is provided in s. 242(2):

> (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.

This statutory remedy has been described as extending beyond strict legal rights to encompass "not just what is legal but what is fair . . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities": ***BCE Inc. v 6796508 Canada Inc.***, 2008 SCC 69 at para. 58, [2008] 3 SCR 560. The three types of conduct mentioned in s. 242(2) are not mutually exclusive and should be read in combination: ***BCE*** at para. 89.

[117] ***BCE*** at para. 68 outlines a two-step process for the analysis:

(1) Does the evidence support the reasonable expectation asserted by the claimant? and

(2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

Once these two initial conditions are satisfied, the applicant must still go on to establish wrongful conduct, causation, and compensable injury: ***BCE*** at para. 90.

[118] The first part of the analysis is factually and contextually driven:

> 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 relationships at play. Conduct that may be oppressive in one situation may not be in another. . . .
>
> 62 As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

Again, the assessment of the "reasonable expectations" is driven by the context and business realities, not merely by the strict legal rights and relationships existing between the parties.

[119] There is no strict legal constraint on what can generate reasonable expectations. ***BCE*** listed some factors that might commonly be in play:

> 72 Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: 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.

Reasonable expectations may also arise from the dealings and relationships of the parties, and from the way the corporation was operated.

[120] However, not every disappointed expectation will be oppressive:

> 89 Thus far we have discussed how a claimant establishes the first element of an action for oppression - a reasonable expectation that he or she would be treated

2016 ABCA 103 (CanLII)

> in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

2016 ABCA 103 (CanLII)

It is thus necessary for the applicant to prove that the challenged conduct was oppressive, or unfairly prejudicial to it, or unfairly disregarded its interests.

[121] It is not suggested on appeal that the chambers judge erred in his statement of the law of oppression. The alleged errors arise primarily from the way the law was applied to the facts.

Status of the Appellants

[122] The respondents argue that the *Act* only gives rights to "complainants" and that the appellants' complaints arise in another context. Complainants are defined to include any security holder, creditor, director, officer or "other proper person". The appellants are clearly security holders, and Shefsky was a director and officer. It is sufficient that their status arose as a result of the Term Sheet; it matters not that Shefsky was not a director when the Term Sheet was signed, because the oppressive conduct occurred later. Given the conduct of the Incumbent Group in entering into the Term Sheet, it would be artificial to think that the appellants are not also "other proper persons" for the purposes of the oppression remedies.

[123] The respondents argue, however, that the dispute does not arise out of Shefsky's status as a shareholder, director, or officer. Rather, they argue that the complaints of oppression arise in his capacity as a financier or underwriter, which does not entitle him to oppression remedies. In support of this argument, the respondents cite ***Rogers Communications Inc. v Maclean Hunter Ltd.*** (1994), 2 CCLS 233 at para. 9; ***Stahlke v Stanfield*** , 2010 BCSC 142 at para. 23; and ***Icahn Partners LP v Lions Gate Entertainment Corp.***, 2010 BCSC 1547 at paras. 182-3, 75 BLR (4th) 212 affirmed other grounds 2011 BCCA 228 at para. 89. Those cases are, however, distinguishable; while the applicants were shareholders, the complaints they made did not arise out of their status as shareholders, but rather out of collateral contracts or relationships.

[124] Allegations of oppression will generally arise against a background of other legal rights. There will frequently be contractual relationships between the various parties. Further, there are

always corporate law rights in play, some of which are loosely analogous to contractual rights. It is generally not oppressive for a party to rely on clear contractual rights, unless they are asserted entirely out of proportion to the reasonable expectations of the parties. If the real complaint is a breach of contract, it should be pursued as such, and not under the guise of an oppression claim: ***Stahlke*** at para. 23. "Reasonable expectations", however, can arise from a background of contractual rights, and can also arise absent any specific contractual right. In this case the expectations of the appellants arose primarily as a result of the terms of the Term Sheet, combined with rights arising from the law of corporations. There were also contractual relationships between the parties, but they were primarily in place to implement the understandings set out in the Term Sheet.

2016 ABCA 103 (CanLII)

[125] It is difficult to regard the Term Sheet as being merely a contract. The only parties to it were California Gold Mining and Shefsky, yet the expectations it created required the cooperation of other parties. Many of the things outlined in the Term Sheet were beyond the practical power of the corporation, for example, the composition of its own board. As another example, it contemplated that one or more of the sitting directors would resign in favour of Shefsky's nominees. Given the reality of "shareholder democracy", the Term Sheet contemplated others (such as the Incumbent Group) voting their shares in ways that would make possible the realization of the reasonable expectations it created. Whatever its contractual content, the Term Sheet was equally important in creating reasonable expectations that could be relied on by the appellants once they became shareholders and Shefsky became a director and officer.

[126] Further, describing Shefsky as merely an underwriter or financier does not accurately describe his role. It is true that he was to raise a certain amount of money for California Gold Mining, but that was only the precondition to him taking a larger role. In addition to becoming a shareholder, Shefsky was to become the Chief Executive Officer, a board member, and was also to have a control of the appointment of the Board. The expectations thus created went well beyond what he might have had as a mere financier.

[127] Given the factual context, and having regard to the particular allegations and complaints being made by the appellants, they are properly regarded as being complainants, and the allegations that they make are properly characterized as complaints about oppressive corporate conduct.

The Expectation of Control

[128] The chambers judge found that Shefsky had met the requirement of raising $5 million in capital, which created a reasonable expectation that the provisions of the Term Sheet would be honoured. That in turn created an expectation that Shefsky could nominate three directors, but this issue was said to be moot because Shefsky never purported to name a third director. Finally, the chambers judge found that the Shefsky's expectation of "control" was unreasonable because the appellants never had control.

2016 ABCA 103 (CanLII)

[129] The appellants argue that the chambers judge defined the alleged scope of the oppressive conduct too narrowly. They argue that the expectation of control went well beyond demonstrating that they could prove a majority of the shareholders would vote as Shefsky recommended. Further, the chambers judge erred in concluding that Shefsky had never nominated a replacement director. The respondents argue that any expectation of control was unreasonable because, at the end of the day, the shareholders control who will be elected as a director.

[130] On this issue it is important to highlight what is not in dispute. Neither side disputes the concept of "shareholder democracy". It is not disputed that only the shareholders can elect the directors. It is thus artificial to characterize Shefsky's asserted expectation of "control", as an expectation that he could override shareholder democracy. His expectations could, however, encompass:

(a) an agreement by the Incumbent Group that they would vote their shares with the appellants in such a way that they could maximize their chances of obtaining control of the Board,

(b) an understanding that Shefsky would never have to concern himself with "winning a proxy fight", because the Incumbent Group agreed that they would vote to elect his three nominees; there would never be a proxy fight, and

(c) the business reality that if Shefsky had control of the Board he could effectively control the management nominees for directors.

The chambers judge's description of the appellants' expectation as centering around whether they could "maintain control" artificially characterizes what was alleged, and sets up an expectation that would be impossible to achieve. It focusses on "narrow legalities" rather than "business realities": ***BCE*** at para. 58.

[131] Further, in the context of an oppression action, "shareholder democracy" is not an absolute. The *Business Corporations Act* allows the Court to order several remedies that are inconsistent with a strict view of shareholder democracy. Thus, the Court can amend the articles or bylaws, appoint additional or replacement directors, and make other corporate changes that usually require shareholder approval. The respondents' artificial reliance on the concept of "shareholder democracy" to justify their oppressive conduct is unsupported by the statute. The statute makes it clear that "shareholder democracy" is not a trump card that always overrides reasonable expectations.

[132] The chambers judge also set an unreasonably high evidentiary standard. The appellant filed affidavits from a few key investors indicating that they had invested because of the appellant's involvement. The chambers judge would not, however, draw an inference that they would have voted as Shefsky recommended. The chambers judge would not accept that Shefsky could have ensured the election of his nominees because he had not brought forward affidavits from all of

those who subscribed for units at his invitation indicating that they would support him. The suggestion that such affidavits would be required from every shareholder sets an artificially high evidentiary standard that could never be met for a publicly traded company.

[133] In any event, the only reasonable inference is that many, if not all who subscribed for units at Shefsky's invitation had a considerable measure of confidence in him, which they demonstrated by writing cheques for units. Absent some noticeable change of circumstances, it is unreasonable to infer that they would have abandoned support for him in favour of the Incumbent Group. Any findings and inferences to the contrary represent palpable and overriding errors.

[134] Further, as noted the chambers judge ignored the business realities. Churchill acknowledged that the "shareholders had never voted against the slate of directors proposed by management": reasons, para. 15. If Shefsky had control of the Board, he controlled the management slate. Further, the Term Sheet implied that the Incumbent Group would vote their shares to support Shefsky's nominees, or at the very least they would not obstruct the process. The finding that the appellants had not proven an ability to control the Board is inconsistent with the finding that they had a legitimate expectation that the Term Sheet would be honoured. The chambers judge's refusal to draw the inference that the board of a company could be controlled notwithstanding the concept of "shareholder democracy" was unreasonable. The only reasonable inference is that if the appellants and the Incumbent Group had joined together to nominate and then vote for a particular slate, that slate would undoubtedly have been elected.

[135] It is also unreasonable to interpret the Term Sheet as only creating reasonable expectations about control of the Board until the next shareholders meeting. Gold mining is not a short-term enterprise. There is nothing in the Term Sheet to suggest that Shefsky's control of the Board would end only a few months after he raised the $5 million. The Term Sheet in fact specifies that Shefsky's initial term as Chief Executive Officer would be for 36 months. The respondents argue that because of "shareholder democracy" no one could guarantee the composition of the Board beyond the next shareholders meeting. As previously discussed, that is an artificial argument and no answer to Shefsky's reasonable expectations that he would have control of the Board, with the support of the Incumbent Group at least in the medium term.

[136] The appellants argue that their reasonable expectation that Shefsky could nominate a third member of the Board was well-established on this record, and that this issue was not moot.

[137] The essence of the arrangement in the Term Sheet was that Shefsky would be able to nominate three members of a five-person board. The Term Sheet specifically provides that if the $5 million was raised "two of the existing members of the board of the Company shall resign in favour of Martin Shefsky and Charlie Cohen". The essential business arrangement was control of the Board, and it is unreasonable to interpret the Term Sheet as meaning that Shefsky could only nominate the two candidates specifically named. If (as it turned out) one of them could not act, or if one commenced to serve but had to resign, the only commercially reasonable interpretation is that Shefsky could nominate qualified replacements: reasons, paras. 107-8. Indeed, the record does

2016 ABCA 103 (CanLII)

not appear to disclose that the respondents ever asserted otherwise. Further, it must be implicit in this arrangement that incumbent directors would resign in order to make place for Shefsky's nominee; in any event the Term Sheet says so explicitly.

[138] The chambers judge concluded at para. 114 that the refusal of any members of the Incumbent Group to resign was a "red herring and moot" because Shefsky "did not name a replacement, seek to call, or actually call a shareholders meeting himself". This fact finding and inference are surprising, as all the objective evidence on the record discloses that Shefsky was persistently asserting his right to nominate three members of a five-member board. On several occasions he proposed calling a shareholders meeting, but was rebuffed. On October 2, 2013 the appellants' counsel wrote a letter demanding that one of the Incumbent Group's directors "immediately resign from the board so that his place can be taken by Charlie Cohen who is prepared to accept the nomination". The chambers judge appears to have overlooked this evidence.

[139] The appellants are justified in arguing that the findings on this point represent palpable and overriding error. Shefsky did nominate a third director, and none of the incumbent directors resigned as specifically required by the Term Sheet, which further defeated a reasonable expectation of the appellants.

[140] In summary, the appellants have demonstrated palpable and overriding error with respect to the expectation of control. The conclusion that Shefsky could not prove potential control arose only because an impossible and unreasonable standard of proof was set. Further, the chambers judge's failure to draw the inference that Shefsky, once in control of the Board, could effectively control the election of directors, reflects palpable and overriding error. The finding that Shefsky never nominated a third director reflects a reviewable error of fact; the letter of October 2, 2013 proves that he did do so no later than then. The failure of one of the incumbent directors to resign to make room for Shefsky's nomination reflected a clear breach of the Term Sheet and the expectation that it would be honoured.

Was the Conduct Oppressive?

[141] ***BCE*** confirms that it is not sufficient for a complainant to prove a breach of a reasonable expectation. The complainant must also show that the offending conduct falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest.

[142] The Secret Private Placement unfairly disregarded the appellants' interests and was prejudicial to them, making it oppressive. The primary reason it unfairly disregarded the appellants' interests was that it was in direct breach of the Term Sheet. As the chambers judge found, once Shefsky had raised $5 million, he had a reasonable expectation that the Term Sheet would be honoured. Not only did the Secret Private Placement dilute the shareholdings of the company, it was part of an overall pattern of conduct by the Incumbent Group that demonstrated their repudiation of the Term Sheet.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

[143] No later than at the time of the Secret Private Placement, it became apparent that the Incumbent Group had no further intention of respecting the provisions of the Term Sheet. It may well be that the conditions of the financing had "morphed significantly", but that did not justify secret, unilateral steps by the Incumbent Group to change the agreement. At this point, Shefsky had completely performed his side of the deal; he had raised the $5 million that California Gold Mining needed to buy the Mariposa property. It was unfair and oppressive for the Incumbent Group to aspire to enjoy the benefits of Shefsky's performance of the Term Sheet, while not performing their reciprocal obligations under it.

[144] The inference is clear that the Incumbent Group was not motivated to perform its obligations under the Term Sheet. It appears that in some quarters there was a lack of enthusiasm from the very beginning for the concept of giving Shefsky control of the company. There was also the view that the capital structure had "morphed" from what was originally envisioned. The Incumbent Group was not disposed to perform its obligations under the Term Sheet, and persistently resisted or deflected attempts by Shefsky to call a shareholders meeting or to appoint a third member to the Board. They seized on the idea, rejected by the chambers judge, that Shefsky had not performed his obligations under the Term Sheet.

[145] There are further aspects of the Secret Private Placement which demonstrate that it unfairly disregarded the appellants' rights. Its very secrecy was objectionable, as was the appellants' exclusion from the opportunity to subscribe to shares. It was only offered to supporters of the Incumbent Group, not to the shareholders as a whole. It was done on very short notice, without opportunity for any amendment or mitigation. For the purposes of the oppression analysis, another important distinction between the Bought Deal and the Secret Private Placement is that the former was consistent with the Term Sheet, which stipulated that Shefsky would retain control, whereas the latter was inconsistent with that agreement.

[146] Further, the Secret Private Placement was oppressive because it was not in the best interests of the corporation. The Secret Private Placement contemplated the issuance of 15,860,000 units at $0.05 a unit, for gross proceeds to the California Gold Mining of $793,000. At the time, the shares were trading at about $0.07 each, and the book value was higher than that. The Bought Deal contemplated the issuance of about 14,286,000 units at $0.07 a unit, for gross proceeds of approximately $1 million. In other words, the Bought Deal generated more capital for the company through less dilution of the shareholdings. While the directors of a company are entitled to act in what they consider to be in the best interests of the company, it is impossible to rationalize how the Secret Private Placement could possibly have been the better deal.

[147] The respondents argue that it is neither unusual nor improper for a junior mining company to want to raise additional capital. That is not the issue. No one doubts that any junior mining company can benefit from more capital. That, however, does not justify oppressive methods of raising that capital.

2016 ABCA 103 (CanLII)

[148] It also unfairly disregards the interests of the shareholders if the Board acts in its own best interest, rather than in the interests of the corporation: ***Legion Oils Ltd v Barron*** (1956), 2 DLR (2d) 505 at p. 516 [33], 17 WWR 209 (Alta SC, TD); ***Noble v Keho Holdings Ltd***, 1987 ABCA 84 at para. 38, 52 Alta LR (2d) 195. While the courts defer to the reasonable business judgment of the directors, no reasonable justification for the Secret Private Placement has been advanced. The respondents cite ***Teck Corp Ltd. v Millar***, [1973] 2 WWR 385 at p. 413 (BCSC) for the proposition that it may sometimes be acceptable for the directors to act to retain control of the corporation:

> My own view is that the directors ought to be allowed to consider who is seeking control and why. If they believe that there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper.

Having expressly agreed in the Term Sheet to voluntarily give control of the company to Shefsky, the Incumbent Group can hardly argue that there was anything contrary to the interests of the company in that change of control. The Secret Private Placement was undoubtedly better for the Incumbent Group, but it cannot reasonably be said to have been in the best interest of the company.

Justification for the Oppressive Conduct

[149] While ***BCE*** makes it clear that corporate oppression is as much concerned with equitable expectations as it is with strict legal rights, the respondents' frequent response to the appellants' claims is that they are inconsistent with strict legal rules.

[150] For example, the respondents argue that after the Term Sheet was signed, the appellants subscribed to shares using a standard form subscription agreement. That agreement had a "whole agreement" clause that disclaimed any prior representations or covenants. Thus, the respondents argue, the subscription agreement overtook the Term Sheet, and at that point any of Shefsky's expectations arising from it expired. This is a completely technical and artificial argument. It was obvious that the arrangements in the Term Sheet would not become operational until after the $5 million private placement had been successfully completed. If that was the true meaning of the whole agreement clause, Shefsky would never be entitled to become Chief Executive Officer, or to nominate three out of five directors; the entire Term Sheet would become meaningless. This proposition is simply unreasonable. The whole agreement clause in the subscription agreement must mean that there were no prior surviving representations representing the subscription itself, not representing other agreements relating to the operation of the company.

[151] Another example of this technical response is the respondents' reliance on artificial and technical concepts of "shareholder democracy", as previously discussed.

[152] The respondents justify the Board's refusal of the Bought Deal in favour of the Secret Private Placement on other technical grounds. For example:

(a) the respondents reply that the Bought Deal, as proposed, was not compliant with the securities regulations because Caland was not licensed to engage in underwriting. That is undoubtedly so, but that does not mean that the Bought Deal could not have easily been made compliant, for example by enlisting Haywood Securities as the underwriter;

(b) the respondents also allege that the Bought Deal required shareholder approval because it would result in Caland owning more than 20% of the shares. That presupposes that Caland was going to retain control of that entire block, whereas the concept of a "bought deal" is that the underwriter will sell the shares to numerous investors. Indeed, the minutes of the Directors' meeting of September 10, 2013 confirm that the "proposed financing would be distributed widely so as to avoid creation of a control person".

If some of the proposed steps and filings were inadvertently non-compliant with securities regulations, that does not necessarily mean that the appellants' expectations were unreasonable.

[153] Neither side disputes that the securities industry is highly regulated. All concerned were sophisticated players, and they knew that whatever was to be done had to be done in compliance with the rules of the TSX-Venture Exchange and the directives of the Securities Commission. The Term Sheet contains numerous references to securities' regulatory requirements. Thus, when proposals were made to take certain steps with respect to California Gold Mining, it must have been the intention of all concerned that such steps were subject to, and would be undertaken in compliance with, the appropriate securities regulation. Securities regulation being extremely complex, it must have been anticipated that expert advice would have been sought on how exactly to implement any steps. It is thus no answer to the oppression claim, or to the appellants' expectations, to say that any particular proposed step required regulatory approval, as it must have been anticipated that such approval would be obtained. It is also no answer that any particular step, as proposed, would be offside the securities regulations, because it must have been intended that all steps would be structured to be compliant.

[154] It should also be remembered that the Bought Deal was put together and presented to the Board with great haste because the Incumbent Group had essentially ambushed the appellants with the Secret Private Placement. It is hardly surprising that the appellants had not had time to explore all of the regulatory requirements that would have to be met, but it was not unreasonable for them to think that those details could be worked out if the Board accepted the Bought Deal in principle. The Board would not even consider a 48 hour adjournment of the meeting to allow the appellants to deal with these regulatory details.

2016 ABCA 103 (CanLII)

2016 ABCA 103 (CanLII)

[155] The respondents argue that any agreements about the composition of the board, or about control of the company, should have been publicly disclosed in accordance with the securities regulations. If such an obligation rested on the company or the directors, they may well have been in breach of them. However, those breaches cannot fairly be used to defeat Shefsky's rights; any consequences of a breach of the Board's duties in that regard more fairly lie on the Incumbent Group. Any such duty of disclosure was equally knowable to all involved, including counsel for the company, and any deficiencies in disclosure should obviously have been promptly remedied as soon as they were identified. The failure to comply with those duties does not, in any event, justify oppressive conduct.

[156] The respondents complain that the Bought Deal was presented on an "all or nothing" basis. Having unilaterally foisted the Secret Private Placement on the appellants, they can hardly complain about the Bought Deal on that basis. The appellants had made it clear that the Bought Deal was an "either/or" proposal, in that it could not proceed contemporaneously with the Secret Private Placement. But it would be unreasonable to permit the Incumbent Group to acquire units at $0.05 under the Secret Private Placement, and then expect those participating in the Bought Deal to acquire units at $0.07. Any of the subscribers to the Secret Private Placement would undoubtedly have been offered shares under the Bought Deal.

[157] The respondents also argue that the appellants failed to mitigate the effect of the Secret Private Placement because they refused an offer to take up units on the same terms. A few days after the Secret Private Placement, Cinq-Mars proposed a further private placement for the appellant's supporters in the sum of $793,000. Churchill, however, would not permit a further private placement for any more than $304,454. That obviously would not neutralize the dilution resulting from the Secret Private Placement. Combined with the Incumbent Group's obvious repudiation of the overall arrangement in the Term Sheet, there was ample justification for the appellants to decline this offer.

[158] In summary, the conduct of the respondents breached the expectations of the appellants in ways that were unfairly prejudicial, and unfairly disregarded their interests. The reasons disclose reviewable error to the extent that they overlooked these breaches based on any of the technical defences raised. They overlook the point that oppression remedies are as much concerned with fairness as they are with strict legal rights, and they are based on unreasonable assumptions, or draw unreasonable inferences about the legitimate expectations of the parties.

The Appropriate Remedy

[159] Given a finding of oppressive conduct, it would be necessary to consider the appropriate remedy. Both parties agree that, given the passage of time, it would be inappropriate to attempt to devise an appropriate remedy from this record. It would accordingly be appropriate to refer the issue of a remedy back to the chambers judge.

2016 ABCA 103 (CanLII)

Conclusion

[160] In conclusion, the appeal should be allowed. The appellants were able to demonstrate breaches of their reasonable expectations resulting from conduct of the respondents that was unfairly prejudicial and unfairly disregarded their interests. The question of remedy should be referred back to the chambers judge.

Appeal heard on February 5, 2016

Memorandum filed at Edmonton, Alberta
this 14th day of April, 2016

Slatter J.A.

Appearances:

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for the Appellants

S.M. Robinson and M.J. Diskin
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2016 ABCA 103 (CanLII)