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

v.

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

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

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

and

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

c.

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

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

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

et

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Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

- and -

6796508 Canada Inc. *Appellant/Respondent on cross-appeals*

v.

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

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Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

- et -

6796508 Canada Inc. *Appelante/Intimée aux pourvois incidents*

c.

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

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Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada,

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CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/ Appellants on cross-appeals*

and

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

INDEXED AS: BCE INC. *v.* 1976 DEBENTUREHOLDERS

Neutral citation: 2008 SCC 69.

File No.: 32647.

2008: June 17; 2008: June 20.

Reasons delivered: December 19, 2008.

Present: McLachlin C.J. and Bastarache,* Binnie, LeBel, Deschamps, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Fiduciary duty of directors of corporation to act in accordance with best interests of corporation — Reasonable expectation of security holders of fair treatment — Directors approving change of control transaction which would affect economic interests of security holders — Whether evidence supported reasonable expectations

* Bastarache J. joined in the judgment of June 20, 2008, but took no part in these reasons for judgment.

compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

RÉPERTORIÉ : BCE INC. *c.* DÉTENTEURS DE DÉBENTURES DE 1976

Référence neutre : 2008 CSC 69.

N° du greffe : 32647.

2008 : 17 juin; 2008 : 20 juin.

Motifs déposés : 19 décembre 2008.

Présents : La juge en chef McLachlin et les juges Bastarache*, Binnie, LeBel, Deschamps, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Obligation fiduciaire des administrateurs envers la société d'agir au mieux des intérêts de la société — Attente raisonnable des détenteurs de valeurs mobilières d'être traités équitablement — Approbation par les administrateurs d'une opération de changement de contrôle qui porterait atteinte aux intérêts financiers de

* Le juge Bastarache a pris part au jugement du 20 juin 2008, mais n'a pas pris part aux présents motifs de jugement.

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asserted by security holders — Whether reasonable expectation was violated by conduct found to be oppressive, unfairly prejudicial or that unfairly disregards a relevant interest — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 122(1)(a), 241.

détenteurs de valeurs mobilières — Les attentes raisonnables invoquées par les détenteurs de valeurs mobilières étaient-elles étayées par la preuve? — Une attente raisonnable a-t-elle été frustrée par un comportement constituant un abus, un préjudice injuste ou une omission injuste de tenir compte d'un intérêt pertinent? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 122(1)a), 241.

Commercial law — Corporations — Plan of arrangement — Proposed plan of arrangement not arranging rights of security holders but affecting their economic interests — Whether plan of arrangement was fair and reasonable — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192.

Droit commercial — Sociétés par actions — Plan d'arrangement — Plan d'arrangement proposé ne visant pas les droits de détenteurs de valeurs mobilières, mais portant atteinte à leurs intérêts financiers — Le plan d'arrangement était-il équitable et raisonnable? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 192.

At issue is a plan of arrangement that contemplates the purchase of the shares of BCE Inc. ("BCE") by a consortium of purchasers (the "Purchaser") by way of a leveraged buyout. After BCE was put "in play", an auction process was held and offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada, a wholly owned subsidiary of BCE, would be liable. BCE's board of directors found that the Purchaser's offer was in the best interests of BCE and BCE's shareholders. Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser represents a premium of approximately 40 percent over the market price of BCE shares at the relevant time. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

Le litige porte sur un plan d'arrangement concernant l'achat des actions de BCE Inc. (« BCE ») par un consortium (l'« acquéreur ») au moyen d'une acquisition par emprunt. BCE ayant été « mise en jeu », un processus d'enchères a été lancé et trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada, une filiale en propriété exclusive de BCE. Le conseil d'administration de BCE a conclu que l'offre d'achat de l'acquéreur servait les intérêts de BCE et des actionnaires de BCE. Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE. Le prix offert par l'acquéreur représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions de BCE à la date pertinente. Le capital requis pour l'opération s'élève au total à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. L'acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

The plan of arrangement was approved by 97.93 percent of BCE's shareholders, but was opposed by a group of financial and other institutions that hold debentures issued by Bell Canada. These debentureholders sought relief under the oppression remedy under s. 241 of the *Canada Business Corporations Act* ("*CBCA*"). They also alleged that the arrangement was not "fair and reasonable" and opposed court approval of the arrangement under s. 192 of the *CBCA*. The crux of their complaints is that, upon the completion of the arrangement, the short-term trading value of the debentures would decline by an average of 20 percent and could lose investment grade status.

Les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100, mais des détenteurs de débentures de Bell Canada, notamment des institutions financières, s'y sont opposés. Ces détenteurs de débentures ont intenté un recours pour abus prévu à l'art. 241 de la *Loi canadienne sur les sociétés par actions* (« *LCSA* »). Ils ont aussi allégué que l'arrangement n'était pas « équitable et raisonnable » et contesté l'approbation de l'arrangement exigée par l'art. 192 *LCSA*. Leur principal argument est que, une fois la transaction achevée, la valeur marchande à court terme de leurs débentures fléchirait de 20 p. 100 en moyenne, et leurs débentures ne seraient plus cotées comme admissibles pour des placements.

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The Quebec Superior Court approved the arrangement as fair and dismissed the claim for oppression. The Court of Appeal set aside that decision, finding the arrangement had not been shown to be fair and held that it should not have been approved. It held that the directors had not only the duty to ensure that the debentureholders' contractual rights would be respected, but also to consider their reasonable expectations which, in its view, required directors to consider whether the adverse impact on debentureholders' economic interests could be alleviated. Since the requirements of s. 192 of the *CBCA* were not met, the court found it unnecessary to consider the oppression claim. BCE and Bell Canada appealed the overturning of the trial judge's approval of the plan of arrangement, and the debentureholders cross-appealed the dismissal of the claims for oppression.

La Cour supérieure du Québec a approuvé l'arrangement, le jugeant équitable, et elle a rejeté la demande de redressement pour abus. La Cour d'appel a annulé cette décision, jugeant que le caractère équitable de l'arrangement n'avait pas été démontré et qu'il n'aurait pas dû être approuvé. Elle a statué que les administrateurs avaient l'obligation non seulement de s'assurer du respect des droits contractuels des détenteurs de débentures, mais aussi de tenir compte de leurs attentes raisonnables, ce qui, selon elle, les obligeait à examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Les conditions fixées par l'art. 192 n'étant pas remplies, la cour a jugé inutile d'examiner la demande de redressement pour abus. BCE et Bell Canada ont interjeté appel de l'annulation de l'approbation du plan d'arrangement par le juge de première instance, et les détenteurs de débentures ont formé un appel incident contre le rejet des demandes de redressement pour abus.

Held: The appeals should be allowed and the cross-appeals dismissed.

Arrêt : Les pourvois sont accueillis et les pourvois incidents sont rejetés.

The s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. The Court of Appeal's decision rested on an approach that erroneously combined the substance of the s. 241 oppression remedy with the onus of the s. 192 arrangement approval process, resulting in a conclusion that could not have been sustained under either provision, read on its own terms. [47] [165]

La demande de redressement pour abus prévue à l'art. 241 et l'approbation judiciaire d'une modification de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. La décision de la Cour d'appel s'appuie sur un raisonnement qui combine à tort les éléments substantiels de la demande de redressement pour abus de l'art. 241 et le fardeau de la preuve applicable à l'approbation d'un arrangement exigée par l'art. 192, ce qui l'a menée à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier. [47] [165]

1. *The Section 241 Oppression Remedy*

1. *La demande de redressement pour abus prévue à l'art. 241*

The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also 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. [45] [58-59]

La demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity d'un vaste éventail de parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours confère au tribunal un vaste pouvoir d'imposer le respect non seulement du droit, mais de l'équité. Le sort d'une demande de redressement pour abus dépend en outre des faits : ce qui est juste et équitable est fonction des attentes raisonnables des parties intéressées compte tenu du contexte et des rapports entre les parties. [45] [58-59]

In assessing a claim of oppression, a court must answer two questions: (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"

Le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste

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of a relevant interest? For the first question, useful factors from the case law 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. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241. [68] [72] [89] [95]

Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen. Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one. [81-83]

Here, the debentureholders did not establish that they had a reasonable expectation that the directors of BCE would protect their economic interests by putting forth a plan of arrangement that would maintain the investment grade trading value of their debentures. The trial judge concluded that this expectation was not made out on the evidence, given the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, the fact that the claimants could have protected themselves against reductions in market value by negotiating appropriate contractual terms, and that any statements by Bell Canada suggesting a commitment to retain investment grade ratings for the debentures were accompanied by warnings precluding such expectations. The trial judge recognized that the content of the directors' fiduciary duty to act in the best interests of the corporation was affected by the various interests at stake in the context of the auction process, and that they might have to approve transactions that were in the best interests of the corporation

de tenir compte » d'un intérêt pertinent? En ce qui a trait à la première question, les facteurs utiles d'appréciation d'une attente raisonnable qui ressortent de la jurisprudence incluent : les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées. En ce qui concerne la deuxième question, le plaignant doit prouver que le défaut de répondre à son attente raisonnable est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241. [68] [72] [89] [95]

Lorsque surgit un conflit d'intérêts, les administrateurs doivent le résoudre conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société. Dans son ensemble, la jurisprudence en matière d'abus confirme que cette obligation inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues ni de principe voulant que les intérêts d'un groupe doivent prévaloir sur ceux d'un autre groupe. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable. Lorsqu'il est impossible de satisfaire toutes les parties intéressées, il importe peu que les administrateurs aient écarté d'autres transactions qui n'étaient pas plus avantageuses que celle qui a été choisie. [81-83]

En l'espèce, les détenteurs de débentures n'ont pas démontré qu'ils s'attendaient raisonnablement à ce que les administrateurs de BCE protègent leurs intérêts financiers en proposant un plan d'arrangement qui maintiendrait la valeur marchande de leurs débentures cotées comme admissibles pour des placements. Le juge de première instance a conclu que la preuve de cette attente n'avait pas été établie compte tenu du contexte global de la relation, de la nature de la société, de sa situation en tant que cible de plusieurs offres d'achat, du fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées et que les déclarations de Bell Canada concernant son engagement à conserver aux débentures une cote de placements admissibles s'accompagnaient de mises en garde excluant pareilles attentes. Le juge de première instance a reconnu que le contenu de l'obligation fiduciaire des administrateurs d'agir au mieux des intérêts de la société dépendait des divers intérêts en jeu dans le contexte du processus

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but which benefited some groups at the expense of others. All three competing bids required Bell Canada to assume additional debt. Under the business judgment rule, deference should be accorded to the business decisions of directors acting in good faith in performing the functions they were elected to perform. In this case, there was no error in the principles applied by the trial judge nor in his findings of fact. [96-100]

The debentureholders had also argued that they had a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures. While the evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration, it is apparent that the directors considered the interests of debentureholders, and concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests and did not amount to "unfair disregard" of the interests of debentureholders. What the claimants contend is, in reality, an expectation that the directors would take positive steps to restructure the purchase in a way that would provide a satisfactory price to shareholders and preserve the high market value of the debentures. There was no evidence that it was reasonable to suppose this could be achieved, since all three bids involved a substantial increase in Bell Canada's debt. Commercial practice and reality also undermine their claim. Leveraged buyouts are not unusual or unforeseeable, and the debentureholders could have negotiated protections in their contracts. Given the nature and the corporate history of Bell Canada, it should not have been outside the contemplation of debentureholders that plans of arrangements could occur in the future. While the debentureholders rely on the past practice of maintaining the investment grade rating of the debentures, the events precipitating the leveraged buyout transaction were market realities affecting what were reasonable practices. No representations had been made to debentureholders upon which they could reasonably rely. [96] [102] [104-106] [108-110]

d'enchères et qu'ils pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada. La règle de l'appréciation commerciale commande la retenue à l'égard des décisions commerciales prises de bonne foi par les administrateurs dans l'exécution des fonctions pour lesquelles ils ont été élus. En l'espèce, le juge de première instance n'a pas commis d'erreur dans son application des principes ni dans ses conclusions de fait. [96-100]

Les détenteurs de débentures avaient aussi fait valoir qu'ils s'attendaient raisonnablement à ce que les administrateurs tiennent compte de leurs intérêts financiers en préservant la valeur marchande des débentures. La preuve, considérée objectivement, permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures dans leurs décisions sur les diverses offres à l'étude, mais ils ont manifestement pris en considération les intérêts des détenteurs de débentures et conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures et ne constituait pas une « omission injuste de tenir compte » de leurs intérêts. Ce que les plaignants font valoir en réalité, c'est qu'ils comptaient que les administrateurs adoptent des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint, puisque les trois offres comportaient toutes un accroissement substantiel de l'endettement de Bell Canada. Le réalité et les pratiques commerciales affaiblissent aussi leur prétention. Les acquisitions par emprunt n'ont rien d'inhabituel ou d'imprévisible, et les détenteurs de débentures auraient pu négocier des mesures de protection contractuelles. Compte tenu de la nature et de l'historique de Bell Canada, les détenteurs de débentures devaient savoir que des arrangements pouvaient être conclus dans l'avenir. Bien que les détenteurs de débentures invoquent les pratiques antérieures selon lesquelles la cote des débentures comme admissibles pour des placements avait toujours été maintenue, les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie des conditions du marché au gré desquelles les pratiques raisonnables peuvent changer. Aucune déclaration à laquelle les détenteurs de débentures auraient pu raisonnablement se fier ne leur avait été faite. [96] [102] [104-106] [108-110]

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With respect to the duty on directors to resolve the conflicting interests of stakeholders in a fair manner that reflected the best interests of the corporation, the corporation's best interests arguably favoured acceptance of the offer at the time. The trial judge accepted the evidence that Bell Canada needed to undertake significant changes to be successful, and the momentum of the market made a buyout inevitable. Considering all the relevant factors, the debentureholders failed to establish a reasonable expectation that could give rise to a claim for oppression. [111-113]

En ce qui a trait à l'obligation des administrateurs de résoudre les conflits entre parties intéressées de façon équitable conformément aux intérêts de la société, il est possible de soutenir que les intérêts de la société favorisaient à l'époque l'acceptation de l'offre. Le juge de première instance a retenu la preuve tendant à démontrer que Bell Canada devait procéder à des changements substantiels pour continuer à prospérer et la dynamique du marché rendait l'acquisition inévitable. Compte tenu de tous les facteurs pertinents, les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. [111-113]

2. *The Section 192 Approval Process*

The s. 192 approval process is generally applicable to change of control transactions where the arrangement is sponsored by the directors of the target company and the goal is to require some or all shareholders to surrender their shares. The approval process focuses on whether the arrangement, viewed objectively, is fair and reasonable. Its purpose is to permit major changes in corporate structure to be made while ensuring that individuals whose rights may be affected are treated fairly, and its spirit is to achieve a fair balance between conflicting interests. In seeking court approval of an arrangement, the onus is on the corporation to establish that (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is "fair and reasonable". [119] [126] [128] [137]

2. *Le processus d'approbation prévu à l'art. 192*

Le processus d'approbation prévu à l'art. 192 s'applique en général aux changements de contrôle lorsque l'arrangement est appuyé par les administrateurs de la société ciblée et vise la remise d'une partie ou de la totalité des actions. Le processus d'approbation est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif. Il a pour but de permettre la réalisation de changements importants dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés, et l'esprit du processus consiste à établir un juste équilibre entre des intérêts opposés. La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est « équitable et raisonnable ». [119] [126] [128] [137]

To approve a plan of arrangement as fair and reasonable, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups. Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan. Courts must focus on the terms and impact of the arrangement itself, rather than the process by which it was reached, and must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. Courts on a

Pour approuver un plan d'arrangement, parce qu'il le juge équitable et raisonnable, un tribunal doit être convaincu que l'arrangement a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. Pour décider si un arrangement répond à ces critères, on tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société, l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés. En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan. Le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir, et être convaincu que l'intérêt de la société justifie le fardeau imposé par

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s. 192 application should refrain from substituting their views of the "best" arrangement, but should not surrender their duty to scrutinize the arrangement. [136] [138] [145] [151] [154-155]

The purpose of s. 192 suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. It is the fact that the corporation is permitted to alter individual rights that places the matter beyond the power of the directors and creates the need for shareholder and court approval. However, in some circumstances, interests that are not strictly legal could be considered. The fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities generally does not, without more, constitute a circumstance where non-legal interests should be considered on a s. 192 application. [133-135]

Here, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192, and the trial judge was correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests, and he did not err in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The arrangement did not fundamentally alter the debentureholders' rights, as the investment and return they contracted for remained intact. It was well known that alteration in debt load could cause fluctuations in the trading value of the debentures, and yet the debentureholders had not contracted against this contingency. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada. No superior arrangement had been put forward and BCE had been assisted throughout by expert legal and financial advisors. Recognizing that there is no such thing as a perfect arrangement, the trial judge correctly concluded that the arrangement

l'arrangement aux détenteurs de valeurs mobilières. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception du « meilleur » arrangement, mais ne doivent pas renoncer pour autant à s'acquitter de leur obligation d'examiner l'arrangement. [136] [138] [145] [151] [154-155]

L'objet de l'art. 192 laisse croire qu'il ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. C'est le fait que la société puisse modifier les droits des parties qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Toutefois, dans certaines circonstances, des intérêts qui ne constituent pas des droits à strictement parler peuvent être pris en considération. Une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, une situation où de simples intérêts doivent être pris en compte pour l'examen d'une demande sous le régime de l'art. 192. [133-135]

En l'espèce, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat porte sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures ne constituaient pas une catégorie touchée pour l'application de cette disposition et le juge de première instance était fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures et il n'a pas commis d'erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. L'arrangement ne modifiait pas fondamentalement les droits des détenteurs de débentures, l'investissement et le rendement prévus par leur contrat demeurant inchangés. Il était bien connu qu'une variation de l'endettement pouvait faire fluctuer la valeur marchande des débentures et les détenteurs de débentures ne se sont malgré tout pas prémunis contractuellement contre cette éventualité. Il était clair pour le juge que, pour la continuité de la société, l'approbation

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had been shown to be fair and reasonable. [157] [161] [163-164]

d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance. Reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu à bon droit que le caractère équitable et raisonnable de l'arrangement avait été démontré. [157] [161] [163-164]

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POURVOIS PRINCIPAUX et POURVOIS INCIDENTS contre des arrêts de la Cour d'appel du Québec (le juge en chef Robert et les juges Otis,

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R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] Q.J. No. 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] Q.J. No. 4170 (QL), 2008 QCCA 930; [2008] Q.J. No. 4171 (QL), 2008 QCCA 931; [2008] Q.J. No. 4172 (QL), 2008 QCCA 932; [2008] Q.J. No. 4174 (QL), 2008 QCCA 933; [2008] Q.J. No. 4175 (QL), 2008 QCCA 934, setting aside decisions by Silcoff J., [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] Q.J. No. 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] Q.J. No. 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] Q.J. No. 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] Q.J. No. 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] Q.J. No. 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Appeals allowed and cross-appeals dismissed.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* and *Steve Tenai*, for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* and *Christopher L. Richter*, for the appellant/respondent on cross-appeals 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* and *Mark Meland*, for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* and *Erin Cowling*, for the respondent/appellant on cross-appeals Group of 1997 Debentureholders.

Written submissions only by *Robert Tessier* and *Ronald Auclair*, for the respondent Computershare Trust Company of Canada.

Christian S. Tacit, for the intervener Catalyst Asset Management Inc.

Nuss, Pelletier et Dalphond), [2008] R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] J.Q. n° 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] J.Q. n° 4170 (QL), 2008 QCCA 930; [2008] J.Q. n° 4171 (QL), 2008 QCCA 931; [2008] J.Q. n° 4172 (QL), 2008 QCCA 932; [2008] J.Q. n° 4174 (QL), 2008 QCCA 933; [2008] J.Q. n° 4175 (QL), 2008 QCCA 934, qui ont infirmé des décisions du juge Silcoff, [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] J.Q. n° 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] J.Q. n° 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] J.Q. n° 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] J.Q. n° 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] J.Q. n° 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Pourvois principaux accueillis et pourvois incidents rejetés.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* et *Steve Tenai*, pour les appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* et *Christopher L. Richter*, pour l'appelante/intimée aux pourvois incidents 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* et *Mark Meland*, pour les intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* et *Erin Cowling*, pour l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997.

Argumentation écrite seulement par *Robert Tessier* et *Ronald Auclair*, pour l'intimée la Société de fiducie Computershare du Canada.

Christian S. Tacit, pour l'intervenante Catalyst Asset Management Inc.

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Raynold Langlois, Q.C., and *Gerald Apostolatos*, for the intervener Matthew Stewart.

Raynold Langlois, c.r., et *Gerald Apostolatos*, pour l'intervenant Matthew Stewart.

The following is the judgment delivered by

Version française du jugement rendu par

THE COURT —

LA COUR —

I. Introduction

[1] These appeals arise out of an offer to purchase all shares of BCE Inc. ("BCE"), a large telecommunications corporation, by a group headed by the Ontario Teachers Pension Plan Board ("Teachers"), financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a $30 billion debt. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. Upon request for court approval of an arrangement under s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the debentureholders argued that it should not be found to be fair. They also opposed the arrangement under s. 241 of the *CBCA* on the ground that it was oppressive to them.

[2] The Quebec Superior Court, *per* Silcoff J., approved the arrangement as fair under the *CBCA* and dismissed the claims for oppression. The Quebec Court of Appeal found that the arrangement had not been shown to be fair and held that it should not have been approved. Thus, it found it unnecessary to consider the oppression claim.

[3] On June 20, 2008, this Court allowed the appeals from the Court of Appeal's disapproval of the arrangement and dismissed two cross-appeals from the dismissal of the claims for oppression, with reasons to follow. These are those reasons.

I. Introduction

[1] Les pourvois ont pour origine une offre d'acquisition visant la totalité des actions d'une grande société de télécommunications, BCE Inc. (« BCE »), offre émanant d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario (« RREO ») et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, filiale en propriété exclusive de BCE. Les détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations. Lors de l'examen de la demande d'approbation d'un arrangement exigée par l'art. 192 de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44 (« *LCSA* »), ils ont fait valoir que l'arrangement ne devait pas être jugé équitable. Ils ont également plaidé qu'il constituait un abus de leurs droits au sens de l'art. 241 de la *LCSA*.

[2] Le juge Silcoff de la Cour supérieure du Québec a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus. La Cour d'appel du Québec a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé. Elle n'a donc pas jugé utile d'examiner la demande de redressement pour abus.

[3] Le 20 juin 2008, notre Cour a accueilli les pourvois interjetés contre le refus de la Cour d'appel d'approuver l'arrangement et elle a rejeté deux pourvois incidents formés à l'encontre du rejet des demandes de redressement pour abus, avec motifs à suivre. Voici maintenant ces motifs.

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II. Facts

[4] At issue is a plan of arrangement valued at approximately $52 billion, for the purchase of the shares of BCE by way of a leveraged buyout. The arrangement was opposed by a group, comprised mainly of financial institutions, that hold debentures issued by Bell Canada. The crux of their complaints is that the arrangement would diminish the trading value of their debentures by an average of 20 percent, while conferring a premium of approximately 40 percent on the market price of BCE shares.

[5] Bell Canada was incorporated in 1880 by a special Act of the Parliament of Canada. The corporation was subsequently continued under the *CBCA*. BCE, a management holding company, was incorporated in 1970 and continued under the *CBCA* in 1979. Bell Canada became a wholly owned subsidiary of BCE in 1983 pursuant to a plan of arrangement under which Bell Canada's shareholders surrendered their shares in exchange for shares of BCE. BCE and Bell Canada are separate legal entities with separate charters, articles and bylaws. Since January 2003, however, they have shared a common set of directors and some senior officers.

[6] At the time relevant to these proceedings, Bell Canada had $7.2 billion in outstanding long-term debt comprised of debentures issued pursuant to three trust indentures: the 1976, the 1996 and the 1997 trust indentures. The trust indentures contain neither change of control nor credit rating covenants, and specifically allow Bell Canada to incur or guarantee additional debt subject to certain limitations.

[7] Bell Canada's debentures were perceived by investors to be safe investments and, up to the time of the proposed leveraged buyout, had maintained an investment grade rating. The debentureholders are some of Canada's largest and most reputable financial institutions, pension funds and insurance

II. Les faits

[4] Le litige porte sur un plan d'arrangement d'une valeur approximative de 52 milliards de dollars concernant l'achat des actions de BCE au moyen d'une acquisition par emprunt. Un groupe de détenteurs de débentures, composé principalement d'institutions financières, s'est opposé à l'arrangement. Son principal argument est que l'arrangement ferait fléchir la valeur marchande de leurs débentures de 20 p. 100 en moyenne, tout en permettant aux actionnaires de toucher une prime d'environ 40 p. 100 par rapport au cours des actions de BCE.

[5] Bell Canada a été constituée en société en 1880 par une loi spéciale du Parlement du Canada. Elle a ensuite été prorogée en vertu de la *LCSA*. BCE est une société de portefeuille de gestion qui a été constituée en 1970, puis prorogée en vertu de la *LCSA* en 1979. Bell Canada est devenue une filiale en propriété exclusive de BCE en 1983, conformément à un plan d'arrangement en vertu duquel les actionnaires de Bell Canada ont reçu des actions de BCE en échange de leurs actions. BCE et Bell Canada sont des entités juridiques distinctes possédant chacune leurs propres chartes, statuts constitutifs et règlements administratifs. Depuis janvier 2003, elles ont les mêmes administrateurs et quelques hauts dirigeants en commun.

[6] À l'époque pertinente pour l'examen des pourvois, Bell Canada avait une dette à long terme de 7,2 milliards de dollars composée de débentures émises en vertu de trois actes de fiducie établis respectivement en 1976, 1996 et 1997. Ces actes ne comportent aucune disposition concernant le changement de contrôle ou la cote financière et ils autorisent expressément Bell Canada à contracter ou à garantir de nouvelles dettes sous réserve de certaines restrictions.

[7] Les débentures de Bell Canada étaient considérées comme des placements sûrs par les investisseurs et, jusqu'à la proposition d'acquisition par emprunt, elles étaient cotées admissibles pour des placements. Les détenteurs de débentures sont des institutions financières, des caisses de retraite et

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companies. They are major participants in the debt markets and possess an intimate and historic knowledge of the financial markets.

des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada. Ce sont des participants d'envergure dans les marchés de la dette, qui ont une expérience approfondie et une connaissance historique des marchés financiers.

[8] A number of technological, regulatory and competitive changes have significantly altered the industry in which BCE operates. Traditionally highly regulated and focused on circuit-switch line telephone service, the telecommunication industry is now guided primarily by market forces and characterized by an ever-expanding group of market participants, substantial new competition and increasing expectations regarding customer service. In response to these changes, BCE developed a new business plan by which it would focus on its core business, telecommunications, and divest its interest in unrelated businesses. This new business plan, however, was not as successful as anticipated. As a result, the shareholder returns generated by BCE remained significantly less than the ones generated by its competitors.

[8] Le secteur d'activité de BCE a connu des changements d'ordre technologique, réglementaire et concurrentiel qui en ont profondément modifié le cadre. Auparavant très réglementée et axée sur la téléphonie classique par ligne téléphonique, l'industrie des télécommunications obéit aujourd'hui principalement aux forces du marché et se caractérise par l'augmentation continue des participants, l'arrivée de nouveaux concurrents et des attentes croissantes en matière de services aux consommateurs. Pour s'ajuster à ces changements, BCE a établi un nouveau plan d'entreprise mettant l'accent sur son activité centrale, les télécommunications, et prévoyant l'abandon de sa participation dans des entreprises non liées à ce secteur. Ce plan, toutefois, n'a pas donné les résultats escomptés, de sorte que les gains des actionnaires de BCE sont demeurés beaucoup moindres que ceux des actionnaires de ses concurrents.

[9] Meanwhile, by the end of 2006, BCE had large cash flows and strong financial indicators, characteristics perceived by market analysts to make it a suitable target for a buyout. In November 2006, BCE was made aware that Kohlberg Kravis Roberts & Co. ("KKR"), a United States private equity firm, might be interested in a transaction involving BCE. Mr. Michael Sabia, President and Chief Executive Officer of BCE, contacted KKR to inform them that BCE was not interested in pursuing such a transaction at that time.

[9] En outre, à la fin de 2006, BCE disposait d'un important flux de trésorerie et ses indicateurs financiers étaient très positifs, caractéristiques qui en faisaient une cible toute désignée pour une acquisition aux yeux des analystes financiers. Au mois de novembre 2006, BCE a appris que Kohlberg Kravis Roberts & Co. (« KKR »), une société américaine gérant un fonds privé d'investissement, pouvait être intéressée par une transaction visant BCE. Monsieur Michael Sabia, président et chef de la direction de BCE, a pris contact avec KKR pour lui indiquer que BCE n'était alors pas intéressée par une telle transaction.

[10] In February 2007, new rumours surfaced that KKR and the Canada Pension Plan Investment Board were arranging financing to initiate a bid for BCE. Shortly thereafter, additional rumours began to circulate that an investment banking firm was assisting Teachers with a potential transaction involving BCE. Mr. Sabia, after meeting with

[10] Au mois de février 2007, la rumeur que KKR et l'Office d'investissement du régime de pensions du Canada préparaient le montage financier d'une offre d'achat de BCE a recommencé à courir. Peu après, d'autres rumeurs se sont propagées, selon lesquelles une société bancaire d'investissement assistait le RREO relativement à une éventuelle

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BCE's board of directors ("Board"), contacted the representatives of both KKR and Teachers to reiterate that BCE was not interested in pursuing a "going-private" transaction at the time because it was set on creating shareholder value through the execution of its 2007 business plan.

transaction visant BCE. Après avoir rencontré le conseil d'administration de BCE (« Conseil d'administration »), M. Sabia a communiqué avec les représentants de KKR et avec ceux du RREO et leur a réitéré que BCE n'était pas intéressée à une « opération de fermeture » parce que BCE avait pour objectif de créer une valeur actionnariale par la réalisation de son plan d'entreprise de 2007.

[11] On March 29, 2007, after an article appeared on the front page of the *Globe and Mail* that inaccurately described BCE as being in discussions with a consortium comprised of KKR and Teachers, BCE issued a press release confirming that there were no ongoing discussions being held with private equity investors with respect to a "going-private" transaction for BCE.

[11] Le 29 mars 2007, à la suite de la parution à la une du *Globe and Mail* d'un article faisant incorrectement état de discussions entre BCE et un consortium constitué de KKR et du RREO, BCE a publié un communiqué de presse dans lequel elle affirmait qu'aucune discussion n'était en cours avec des fonds privés d'investissement au sujet d'une « opération de fermeture » de BCE.

[12] On April 9, 2007, Teachers filed a report (Schedule 13D) with the United States Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This filing heightened press speculation concerning a potential privatization of BCE.

[12] Le 9 avril 2007, le RREO a déposé un formulaire 13D auprès de la Securities and Exchange Commission des États-Unis, dans lequel il indiquait que, de passive, sa participation comme actionnaire de BCE devenait active. Le dépôt de ce formulaire est venu renforcer l'hypothèse, véhiculée par les médias, de la transformation possible de BCE en société fermée.

[13] Faced with renewed speculation and BCE having been put "in play" by the filing by Teachers of the Schedule 13D report, the Board met with its legal and financial advisors to assess strategic alternatives. It decided that it would be in the best interests of BCE and its shareholders to have competing bidding groups and to guard against the risk of a single bidding group assembling such a significant portion of available debt and equity that the group could preclude potential competing bidding groups from participating effectively in an auction process.

[13] Devant la recrudescence des conjectures et la « mise en jeu » de BCE résultant du dépôt du formulaire 13D par le RREO, le Conseil d'administration a convoqué ses conseillers juridiques et financiers afin d'examiner différentes options stratégiques. Il en est venu à la conclusion qu'il était dans l'intérêt de BCE et de ses actionnaires de bénéficier de la concurrence entre plusieurs groupes soumissionnaires et de parer au risque qu'un groupe soumissionnaire mobilise à lui seul une telle part des prêts et des capitaux disponibles qu'il empêcherait les groupes concurrents potentiels de participer efficacement au processus d'enchères.

[14] In a press release dated April 17, 2007, BCE announced that it was reviewing its strategic alternatives with a view to further enhancing shareholder value. On the same day, a Strategic Oversight Committee ("SOC") was created. None of its members had ever been part of management at BCE. Its

[14] Dans un communiqué de presse daté du 17 avril 2007, BCE a annoncé qu'elle examinait les options stratégiques qui s'offraient à elle en vue d'améliorer davantage la valeur actionnariale. Le même jour, elle a mis sur pied un comité de surveillance stratégique (« CSS »), dont aucun des

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mandate was, notably, to set up and supervise the auction process.

membres n'avait déjà fait partie de la direction de BCE. Le mandat du CSS consistait notamment à mettre en marche et à surveiller le processus d'enchères.

[15] Following the April 17 press release, several debentureholders sent letters to the Board voicing their concerns about a potential leveraged buyout transaction. They sought assurance that their interests would be considered by the Board. BCE replied in writing that it intended to honour the contractual terms of the trust indentures.

[15] À la suite du communiqué de presse du 17 avril, plusieurs détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant la possibilité d'une acquisition par emprunt. Ils voulaient recevoir l'assurance que le Conseil d'administration tiendrait compte de leurs intérêts. BCE leur a répondu par écrit qu'elle avait l'intention de respecter les dispositions contractuelles des actes de fiducie.

[16] On June 13, 2007, BCE provided the potential participants in the auction process with bidding rules and the general form of a definitive transaction agreement. The bidders were advised that, in evaluating the competitiveness of proposed bids, BCE would consider the impact that their proposed financing arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under the trust indentures.

[16] Le 13 juin 2007, BCE a communiqué aux soumissionnaires potentiels les règles de soumission des propositions ainsi qu'une ébauche générale d'entente définitive. Elle les a informés que, lorsqu'elle étudierait les offres, elle tiendrait compte de l'incidence du mécanisme de financement proposé sur BCE et sur les détenteurs de débentures de Bell Canada et, en particulier, du fait que leurs offres respectent ou non les droits contractuels que les actes de fiducie conféraient aux détenteurs de débentures.

[17] Offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable. All would have likely resulted in a downgrade of the debentures below investment grade. The initial offer submitted by the appellant 6796508 Canada Inc. (the "Purchaser"), a corporation formed by Teachers and affiliates of Providence Equity Partners Inc. and Madison Dearborn Partners LLC, contemplated an amalgamation of Bell Canada that would have triggered the voting rights of the debentureholders under the trust indentures. The Board informed the Purchaser that such an amalgamation made its offer less competitive. The Purchaser submitted a revised offer with an alternative structure for the transaction that did not involve an amalgamation of Bell Canada. Also, the Purchaser's revised offer increased the initial price per share from $42.25 to $42.75.

[17] Trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada. Les trois offres auraient probablement pour effet d'abaisser la cote des débentures au-dessous de celle requise pour qu'elles constituent un placement admissible. L'offre initiale présentée par l'appelante 6796508 Canada Inc. (l'« Acquéreur »), une société constituée par le RREO, et des membres du groupe de Providence Equity Partners Inc. et de Madison Dearborn Partners LLC, prévoyait une fusion de Bell Canada qui aurait déclenché l'exercice des droits de vote des détenteurs de débentures en vertu des actes de fiducie. Le Conseil d'administration a informé l'Acquéreur que ce projet de fusion rendait son offre moins attrayante. L'Acquéreur a donc présenté une nouvelle offre dans laquelle il proposait une structure différente pour la transaction qui n'impliquait pas de fusion de Bell Canada. De plus, il haussait à 42,75 $ le prix de 42,25 $ initialement offert pour chaque action.

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[18] The Board, after a review of the three offers and based on the recommendation of the SOC, found that the Purchaser's revised offer was in the best interests of BCE and BCE's shareholders. In evaluating the fairness of the consideration to be paid to the shareholders under the Purchaser's offer, the Board and the SOC received opinions from several reputable financial advisors. In the meantime, the Purchaser agreed to cooperate with the Board in obtaining a solvency certificate stating that BCE would still be solvent (and hence in a position to meet its obligations after completion of the transaction). The Board did not seek a fairness opinion in respect of the debentureholders, taking the view that their rights were not being arranged.

[18] Après avoir étudié les trois offres, le Conseil d'administration a conclu, suivant la recommandation du CSS, que l'offre révisée de l'Acquéreur servait les intérêts de BCE et des actionnaires de BCE. Pour évaluer le caractère équitable de la contrepartie qui serait versée aux actionnaires selon cette offre, le Conseil d'administration et le CSS ont sollicité l'avis de plusieurs conseillers financiers réputés. Par ailleurs, l'Acquéreur a accepté de prêter son concours au Conseil d'administration pour l'obtention d'un certificat de solvabilité attestant que BCE demeurerait solvable (et serait donc en mesure de respecter ses obligations une fois la transaction achevée). Le Conseil d'administration n'a pas sollicité l'avis d'experts sur le caractère équitable de la transaction pour les détenteurs de débentures, estimant que l'arrangement ne visait pas leurs droits.

[19] On June 30, 2007, the Purchaser and BCE entered into a definitive agreement. On September 21, 2007, BCE's shareholders approved the arrangement by a majority of 97.93 percent.

[19] Le 30 juin 2007, l'Acquéreur et BCE ont conclu une entente définitive. Le 21 septembre suivant, les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100.

[20] Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser is $42.75 per common share, which represents a premium of approximately 40 percent to the closing price of the shares as of March 28, 2007. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

[20] Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE au prix de 42,75 $ l'action ordinaire, ce qui représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions en date du 28 mars 2007. Le capital requis pour la transaction s'élève à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. Enfin, l'Acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

[21] As a result of the announcement of the arrangement, the credit ratings of the debentures by the time of trial had been downgraded from investment grade to below investment grade. From the perspective of the debentureholders, this downgrade was problematic for two reasons. First, it caused the debentures to decrease in value by an average of approximately 20 percent. Second, the downgrade could oblige debentureholders with credit-rating restrictions on their holdings to sell their debentures at a loss.

[21] L'annonce de cette entente a entraîné une baisse de la cote de crédit des débentures de sorte que, lors du procès, elles n'étaient plus considérées comme des placements admissibles. Du point de vue des détenteurs de débentures, cette décote pose problème à deux égards. Premièrement, elle a entraîné une diminution de la valeur des débentures de l'ordre d'environ 20 p. 100 en moyenne. Deuxièmement, elle risque d'obliger les détenteurs de débentures qui sont assujettis à des restrictions concernant la cote de crédit des titres qu'ils détiennent à vendre leurs débentures à perte.

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[22] The debentureholders at trial opposed the arrangement on a number of grounds. First, the debentureholders sought relief under the oppression provision in s. 241 of the *CBCA*. Second, they opposed court approval of the arrangement, as required by s. 192 of the *CBCA*, alleging that the arrangement was not "fair and reasonable" because of the adverse effect on their economic interests. Finally, the debentureholders brought motions for declaratory relief under the terms of the trust indentures, which are not before us: (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

[22] En première instance, les détenteurs de débentures ont invoqué plusieurs motifs d'opposition à l'arrangement. Ils ont d'abord invoqué la disposition de la *LCSA* applicable en cas d'abus, l'art. 241. Ils ont ensuite contesté la demande d'approbation de l'arrangement exigée par l'art. 192 de la *LCSA* en alléguant que l'arrangement n'était pas « équitable et raisonnable » en raison de ses effets préjudiciables sur leurs intérêts financiers. Enfin, ils ont présenté des demandes de jugement déclaratoire fondées sur les actes de fiducie, sur lesquelles la Cour n'est pas appelée à se prononcer : (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

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III. Judicial History

[23] The trial judge reviewed the s. 241 oppression claim as lying against both BCE and Bell Canada, since s. 241 refers to actions by the "corporation or any of its affiliates". He dismissed the claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders: (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

III. Historique judiciaire

[23] Le juge de première instance a examiné les demandes de redressement pour abus à la fois contre Bell Canada et contre BCE, puisque l'art. 241 vise la situation provoquée par « la société ou l'une des personnes morales de son groupe ». Il a rejeté ces recours parce que, selon lui, la garantie d'emprunt fournie par Bell Canada poursuivait un objectif commercial légitime, la transaction ne frustrait pas les attentes raisonnables des détenteurs de débentures, la prétention que la transaction constituait un abus parce qu'elle rendait les détenteurs de débentures vulnérables n'était pas fondée et celle selon laquelle BCE et ses administrateurs s'étaient montrés injustes en ne tenant pas compte des intérêts des détenteurs de débentures ne pouvait être retenue : (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[24] In arriving at these conclusions, the trial judge proceeded on the basis that the BCE directors had a fiduciary duty under s. 122 of the *CBCA* to act in the best interests of the corporation. He held that while the best interests of the corporation are not to be confused with the interests of the shareholders or other stakeholders, corporate law recognizes fundamental differences between shareholders and debt security holders. He held that these differences affect the content of the directors' fiduciary duty. As a result, the directors' duty to act in the best interests of the corporation might require them to approve transactions that, while in the interests

[24] Pour parvenir à ces conclusions, le juge a considéré que l'art. 122 de la *LCSA* imposait aux administrateurs de BCE l'obligation fiduciaire d'agir au mieux des intérêts de la société. Selon lui, bien que les intérêts de la société ne doivent pas être confondus avec ceux des actionnaires ou d'autres parties intéressées, le droit des sociétés reconnaît l'existence de différences fondamentales entre les actionnaires et les détenteurs de titres de créance. À son avis, ces différences ont une incidence sur le contenu de l'obligation fiduciaire des administrateurs. Ainsi, leur devoir d'agir au mieux des intérêts de la société pourrait les obliger à

of the corporation, might also benefit some or all shareholders at the expense of other stakeholders. He also noted that in accordance with the business judgment rule, Canadian courts tend to accord deference to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by shareholders.

approuver des transactions qui, tout en servant les intérêts de la société, privilégient une partie ou la totalité des actionnaires au détriment d'autres parties intéressées. Le juge a aussi indiqué que, suivant la règle de l'appréciation commerciale, les tribunaux canadiens ont tendance à faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi et dans l'exécution des fonctions que les actionnaires leur ont confiées en les élisant.

[25] The trial judge held that the debentureholders' reasonable expectations must be assessed on an objective basis and, absent compelling reasons, must derive from the trust indentures and the relevant prospectuses issued in connection with the debt offerings. Statements by Bell Canada indicating a commitment to retaining investment grade ratings did not assist the debentureholders, since these statements were accompanied by warnings, repeated in the prospectuses pursuant to which the debentures were issued, that negated any expectation that this policy would be maintained indefinitely. The reasonableness of the alleged expectation was further negated by the fact that the debentureholders could have guarded against the business risks arising from a change of control by negotiating protective contract terms. The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that the bidders were prepared to treat the debentureholders any differently. The materialization of certain risks as a result of decisions taken by the directors in accordance with their fiduciary duty to the corporation did not constitute oppression against the debentureholders or unfair disregard of their interests.

[25] Le juge de première instance a statué que les attentes raisonnables des détenteurs de débentures doivent être évaluées objectivement et qu'elles doivent, à moins de motifs impérieux, découler des actes de fiducie et des prospectus d'émission des débentures. Les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles n'ont été d'aucun secours pour les détenteurs de débentures, car ces déclarations étaient accompagnées de mises en garde, réitérées dans les prospectus d'émission des débentures, qui excluaient toute attente quant au maintien indéfini de cette politique. En outre, le fait que les détenteurs de débentures auraient pu se protéger contractuellement contre les risques associés à un changement de contrôle en négociant des clauses de protection rendait leurs prétendues attentes déraisonnables. Le fait que la transaction serait profitable pour les actionnaires alors qu'elle désavantagerait les détenteurs de débentures ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que leurs auteurs étaient disposés à traiter les détenteurs de débentures différemment. Par conséquent, la réalisation de certains risques par suite des décisions prises par les administrateurs en conformité avec leur obligation fiduciaire envers la société ne constituait ni un abus des droits des détenteurs de débentures ni une omission injuste de tenir compte de leurs intérêts.

[26] Having dismissed the claim for oppression, the trial judge went on to consider BCE's application for approval of the transaction under s. 192 of the *CBCA*: (2008), 43 B.L.R. (4th) 1, 2008 QCCS

[26] Après avoir rejeté les demandes de redressement pour abus, le juge de première instance a examiné la demande d'approbation de la transaction exigée par l'art. 192 de la *LCSA* : (2008), 43 B.L.R.

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905. He dismissed the debentureholders' claim for voting rights on the arrangement on the ground that their legal interests were not compromised by the arrangement and that it would be unfair to allow them in effect to veto the shareholder vote. However, in determining whether the arrangement was fair and reasonable — the main issue on the application for approval — he considered the fairness of the transaction with respect to both the shareholders and the debentureholders, and concluded that the arrangement was fair and reasonable. He considered the necessity of the arrangement for Bell Canada's continued operations; that the Board, comprised almost entirely of independent directors, had determined the arrangement was fair and reasonable and in the best interests of BCE and the shareholders; that the arrangement had been approved by over 97 percent of the shareholders; that the arrangement was the culmination of a robust strategic review and auction process; the assistance the Board received throughout from leading legal and financial advisors; the absence of a superior proposal; and the fact that the proposal did not alter or arrange the debentureholders' legal rights. While the proposal stood to alter the debentureholders' economic interests, in the sense that the trading value of their securities would be reduced by the added debt load, their contractual rights remained intact. The trial judge noted that the debentureholders could have protected themselves against this eventuality through contract terms, but had not. Overall, he concluded that taking all relevant matters into account, the arrangement was fair and reasonable and should be approved.

(4th) 1, 2008 QCCS 905. Il a refusé aux détenteurs de débentures le droit de voter sur l'arrangement, estimant que celui-ci ne compromettait pas leurs droits et qu'il serait injuste de leur permettre en fait d'opposer leur veto au vote des actionnaires. Toutefois, pour déterminer si l'arrangement était équitable et raisonnable — la question déterminante pour l'octroi de l'approbation — le juge a examiné le caractère équitable de la transaction à l'égard à la fois des actionnaires et des détenteurs de débentures, et il a conclu que l'arrangement était équitable et raisonnable. Il a pris en compte la nécessité de l'arrangement pour la continuité des activités de Bell Canada; le fait que le Conseil d'administration — constitué presque entièrement d'administrateurs indépendants — avait déterminé que l'arrangement était équitable et raisonnable et qu'il servait au mieux les intérêts de BCE et des actionnaires; l'approbation de l'arrangement par plus de 97 p. 100 des actionnaires; le fait que l'arrangement était l'aboutissement d'un processus rigoureux d'analyse stratégique et d'enchères; l'aide de conseillers juridiques et financiers renommés reçue par le Conseil d'administration pendant tout le processus; l'absence d'offre supérieure; et le fait que l'offre ne modifiait ni ne visait les droits contractuels des détenteurs de débentures. Bien que l'offre modifie les intérêts financiers des détenteurs de débentures, au sens où l'accroissement de l'endettement ferait fléchir la valeur marchande de leurs titres, leurs droits contractuels demeuraient intacts. Le juge de première instance a souligné que les détenteurs de débentures auraient pu se protéger contractuellement contre ce risque, mais qu'ils ne l'avaient pas fait. Il a conclu dans l'ensemble que, compte tenu de tous les facteurs pertinents, l'arrangement était équitable et raisonnable et devait être approuvé.

[27] The Court of Appeal allowed the appeals on the ground that BCE had failed to meet its onus on the test for approval of an arrangement under s. 192, by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on this Court's decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, the Court of Appeal found that the directors were required to consider

[27] La Cour d'appel a accueilli les appels, jugeant que BCE n'avait pas démontré que la transaction était équitable et raisonnable pour les détenteurs de débentures, de sorte qu'elle ne satisfaisait pas au critère d'approbation d'un arrangement en vertu de l'art. 192. S'appuyant sur nos motifs dans l'affaire *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, [2004] 3 R.C.S. 461, 2004 CSC 68, elle a conclu que les administrateurs avaient l'obligation

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the non-contractual interests of the debentureholders. It held that representations made by Bell Canada over the years could have created reasonable expectations above and beyond the contractual rights of the debentureholders. In these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. In the absence of such efforts, BCE had not discharged its onus under s. 192 of showing that the arrangement was fair and reasonable. The Court of Appeal therefore overturned the trial judge's order approving the plan of arrangement: (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

d'examiner les intérêts non contractuels des détenteurs de débentures. À son avis, les déclarations que Bell Canada avaient faites au cours des années pouvaient avoir créé des attentes raisonnables qui s'ajoutaient aux droits contractuels des détenteurs de débentures. Les administrateurs n'avaient donc pas simplement l'obligation d'accepter la meilleure offre, mais aussi celle de déterminer si l'arrangement pouvait être restructuré de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures. Comme cet examen n'avait pas été fait, BCE ne s'était pas acquittée de son obligation d'établir le caractère équitable et raisonnable de l'arrangement pour l'application de l'art. 192. La Cour d'appel a donc infirmé l'ordonnance d'approbation rendue par le juge de première instance : (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

[28] The Court of Appeal found it unnecessary to consider the s. 241 oppression claim, holding that its rejection of the s. 192 approval application effectively disposed of the oppression claim. In its view, where approval is sought under s. 192 and opposed, there is generally no need for an affected security holder to assert an oppression remedy under s. 241.

[28] La Cour d'appel a jugé inutile d'examiner les demandes de redressement pour abus fondées sur l'art. 241, estimant que le rejet de la demande d'approbation visée à l'art. 192 en scellait en fait le sort. Selon elle, lorsqu'une demande d'approbation présentée en vertu de l'art. 192 est contestée, les détenteurs de valeurs mobilières touchés n'ont généralement nullement besoin de présenter une demande de redressement pour abus sous le régime de l'art. 241.

[29] BCE and Bell Canada appeal to this Court arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. While formally cross-appealing on s. 241, the debentureholders argue that the Court of Appeal was correct to consider their complaints under s. 192, such that their appeals under s. 241 became moot.

[29] BCE et Bell Canada se pourvoient devant notre Cour, soutenant que la Cour d'appel a infirmé à tort l'approbation du plan d'arrangement par le juge de première instance. Bien qu'ils aient officiellement formé un pourvoi incident fondé sur l'art. 241, les détenteurs de débentures font valoir que la Cour d'appel a statué à bon droit sur leurs prétentions sous le régime de l'art. 192, ce qui rendait théoriques leurs appels fondés sur l'art. 241.

IV. Issues

IV. Les questions en litige

[30] The issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders' s. 241 oppression claim and in overturning the Superior Court's s. 192 approval of the plan

[30] En résumé, la Cour doit décider si la Cour d'appel a commis une erreur en rejetant les demandes de redressement pour abus des détenteurs de débentures fondée sur l'art. 241 et en infirmant

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of arrangement. These questions raise the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control, and how a judge on an application for approval of an arrangement under s. 192 of the *CBCA* should treat claims such as those of the debentureholders in these actions. These reasons will consider both issues.

l'ordonnance d'approbation du plan d'arrangement prononcée par la Cour supérieure en vertu de l'art. 192. Pour ce faire, la Cour doit déterminer quelle preuve doit être faite pour établir l'existence d'un abus des droits des détenteurs de débentures dans le contexte du changement de contrôle d'une société et comment le juge saisi d'une demande d'approbation d'un arrangement en vertu de l'art. 192 de la *LCSA* doit traiter des prétentions de la nature de celles formulées en l'espèce par les détenteurs de débentures. Les présents motifs traitent de ces deux questions.

[31] In order to situate these issues in the context of Canadian corporate law, it may be useful to offer a preliminary description of the remedies provided by the *CBCA* to shareholders and stakeholders in a corporation facing a change of control.

[31] Pour situer ces questions dans le contexte du droit canadien des sociétés, il peut être utile de décrire d'abord les recours que peuvent exercer les actionnaires et les autres parties intéressées sous le régime de la *LCSA* devant la perspective d'un changement de contrôle de la société.

[32] Accordingly, these reasons will consider:

(1) the rights, obligations and remedies under the *CBCA* in overview;

(2) the debentureholders' entitlement to relief under the s. 241 oppression remedy;

(3) the debentureholders' entitlement to relief under the requirement for court approval of an arrangement under s. 192.

[32] Par conséquent, les présents motifs comportent :

(1) un aperçu des droits, obligations et recours prévus par la *LCSA*;

(2) un examen du droit des détenteurs de débentures à un redressement en cas d'abus en application de l'art. 241;

(3) une analyse du droit des détenteurs de débentures à un redressement dans le contexte de l'approbation d'un arrangement exigée par l'art. 192.

[33] We note that it is unnecessary for the purposes of these appeals to distinguish between the conduct of the directors of BCE, the holding company, and the conduct of the directors of Bell Canada. The same directors served on the boards of both corporations. While the oppression remedy was directed at both BCE and Bell Canada, the courts below considered the entire context in which the directors of BCE made their decisions, which included the obligations of Bell Canada in relation to its debentureholders. It was not found by the lower courts that the directors of BCE and Bell Canada should have made different decisions with respect to the two corporations. Accordingly, the

[33] Il n'est pas nécessaire pour trancher les pourvois de faire une distinction entre le comportement des administrateurs de BCE, la société de portefeuille, et celui des administrateurs de Bell Canada. Les mêmes administrateurs siégeaient aux conseils d'administration de l'une et l'autre de ces sociétés. Bien que la demande de redressement pour abus ait été dirigée à la fois contre Bell Canada et contre BCE, les juridictions inférieures ont tenu compte de toutes les circonstances dans lesquelles les administrateurs ont été appelés à prendre leurs décisions, ce qui incluait les obligations de Bell Canada envers ses détenteurs de débentures. Elles n'ont pas conclu que les administrateurs de BCE et de Bell

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distinct corporate character of the two entities does not figure in our analysis.

Canada auraient dû prendre des décisions différentes relativement aux deux sociétés. Par conséquent, le caractère distinct des deux entités ne sera pas pris en considération dans notre analyse.

V. Analysis

V. Analyse

A. *Overview of Rights, Obligations and Remedies Under the CBCA*

A. *Aperçu des droits, obligations et recours prévus par la LCSA*

[34] An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares: *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), at p. 767; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438. While the corporation is ongoing, shares confer no right to its underlying assets.

[34] Une composante essentielle d'une société est son capital social, qui est fractionné en actions : *Bradbury c. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), p. 767; *Zwicker c. Stanbury*, [1953] 2 R.C.S. 438. Tant que la société continue d'exister, les actions ne confèrent aucun droit sur ses éléments d'actifs.

[35] A share "is not an isolated piece of property . . . [but] a 'bundle' of interrelated rights and liabilities": *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1025, *per* La Forest J. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.

[35] Une action « n'est pas un bien pris isolément [. . .] [mais] un "ensemble" de droits et d'obligations étroitement liés entre eux » : *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015, p. 1025, le juge La Forest. Ces droits comprennent le droit à une part proportionnelle des éléments d'actif de la société lors de sa liquidation et un droit de regard sur la façon dont le conseil d'administration gère la société, qui s'exprime par l'exercice du droit de vote lors des assemblées des actionnaires.

[36] The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(*a*) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(*b*) (the duty of care). The second duty is not at issue in these proceedings as this is not a claim against the directors of the corporation for failing to meet their duty of care. However, this case does involve the fiduciary duty of the directors to the corporation, and particularly the "fair treatment" component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.

[36] Les administrateurs sont responsables de la gouvernance de la société. À ce titre, ils doivent s'acquitter de deux obligations : leur obligation fiduciaire envers la société prévue à l'al. 122(1)*a*) (l'obligation fiduciaire) et l'obligation d'agir avec le soin, la diligence et la compétence dont ferait preuve une personne prudente en pareilles circonstances, prévue à l'al. 122(1)*b*) (l'obligation de diligence). Cette deuxième obligation n'est pas en cause en l'espèce, car on ne reproche pas aux administrateurs d'avoir manqué à leur obligation de diligence. L'obligation fiduciaire des administrateurs envers la société est toutefois en cause, plus particulièrement en ce qui concerne l'une de ses composantes, soit l'obligation de « traitement équitable » qui, comme on le verra, est fondamentale pour ce qui est des attentes raisonnables des parties intéressées qui présentent une demande de redressement pour abus.

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[37] The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation: *Peoples Department Stores*.

[38] The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

[39] In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

As will be discussed, cases dealing with claims of oppression have further clarified the content of the fiduciary duty of directors with respect to the range of interests that should be considered in determining what is in the best interests of the corporation, acting fairly and responsibly.

[37] L'obligation fiduciaire des administrateurs envers la société tire son origine de la common law. Elle leur impose d'agir au mieux des intérêts de la société. Souvent les intérêts des actionnaires et des parties intéressées concordent avec ceux de la société. Toutefois, lorsque ce n'est pas le cas, l'obligation des administrateurs est claire : elle est envers la société (*Magasins à rayons Peoples*).

[38] L'obligation fiduciaire des administrateurs est un concept large et contextuel. Elle ne se limite pas à la valeur des actions ou au profit à court terme. Dans le contexte de la continuité de l'entreprise, cette obligation vise les intérêts à long terme de la société. Son contenu varie selon la situation. Elle exige à tous le moins des administrateurs qu'ils veillent à ce que la société s'acquitte de ses obligations légales mais, selon le contexte, elle peut aussi englober d'autres exigences. Quoi qu'il en soit, l'obligation fiduciaire des administrateurs est de nature impérative; ils sont tenus d'agir au mieux des intérêts de la société.

[39] Selon l'arrêt *Magasins à rayons Peoples* de notre Cour, bien que les administrateurs *doivent* agir au mieux des intérêts de la société, il peut également être opportun, *sans être obligatoire*, qu'ils tiennent compte de l'effet des décisions concernant la société sur l'actionnariat ou sur un groupe particuliers de parties intéressées. Comme l'ont indiqué les juges Major et Deschamps au par. 42 :

> Nous considérons qu'il est juste d'affirmer en droit que, pour déterminer s'il agit au mieux des intérêts de la société, il peut être légitime pour le conseil d'administration, vu l'ensemble des circonstances dans un cas donné, de tenir compte notamment des intérêts des actionnaires, des employés, des fournisseurs, des créanciers, des consommateurs, des gouvernements et de l'environnement.

On verra plus loin que la jurisprudence sur les recours en cas d'abus a clarifié davantage le contenu de l'obligation fiduciaire des administrateurs quant à l'éventail des intérêts qu'ils doivent prendre en compte pour déterminer ce qui est au mieux des intérêts de la société, en agissant de façon équitable et responsable.

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[40] In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[40] En déterminant ce qui sert au mieux les intérêts de la société, les administrateurs peuvent examiner notamment les intérêts des actionnaires, des employés, des créanciers, des consommateurs, des gouvernements et de l'environnement. Les tribunaux doivent faire preuve de la retenue voulue à l'égard de l'appréciation commerciale des administrateurs qui tiennent compte de ces intérêts connexes, comme le veut la « règle de l'appréciation commerciale ». Cette règle appelle les tribunaux à respecter une décision commerciale, pourvu qu'elle s'inscrive dans un éventail de solutions raisonnables possibles : voir *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr c. Danier Leather Inc.*, [2007] 3 R.C.S. 331, 2007 CSC 44. Elle rend compte du fait que les administrateurs qui, aux termes du par. 102(1) de la *LCSA*, ont pour fonction de gérer les activités commerciales et les affaires internes de la société, sont souvent plus à même de déterminer ce qui sert au mieux ses intérêts. Cela vaut tant pour les décisions touchant les intérêts des parties intéressées que pour d'autres décisions relevant des administrateurs.

[41] Normally only the beneficiary of a fiduciary duty can enforce the duty. In the corporate context, however, this may offer little comfort. The directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty. The shareholders cannot act in the stead of the corporation; their only power is the right to oversee the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.

[41] Normalement, seul le bénéficiaire d'une obligation fiduciaire peut en réclamer l'exécution. Toutefois, dans le contexte du droit des sociétés, suivre cette règle se révélerait souvent illusoire. Il est en effet invraisemblable que les administrateurs qui contrôlent la société intentent contre eux-mêmes une action pour manquement à leur propre obligation fiduciaire. Les actionnaires ne peuvent agir à la place de la société. Leur seul pouvoir réside dans leur droit de regard sur le comportement des administrateurs qui s'exprime par l'exercice de leur droit de vote aux assemblées des actionnaires. D'autres parties intéressées n'ont même pas ce pouvoir.

[42] To meet these difficulties, the common law developed a number of special remedies to protect the interests of shareholders and stakeholders of the corporation. These remedies have been affirmed, modified and supplemented by the *CBCA*.

[42] Pour pallier ces difficultés, la common law a élaboré des recours spéciaux visant à protéger les intérêts des actionnaires et des parties intéressées. La *LCSA* a maintenu, modifié et complété ces recours.

[43] The first remedy provided by the *CBCA* is the s. 239 derivative action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling

[43] Le premier recours prévu par la *LCSA* est l'action oblique, décrite à l'art. 239, qui permet aux parties intéressées de forcer les administrateurs récalcitrants à s'acquitter de leurs obligations

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to do so. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. (The requirement of leave serves to prevent frivolous and vexatious actions, and other actions which, while possibly brought in good faith, are not in the interest of the corporation to litigate.)

envers la société. Le plaignant peut, avec l'autorisation du tribunal, intenter une action oblique au nom et pour le compte de la société ou de l'une de ses filiales (ou y intervenir) pour faire respecter un droit de la société, et notamment un droit corrélatif à une obligation des administrateurs envers la société. (L'obligation d'obtenir une autorisation vise à prévenir les actions frivoles ou vexatoires ainsi que les actions qui, même intentées de bonne foi, ne servent pas les intérêts de la société.)

[44] A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(*b*) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(*a*) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores*. Section 122(1)(*b*) does not provide an independent foundation for claims. However, applying the principles of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

[44] Deuxièmement, les administrateurs peuvent faire l'objet d'une action civile pour manquement à leur obligation de diligence. Comme il en a été fait mention, l'al. 122(1)*b*) de la *LCSA* oblige les administrateurs et les dirigeants d'une société à agir « avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente ». Cette obligation, à la différence de l'obligation fiduciaire énoncée à l'al. 122(1)*a*), n'est pas uniquement envers la société. Elle peut donc engager la responsabilité des administrateurs envers les autres parties intéressées, conformément aux principes régissant la responsabilité délictuelle et extracontractuelle : *Magasins à rayons Peoples*. L'alinéa 122(1)*b*) ne peut servir de fondement indépendant à un recours, mais les tribunaux peuvent s'en inspirer, conformément aux principes énoncés dans *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205, pour définir la norme de conduite à laquelle on peut raisonnablement s'attendre.

[45] A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

[45] Un troisième recours de common law codifié par la *LCSA* est la demande de redressement pour abus prévue à l'art. 241. Contrairement à l'action oblique, qui a pour objet le respect d'un droit de la société proprement dite, la demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity des parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours est ouvert à un large éventail de parties intéressées — détenteurs de valeurs mobilières, créanciers, administrateurs et dirigeants.

[46] Additional "remedial" provisions are found in provisions of the *CBCA* providing for court

[46] Enfin, les dispositions de la *LCSA* qui exigent l'obtention d'une approbation judiciaire

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approval in certain cases. An arrangement under s. 192 of the *CBCA* is one of these. While s. 192 cannot be described as a remedy *per se*, it has remedial-like aspects. It is directed at the situation of corporations seeking to effect fundamental changes to the corporation that affects stakeholder rights. The Act provides that such arrangements require the approval of the court. Unlike the civil action and oppression, which focus on the conduct of the directors, a s. 192 review requires a court approving a plan of arrangement to be satisfied that: (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is fair and reasonable. If the corporation fails to discharge its burden of establishing these elements, approval will be withheld and the proposed change will not take place. In assessing whether the arrangement should be approved, the court will hear arguments from opposing security holders whose rights are being arranged. This provides an opportunity for security holders to argue against the proposed change.

dans certains cas ont aussi une vocation réparatrice. L'article 192, relatif aux arrangements, en est un exemple. Bien que cet article ne puisse pas être décrit comme une disposition qui établit un recours à proprement parler, il comporte des aspects qui s'y apparentent. Il vise les situations où une société envisage des changements fondamentaux qui modifient les droits d'une partie intéressée. La *LCSA* prévoit que de tels arrangements doivent être approuvés par le tribunal. Contrairement à l'action civile et à la demande de redressement pour abus, qui mettent l'accent sur le comportement des administrateurs, l'examen prévu à l'art. 192 exige simplement que le tribunal qui approuve un plan d'arrangement soit convaincu que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable. Si la société ne s'acquitte pas de son fardeau de prouver ces éléments, sa demande d'approbation sera rejetée et elle ne pourra procéder au changement proposé. Pour décider s'il approuvera l'arrangement, le tribunal entend les détenteurs de valeurs mobilières dont les droits sont visés par l'arrangement et qui s'y opposent, ce qui leur donne la possibilité de faire valoir leurs objections au changement proposé.

[47] Two of these remedies are in issue in these actions: the action for oppression and approval of an arrangement under s. 192. The trial judge treated these remedies as involving distinct considerations and concluded that the debentureholders had failed to establish entitlement to either remedy. The Court of Appeal, by contrast, viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' expectations. Having found on this basis that the requirements of s. 192 were not met, the Court of Appeal concluded that the action for oppression was moot. As will become apparent, we do not endorse this approach. In our view, the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. Accordingly, we find it necessary to consider both the claims

[47] Deux de ces recours sont en cause en l'espèce : la demande de redressement pour abus et l'approbation d'un arrangement sous le régime de l'art. 192. Le juge de première instance a appliqué des considérations distinctes à chacun de ces recours, et conclu que les détenteurs de débentures n'avaient établi le bien-fondé ni de l'un ni de l'autre. La Cour d'appel a considéré, au contraire, que les recours se chevauchaient de façon importante, en ce qu'ils posaient tous deux la question de savoir si les administrateurs avaient suffisamment tenu compte des attentes des détenteurs de débentures. Ayant conclu, à cet égard, que les exigences de l'art. 192 n'avaient pas été respectées, elle a considéré la demande de redressement pour abus comme théorique. La Cour ne souscrit pas à ce raisonnement, comme elle l'expliquera plus loin. À notre avis, la demande de redressement pour abus et l'approbation judiciaire d'une modification

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for oppression and the s. 192 application for approval.

de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. Par conséquent, la Cour estime nécessaire d'examiner tant les demandes de redressement pour abus que la demande d'approbation fondée sur l'art. 192.

[48] The debentureholders have formally cross-appealed on the oppression remedy. However, due to the Court of Appeal's failure to consider this issue, the debentureholders did not advance separate arguments before this Court. As certain aspects of their position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here.

[48] Les détenteurs de débentures ont formé officiellement un pourvoi incident relativement à la demande de redressement pour abus. Toutefois, la Cour d'appel ne s'étant pas prononcée sur ce recours, ils n'ont pas présenté d'argumentation distincte à cet égard devant notre Cour. Néanmoins, comme certains aspects de leur position sont traités à bon droit dans le cadre de l'analyse de la demande de redressement pour abus en vertu de l'art. 241, ils seront examinés dans les présents motifs.

[49] Against this background, we turn to a more detailed consideration of the claims.

[49] À la lumière de ce qui précède, la Cour passe maintenant à l'examen plus approfondi des demandes.

B. *The Section 241 Oppression Remedy*

B. *La demande de redressement pour abus prévue à l'art. 241*

[50] The debentureholders in these appeals claim that the directors acted in an oppressive manner in approving the sale of BCE, contrary to s. 241 of the *CBCA*.

[50] Les détenteurs de débentures soutiennent que les administrateurs ont agi de façon abusive en l'espèce en approuvant la vente de BCE, contrevenant ainsi à l'art. 241 de la *LCSA*.

[51] Security holders of a corporation or its affiliates fall within the class of persons who may be permitted to bring a claim for oppression under s. 241 of the *CBCA*. The trial judge permitted the debentureholders to do so, although in the end he found the claim had not been established. The question is whether the trial judge erred in dismissing the claim.

[51] Les détenteurs de valeurs mobilières d'une société ou de l'une des personnes morales de son groupe appartiennent à la catégorie des personnes qui peuvent être autorisées à demander un redressement pour abus en vertu de l'art. 241 de la *LCSA*. Le juge de première instance a autorisé les détenteurs de débentures à présenter une telle demande, mais il a conclu en bout de ligne qu'ils n'en avaient pas établi le bien-fondé. Il faut maintenant déterminer si le juge de première instance a commis une erreur en rejetant cette demande.

[52] We will first set out what must be shown to establish the right to a remedy under s. 241, and then review the conduct complained of in the light of those requirements.

[52] La Cour décrira d'abord la preuve exigée pour que soit établi le droit à un redressement en vertu de l'art. 241, puis elle examinera le comportement visé à la lumière de ces exigences.

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(1) The Law

[53] Section 241(2) provides that a court may make an order to rectify the matters complained of where

> (*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 . . . .

[54] Section 241 jurisprudence reveals two possible approaches to the interpretation of the oppression provisions of the *CBCA*: M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 79-80 and 84. One approach emphasizes a strict reading of the three types of conduct enumerated in s. 241 (oppression, unfair prejudice and unfair disregard): see *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.). Cases following this approach focus on the precise content of the categories "oppression", "unfair prejudice" and "unfair disregard". While these cases may provide valuable insight into what constitutes oppression in particular circumstances, a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined. As Koehnen puts it (at p. 84), "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct. . . . The difficulty with adjectives is they provide no assistance in formulating principles that should underlie court intervention."

(1) L'état du droit

[53] Le paragraphe 241(2) permet au tribunal de redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

> *a*) soit en raison de son comportement;
>
> *b*) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;
>
> *c*) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[54] Deux façons différentes d'aborder les dispositions de la *LCSA* applicables en cas d'abus se dégagent de la jurisprudence relative à l'art. 241 : M. Koehnen, *Oppression and Related Remedies* (2004), p. 79-80 et 84. L'une d'elles appelle à une interprétation stricte des trois types de comportement énumérés à l'art. 241 (abus, préjudice injuste et omission injuste de tenir compte des intérêts) : voir *Scottish Co-operative Wholesale Society Ltd. c. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti c. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (C.S.); *Stech c. Davies*, [1987] 5 W.W.R. 563 (B.R. Alb.). Les arrêts guidés par cette interprétation s'intéressent à la teneur exacte d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » des intérêts en cause. Bien que ces décisions puissent fournir des indications valables sur ce qui constitue un abus dans une situation donnée, envisager la notion d'abus à partir de catégories définies pose problème parce que les termes utilisés ne peuvent être classés dans des compartiments étanches ni définis une fois pour toutes. Comme le dit Koehnen (p. 84) : [TRADUCTION] « Les trois composantes légales de l'abus sont en fait des qualificatifs destinés à décrire un comportement incorrect. [. . .] Le problème lié aux qualificatifs tient à ce qu'ils ne sont d'aucun secours pour la formulation des principes qui doivent fonder l'intervention du tribunal. »

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

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

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

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

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

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

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

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

[59] 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

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

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relationships at play. Conduct that may be oppressive in one situation may not be in another.

[60] Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:

> The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

[61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.

[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.

attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu. Un comportement abusif dans une situation donnée ne sera pas nécessairement abusif dans une situation différente.

[60] À partir de ces considérations générales, la Cour passe maintenant au premier volet de l'analyse, soit à l'examen des principes qui sous-tendent la demande de redressement pour abus. Dans *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), p. 379, lord Wilberforce, qui interprétait l'art. 222 de la *Companies Act, 1948* du Royaume-Uni, a décrit la demande de redressement pour abus en ces termes novateurs :

> [TRADUCTION] Par ces mots [« juste et équitable »] on reconnaît le fait qu'une société à responsabilité limitée est davantage qu'une simple entité légale dotée d'une personnalité morale propre. Il y a place, en droit des sociétés, pour la reconnaissance du fait que, derrière cette société, ou au sein de celle-ci, il y a des individus et que ces individus ont des droits, des attentes et des obligations entre eux qui ne se dissolvent pas nécessairement dans la structure de la société.

[61] Lord Wilberforce a présenté le recours en equity en faisant référence aux « droits », « attentes » et « obligations » des individus. Les mots « droits » et « obligations » renvoient à des intérêts dont on peut exiger le respect en droit sans faire appel à des recours spéciaux, par exemple, au moyen d'un recours contractuel ou de l'action oblique prévue à l'art. 239 de la *LCSA*. Restent donc les « attentes » des parties intéressées comme objet de la demande de redressement pour abus. Les attentes raisonnables de ces parties intéressées constituent la pierre angulaire de la demande de redressement pour abus.

[62] Comme le suggère le mot « raisonnable », le concept d'attentes raisonnables est objectif et contextuel. Les attentes réelles d'une partie intéressée en particulier ne sont pas concluantes. Lorsqu'il s'agit de déterminer s'il serait « juste et équitable » d'accueillir un recours, la question est de savoir si ces attentes sont raisonnables compte tenu des faits propres à l'espèce, des rapports en cause et de l'ensemble du contexte, y compris la possibilité d'attentes et de demandes opposées.

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

[63] Des circonstances particulières suscitent des attentes particulières. Les parties intéressées entretiennent des rapports entre elles et avec la société, sur le fondement de perceptions et d'attentes sur lesquelles elles sont en droit de miser, sous réserve de leur caractère raisonnable dans les circonstances : voir *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (C.S.J. Ont.). Le recours en cas d'abus vise précisément à assurer le respect de ces attentes.

[64] Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

[64] La possibilité d'un conflit entre les intérêts et les attentes de différentes parties intéressées ajoute à la complexité de l'appréciation du caractère raisonnable d'une attente particulière. La demande de redressement pour abus reconnaît qu'une société est une entité qui comprend et touche différents groupes et individus dont les intérêts peuvent être opposés. Les administrateurs ou d'autres parties impliquées dans les affaires de la société peuvent, en prenant des décisions à son égard ou en tentant de résoudre des conflits, retenir des solutions qui maximisent abusivement ou injustement les intérêts d'un groupe en particulier au détriment d'autres parties intéressées. Certes, la société et les actionnaires ont le droit de maximiser les bénéfices et la valeur des actions, mais ils ne peuvent le faire en traitant des parties intéressées inéquitablement. Un traitement équitable est, fondamentalement, ce à quoi les parties intéressées peuvent « raisonnablement s'attendre » — et le thème central récurrent de toute la jurisprudence en matière d'abus.

[65] Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable

[65] Le paragraphe 241(2) parle du « comportement » de la société ou de l'une des personnes morales de son groupe, de la conduite de « ses activités commerciales ou ses affaires internes » et de l'exercice par « ses administrateurs » de leurs « pouvoirs ». La situation dont on se plaint est souvent provoquée par le comportement de la société ou de ses administrateurs, qui sont responsables de la gouvernance de la société. Une demande de redressement pour abus peut toutefois découler du comportement d'autres parties impliquées dans les affaires de la société, comme des actionnaires : voir Koehnen, p. 109-110; *GATX Corp. c. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (C. Ont. (Div. gén.)). Dans les présents pourvois,

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expectations of the debentureholders, and it is unnecessary to go beyond this.

les demandes de redressement pour abus sont fondées sur des allégations selon lesquelles les administrateurs de BCE et de Bell Canada ont frustré les attentes raisonnables des détenteurs de débentures et il est inutile d'étendre notre examen au-delà de ces allégations.

[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 coincide 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.

[66] Le fait que le comportement des administrateurs soit souvent au centre des actions pour abus peut sembler indiquer que les administrateurs sont assujettis à une obligation directe envers les parties intéressées qui risquent d'être touchées par une décision de la société. En agissant au mieux des intérêts de la société, les administrateurs peuvent être obligés de considérer les effets de leurs décisions sur les parties intéressées, comme les détenteurs de débentures en l'espèce. C'est ce qu'on entend lorsqu'on affirme qu'un administrateur doit agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable. Toutefois, les administrateurs ont une obligation fiduciaire envers la société, et uniquement envers la société. Certes, on parle parfois de l'obligation des administrateurs envers la société et envers les parties intéressées. Cela ne porte habituellement pas à conséquence, puisque les attentes raisonnables d'une partie intéressée quant à un résultat donné coïncident souvent avec les intérêts de la société. Il peut néanmoins arriver (comme en l'espèce) que ce ne soit pas le cas. Il importe de préciser que l'obligation des administrateurs est alors envers la société et non envers les parties intéressées, et que les parties intéressées ont pour seule attente raisonnable celle que les administrateurs agissent au mieux des intérêts de la société.

[67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of

[67] Après avoir examiné le concept des attentes raisonnables qui sous-tend la demande de redressement pour abus, la Cour passe au second volet du recours prévu à l'art. 241. Toutes les attentes déçues, même lorsqu'elles sont raisonnables, ne donnent pas ouverture à une demande sous le régime de l'art. 241. Cette disposition exige que le comportement visé constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause. Le terme « abus » désigne un comportement coercitif et excessif et évoque la mauvaise foi. Le « préjudice injuste »

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interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

peut impliquer un état d'esprit moins coupable, mais dont les conséquences sont néanmoins injustes. Enfin, l'« omission injuste de tenir compte » d'intérêts donnés étend l'application de ce recours à une situation où un intérêt n'est pas pris en compte parce qu'il est perçu comme sans importance, contrairement aux attentes raisonnables des parties intéressées : voir Koehnen, p. 81-88. Ces expressions décrivent, à l'aide de qualificatifs, des façons dont les parties impliquées dans les affaires d'une société peuvent frustrer les attentes raisonnables des parties intéressées.

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

[68] En résumé, les considérations qui précèdent indiquent que le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions interreliées : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement qui correspond à la définition d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » d'un intérêt pertinent?

[69] Against the background of this overview, we turn to a more detailed discussion of these inquiries.

[69] C'est sur cette toile de fond que la Cour examinera maintenant ces questions de façon plus approfondie.

(a) *Proof of a Claimant's Reasonable Expectations*

a) *La preuve de l'attente raisonnable*

[70] At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

[70] L'auteur de la demande de redressement doit d'abord préciser quelles attentes ont censément été frustrées par le comportement en cause et en établir le caractère raisonnable. Comme cela a déjà été mentionné, on peut d'emblée déduire qu'une partie intéressée s'attend raisonnablement à être traitée équitablement. Toutefois, comme on l'a vu, l'abus touche généralement une attente particulière propre à une situation donnée. Il faut dès lors établir l'existence de cette attente raisonnable de la partie intéressée. La preuve d'une attente peut se faire de différentes façons selon les faits.

[71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is

[71] Il est impossible de dresser une liste exhaustive des situations qui peuvent susciter une attente raisonnable, compte tenu de leur nature circonstancielle. Il est toutefois possible d'énoncer quelques

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not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

principes généraux. Le recours prévu par l'art. 241 n'exige pas qu'il y ait illégalité; cet article entre en jeu « lorsque la conduite attaquée est [fautive], même si elle n'est pas en fait illégale » : Comité Dickerson (R. W. V. Dickerson, J. L. Howard et L. Getz), *Propositions pour un nouveau droit des corporations commerciales canadiennes* (1971), vol. I, p. 188. Ce recours est axé sur les notions de justice et d'équité plutôt que sur les droits. Pour déterminer si des intérêts ou attentes raisonnables doivent être pris en considération, les tribunaux vont au-delà de la légalité et se demandent ce qui est équitable compte tenu de tous les intérêts en jeu : *Re Keho Holdings Ltd. and Noble*. Il s'ensuit que toute conduite préjudiciable pour une partie intéressée ne donnera pas nécessairement ouverture à une demande de redressement pour abus contre la société.

[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.

[72] Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

(i) Commercial Practice

[73] Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy: *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)), var'd (1998), 110 O.A.C. 160 (Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2002] 1 S.C.R. vi.

(i) Les pratiques commerciales

[73] Les pratiques commerciales jouent un rôle important dans la formation des attentes raisonnables des parties. Une dérogation aux pratiques commerciales habituelles qui entrave ou rend impossible l'exercice de ses droits par le plaignant donnera généralement (mais pas inévitablement) ouverture à un recours : *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (C.S.J. Ont.); *SCI Systems Inc. c. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (C. Ont. (Div. gén.)), mod. par (1998), 110 O.A.C. 160 (C. div.); *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 200 D.L.R. (4th) 289 (C.A. Ont.), autorisation d'appel refusée, [2002] 1 R.C.S. vi.

(ii) The Nature of the Corporation

[74] The size, nature and structure of the corporation are relevant factors in assessing reasonable

(ii) La nature de la société

[74] La taille, la nature et la structure de la société constituent également des facteurs pertinents

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expectations: *First Edmonton Place*; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

dans l'appréciation d'une attente raisonnable : *First Edmonton Place*; G. Shapira, « Minority Shareholders' Protection — Recent Developments » (1982), 10 *N.Z. Univ. L. Rev.* 134, p. 138 et 145-146. Il est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille.

(iii) Relationships

[75] Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

(iii) Les rapports existants

[75] Les rapports personnels entre le plaignant et d'autres parties impliquées dans les affaires de la société peuvent également donner naissance à des attentes raisonnables. Par exemple, il se peut que les rapports entre actionnaires fondés sur des liens familiaux ou des liens d'amitié n'obéissent pas aux mêmes normes que les rapports entre actionnaires sans lien de dépendance d'une société ouverte. Pour reprendre les propos tenus dans l'affaire *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (C.A. Ont.), [TRADUCTION] « lorsqu'une société fermée est en cause, le tribunal peut tenir compte du rapport entre les actionnaires et non simplement des droits » (p. 727).

(iv) Past Practice

[76] Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

(iv) Les pratiques antérieures

[76] Les pratiques antérieures peuvent faire naître des attentes raisonnables, plus particulièrement chez les actionnaires d'une société fermée quant à leur participation aux profits et à la gouvernance de la société : *Gibbons c. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. Dans *Gibbons*, par exemple, la Cour a jugé que les actionnaires pouvaient légitimement s'attendre à ce que tous les versements faits aux actionnaires par la société soient proportionnels au pourcentage d'actions qu'ils détenaient. La décision des nouveaux administrateurs de se verser des honoraires, pour lesquels les actionnaires ne recevraient pas de paiements correspondants, était contraire à ces attentes.

[77] It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the

[77] Il importe de souligner que les pratiques et les attentes peuvent changer avec le temps. Lorsqu'un changement est motivé par des raisons

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change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice: *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

commerciales valides et qu'il ne porte pas atteinte aux droits du plaignant, il ne saurait exister d'attente raisonnable que les administrateurs s'abstiendront de déroger aux pratiques antérieures : *Alberta Treasury Branches c. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (B.R. Alb.), conf. par (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

(v) Preventive Steps

[78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

(v) Les mesures préventives

[78] Lorsqu'il apprécie le caractère raisonnable d'une attente d'une partie intéressée, le tribunal peut se demander si le plaignant aurait pu prendre des mesures pour se protéger contre le préjudice qu'il allègue avoir subi. Ainsi, il peut être pertinent de déterminer si un créancier garanti qui se plaint d'un abus aurait pu négocier des mesures de protection contre le préjudice en cause : *First Edmonton Place*; *SCI Systems*.

(vi) Representations and Agreements

[79] Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties: *Main*; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C.C.A.).

[80] Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications: *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.), aff'd (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Ct. (Gen. Div.)); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Gen. Div.), var'd (1998), 38 O.R. (3d) 749 (C.A.).

(vi) Les déclarations et conventions

[79] On peut considérer une convention d'actionnaires comme l'expression des attentes raisonnables des parties : *Main*; *Lyall c. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (C.A.C.-B.).

[80] Les déclarations faites à des parties intéressées ou au public dans des documents promotionnels, des prospectus, des circulaires d'offre et d'autres communications peuvent également influer sur les attentes raisonnables : *Tsui c. International Capital Corp.*, [1993] 4 W.W.R. 613 (B.R. Sask.), conf. par (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada c. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (C. Ont. (Div. gén.)); *Themadel Foundation c. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Div. gén.), mod. par (1998), 38 O.R. (3d) 749 (C.A.).

(vii) Fair Resolution of Conflicting Interests

[81] As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary

(vii) La conciliation équitable d'intérêts opposés

[81] Comme cela a été souligné, des conflits peuvent surgir soit entre les intérêts de différentes parties intéressées, soit entre les intérêts des parties intéressées et ceux de la société. Lorsque le conflit touche les intérêts de la société, il revient aux administrateurs de la société de le résoudre

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duty to act in the best interests of the corporation, viewed as a good corporate citizen.

conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable.

[82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

[82] Dans son ensemble, la jurisprudence en matière d'abus confirme que l'obligation des administrateurs d'agir au mieux des intérêts de la société inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées qui sont touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable.

[83] Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods*, *per* Weiler J.A., at p. 192.

[83] Les administrateurs peuvent se retrouver dans une situation où il leur est impossible de satisfaire toutes les parties intéressées. [TRADUCTION] « Il importe peu que les administrateurs aient écarté d'autres transactions, sauf si on peut démontrer que l'une de ces autres transactions pouvait effectivement être réalisée et était manifestement plus avantageuse pour l'entreprise que celle qui a été choisie » : *Maple Leaf Foods*, la juge Weiler, p. 192.

[84] There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

[84] Aucun principe n'établit que les intérêts d'un groupe — ceux des actionnaires, par exemple — doivent prévaloir sur ceux d'un autre groupe. Tout dépend des particularités de la situation dans laquelle se trouvent les administrateurs et de la question de savoir si, dans les circonstances, ils ont agi de façon responsable dans leur appréciation commerciale.

[85] On these appeals, it was suggested on behalf of the corporations that the "*Revlon* line" of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.

[85] En l'espèce, les appelantes ont fait valoir que le courant jurisprudentiel émanant du Delaware et représenté par l'arrêt *Revlon* appuie le principe voulant qu'un conflit entre les intérêts des actionnaires et ceux des créanciers doive être résolu en faveur des actionnaires.

[86] The "*Revlon* line" refers to a series of Delaware corporate takeover cases, the two most important of which are *Revlon, Inc. v. MacAndrews*

[86] Le courant jurisprudentiel dit *Revlon* regroupe une série de décisions rendues au Delaware dans le contexte d'offres publiques d'achat (« OPA ») et

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& *Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). In both cases, the issue was how directors should react to a hostile takeover bid. *Revlon* suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. *Unocal* tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover "may have regard for various constituencies in discharging its responsibilities, . . . such concern for non-stockholder interests is inappropriate when . . . the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder" (p. 182).

[87] What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces. In a review of trends in Delaware corporate jurisprudence, former Delaware Supreme Court Chief Justice E. Norman Veasey put it this way:

> [I]t is important to keep in mind the precise content of this "best interests" concept — that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of stockholders [i.e., as in *Revlon*]. But, in general, the directors owe fiduciary duties to the *corporation*, not to the stockholders. [Emphasis in original.]

(E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on

dont les deux plus importantes sont *Revlon, Inc. c. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), et *Unocal Corp. c. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Dans ces deux décisions, il s'agissait de déterminer comment les administrateurs devaient réagir à une OPA hostile. L'arrêt *Revlon* donne à croire que, dans ce contexte, les intérêts des actionnaires doivent l'emporter sur ceux des autres parties intéressées, comme les créanciers. L'arrêt *Unocal* a appliqué cette approche aux situations dans lesquelles la société ne poursuivra pas ses activités et précisé que, bien que le conseil d'administration d'une société visée par une OPA hostile [TRADUCTION] « puisse tenir compte de diverses parties intéressées lorsqu'il s'acquitte de ses fonctions [. . .] il n'est pas approprié de prendre ainsi en compte les intérêts des non-actionnaires lorsque [. . .] l'objectif n'est plus de protéger la société ou d'en poursuivre les activités, mais de la vendre au plus offrant » (p. 182).

[87] Ce qui est clair, c'est que le courant jurisprudentiel dit *Revlon* n'a pas remplacé la règle fondamentale selon laquelle l'obligation des administrateurs ne peut se réduire à l'application de règles de priorité particulières, mais relève plutôt de l'appréciation commerciale de ce qui sert le mieux les intérêts de la société, dans la situation où elle se trouve. L'ancien juge en chef de la Cour suprême du Delaware, E. Norman Veasey, s'est exprimé ainsi dans une analyse des tendances jurisprudentielles en droit des sociétés au Delaware :

> [TRADUCTION] [I]l faut garder à l'esprit le contenu précis du concept « d'obligation d'agir au mieux des intérêts » — c'est-à-dire envers qui et quand s'applique cette obligation. Naturellement, on pense souvent que les administrateurs sont ainsi obligés tant envers la société qu'envers les actionnaires. Cette façon de voir est le plus souvent inoffensive parce qu'il y a concordance des intérêts, puisque ce qui est bon pour la société est habituellement bon pour les actionnaires. Il arrive bien sûr que l'accent soit mis directement sur les intérêts des actionnaires [comme dans *Revlon*]. En général, cependant, les administrateurs sont obligés envers la *société*, et non envers les actionnaires. [En italique dans l'original.]

(E. Norman Veasey, assisté de Christine T. Di Guglielmo, « What Happened in Delaware Corporate Law and Governance from 1992-2004?

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Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399, at p. 1431)

[88] Nor does this Court's decision in *Peoples Department Stores* suggest a fixed rule that the interests of creditors must prevail. In *Peoples Department Stores*, the Court had to consider whether, in the case of a corporation under threat of bankruptcy, creditors deserved special consideration (para. 46). The Court held that the fiduciary duty to the corporation did not change in the period preceding the bankruptcy, but that if the directors breach their duty of care to a stakeholder under s. 122(1)(*b*) of the *CBCA*, such a stakeholder may act upon it (para. 66).

(b) *Conduct Which Is Oppressive, Is Unfairly Prejudicial or Unfairly Disregards the Claimant's Relevant Interests*

[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 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*.

A Retrospective on Some Key Developments » (2005), *153 U. Pa. L. Rev.* 1399, p. 1431)

[88] Par ailleurs, l'arrêt *Magasins à rayons Peoples* n'établit pas non plus de règle fixe qui ferait prévaloir les droits des créanciers. Dans cet arrêt, la Cour devait décider s'il fallait accorder une attention particulière aux créanciers d'une société menacée de faillite (par. 46). Elle a statué que l'obligation fiduciaire envers la société ne change pas au cours de la période précédant la faillite, mais qu'une partie intéressée peut intenter un recours en cas de manquement des administrateurs à l'obligation de diligence que leur impose l'al. 122(1)*b*) de la *LCSA* (par. 66).

b) *La conduite abusive ou injuste à l'égard des intérêts du plaignant en ce qu'elle lui porte préjudice ou ne tient pas compte de ses intérêts*

[89] Jusqu'à maintenant, la Cour a examiné la façon dont le plaignant doit établir la preuve du premier élément de la demande de redressement pour abus — à savoir qu'il s'attendait raisonnablement à être traité d'une certaine manière. Or, pour parfaire sa demande de redressement pour abus, le plaignant doit prouver que le défaut de répondre à cette attente est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241 de la *LCSA*. Ce ne sont pas, en effet, tous les cas où une attente raisonnable a été frustrée qui commandent la prise en compte des considérations en equity sur lesquelles repose la demande de redressement pour abus. Le tribunal doit être convaincu que la conduite en cause relève des notions d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » des intérêts du plaignant, au sens de l'art. 241 de la *LCSA*. Dans cette perspective, l'analyse des attentes raisonnables qui constitue l'assise théorique de la demande de redressement pour abus et les types particuliers de comportement décrits à l'art. 241 apparaissent comme des approches complémentaires, et non des approches distinctes, comme on l'a parfois supposé. Ensemble, ces approches offrent un tableau complet de ce qui constitue une conduite injuste et inéquitable, pour reprendre les termes de l'arrêt *Ebrahimi*.

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[90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

[90] Dans la plupart des cas, la preuve d'une attente raisonnable sera liée aux notions d'abus, de préjudice injuste ou d'omission injuste de tenir compte des intérêts, ainsi que le prévoit l'art. 241, et les deux volets de la preuve se trouveront dans les faits réunis. Il faut néanmoins souligner que, comme dans toute action en equity, la demande de redressement pour abus requiert que l'on prouve la conduite fautive, le lien de causalité et le préjudice indemnisable.

[91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[91] Les notions d'abus, de préjudice injuste et d'omission injuste de tenir compte des intérêts pertinents sont de nature descriptive. Elles indiquent le type de faute ou de comportement visé par le recours prévu à l'art. 241 de la *LCSA*. Toutefois, il ne s'agit pas de compartiments étanches. Ces notions se chevauchent et s'enchevêtrent souvent.

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

[92] À l'origine, la jurisprudence décrivait simplement l'acte fautif comme un abus, généralement associé à une conduite qualifiée selon les cas d'[TRADUCTION] « accablante, dure et illégitime », d'« écart marqué par rapport aux normes de traitement équitable », ou d'« abus de pouvoir » mettant en cause la probité dans la conduite des affaires de la société : voir Koehnen, p. 81. C'est de cet acte fautif que le recours tire son nom, lequel sert dorénavant à désigner de façon générale tous les recours fondés sur l'art. 241. Toutefois, ce terme sous-entend également un type particulier de préjudice relevant de la conception moderne de l'abus au sens général, soit un acte fautif très grave.

[93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees

[93] À la notion initiale de la common law, la *LCSA* a ajouté les notions de « préjudice injuste » et d'« omission injuste de tenir compte » des intérêts, indiquant ainsi clairement que les actes fautifs qui ne peuvent être qualifiés d'abusifs peuvent néanmoins tomber sous le coup de l'art. 241. Règle générale, le « préjudice injuste » est considéré comme supposant une conduite moins grave que l'« abus », par exemple l'éviction d'un actionnaire minoritaire, l'omission de divulguer des transactions avec des apparentés, la modification de la structure de la société pour changer radicalement les ratios d'endettement, l'adoption d'une « pilule

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and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

empoisonnée » pour éviter une OPA, le versement de dividendes sans déclaration formelle, le fait de privilégier certains actionnaires par le paiement d'honoraires de gestion et le paiement aux administrateurs d'honoraires plus élevés que la norme appliquée dans le secteur d'activité en cause : voir Koehnen, p. 82-83.

[94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

[94] L'« omission injuste de tenir compte » des intérêts est considérée comme le moins grave des trois préjudices ou actes fautifs mentionnés à l'art. 241. Favoriser un administrateur en omettant d'engager une poursuite, réduire indûment le dividende d'un actionnaire ou ne pas remettre au plaignant un bien lui appartenant en sont autant d'exemples : voir Koehnen, p. 83-84.

(2) Application to These Appeals

(2) Application aux présents pourvois

[95] As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? 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?

[95] Comme cela a déjà été expliqué (au par. 68), le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » d'un intérêt pertinent?

[96] The debentureholders in this case assert two alternative expectations. Their highest position is that they had a reasonable expectation that the directors of BCE would protect their economic interests as debentureholders in Bell Canada by putting forward a plan of arrangement that would maintain the investment grade trading value of their debentures. Before this Court, however, they argued a softer alternative — a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures.

[96] En l'espèce, les détenteurs de débentures soutiennent avoir eu deux attentes distinctes. Leur position première est qu'ils avaient des motifs raisonnables de s'attendre à ce que les administrateurs de BCE protègent leurs intérêts financiers comme détenteurs de débentures de Bell Canada en proposant un plan d'arrangement qui maintiendrait la cote de leurs débentures comme admissibles pour des placements. Devant notre Cour, cependant, ils ont plaidé subsidiairement avoir eu une attente plus limitée — l'attente raisonnable que les administrateurs tiendraient compte de leurs intérêts financiers en préservant la valeur marchande des débentures.

[97] As summarized above (at para. 25), the trial judge proceeded on the debentureholders' alleged expectation that the directors would act in a way that would preserve the investment grade status of their debentures. He concluded that this expectation

[97] Ainsi que la Cour l'a exposé brièvement plus haut (au par. 25), le juge de première instance a étudié la prétention des détenteurs de débentures qu'ils s'attendaient à ce que les administrateurs agissent de façon à préserver la cote de placements

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was not made out on the evidence, since the statements by Bell Canada suggesting a commitment to retaining investment grade ratings were accompanied by warnings that explicitly precluded investors from reasonably forming such expectations, and the warnings were included in the prospectuses pursuant to which the debentures were issued.

admissibles de leurs débentures. Il a conclu que la preuve de cette attente n'avait pas été établie étant donné que les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles s'accompagnaient de mises en garde faisant explicitement en sorte que les investisseurs ne pourraient former de telles attentes, mises en garde qui figuraient aussi dans les prospectus d'émission des débentures.

[98] The absence of a reasonable expectation that the investment grade of the debentures would be maintained was confirmed, in the trial judge's view, by the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, as well as by the fact that the claimants could have protected themselves against reduction in market value by negotiating appropriate contractual terms.

[98] L'absence d'une attente raisonnable quant au maintien de la cote de placements admissibles des débentures trouvait confirmation, selon le juge de première instance, dans le contexte global de la relation entre la société et les détenteurs de débentures, la nature de la société, sa situation en tant que cible de plusieurs offres d'achat, de même que dans le fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées.

[99] The trial judge situated his consideration of the relevant factors in the appropriate legal context. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others. He held that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt. Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

[99] Le juge de première instance a procédé à l'examen des facteurs pertinents en utilisant le cadre juridique approprié. Il a reconnu que les administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et que le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet. Il a souligné que, face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Il a conclu que le fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que les soumissionnaires étaient disposés à accepter un endettement moindre. Selon la règle de l'appréciation commerciale, il faut faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi dans l'exécution des fonctions pour lesquelles ils ont été élus par les actionnaires.

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[100] We see no error in the principles applied by the trial judge nor in his findings of fact, which were amply supported by the evidence. We accordingly agree that the first expectation advanced in this case — that the investment grade status of the debentures would be maintained — was not established.

[101] The alternative, softer, expectation advanced is that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures. The Court of Appeal, albeit in the context of its reasons on the s. 192 application, accepted this as a reasonable expectation. It held that the representations made over the years, while not legally binding, created expectations beyond contractual rights. It went on to state that in these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on debentureholders.

[102] The evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration. As discussed above, reasonable expectations for the purpose of a claim of oppression are not confined to legal interests. Given the potential impact on the debentureholders of the transactions under consideration, one would expect the directors, acting in the best interests of the corporation, to consider their short and long-term interests in the course of making their ultimate decision.

[103] Indeed, the evidence shows that the directors did consider the interests of the debentureholders. A number of debentureholders sent letters to the Board, expressing concern about the proposed leveraged buyout and seeking assurances that their interests would be considered. One of the directors, Mr. Pattison, met with Phillips, Hager & North,

[100] La Cour estime que le juge de première instance n'a commis aucune erreur dans son application des principes ni dans ses conclusions de fait, qui étaient amplement étayées par la preuve. La Cour est donc d'accord pour dire que la première attente alléguée en l'espèce — soit le maintien de la cote de placements admissibles des débentures — n'a pas été établie.

[101] L'attente subsidiaire, plus limitée, avancée par les plaignants, est que les administrateurs prendraient en compte les intérêts des créanciers obligataires en maintenant la valeur marchande des débentures. Dans le contexte de ses motifs concernant l'application de l'art. 192, la Cour d'appel a reconnu qu'il s'agissait là d'une attente raisonnable. Elle a conclu que les déclarations faites au cours des années, bien que non juridiquement contraignantes, avaient créé des attentes qui s'ajoutaient aux droits contractuels. Elle a ajouté que, dans ces circonstances, il incombait aux administrateurs non seulement de retenir la meilleure offre, mais encore d'examiner s'il était possible de restructurer l'arrangement de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures.

[102] Considérée objectivement, la preuve permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures pour prendre leurs décisions concernant les diverses offres à l'étude. Comme cela a été mentionné, dans le cadre d'une demande de redressement pour abus, les attentes raisonnables ne se limitent pas aux droits. Étant donné les répercussions potentielles des transactions proposées sur les détenteurs de débentures, on s'attendrait à ce que les administrateurs, agissant au mieux des intérêts de la société, tiennent compte de leurs intérêts à court et à long termes dans leur décision ultime.

[103] De fait, la preuve indique que les administrateurs ont effectivement tenu compte des intérêts des détenteurs de débentures. Un certain nombre de détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant l'acquisition par emprunt proposée et demander l'assurance que leurs intérêts seraient pris en

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representatives of the debentureholders. The directors' response to these overtures was that the contractual terms of the debentures would be met, but no additional assurances were given.

[104] It is apparent that the directors considered the interests of the debentureholders and, having done so, concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests. It did not amount to "unfair disregard" of the interests of the debentureholders. As discussed above, it may be impossible to satisfy all stakeholders in a given situation. In this case, the Board considered the interests of the claimant stakeholders. Having done so, and having considered its options in the difficult circumstances it faced, it made its decision, acting in what it perceived to be the best interests of the corporation.

[105] What the claimants contend for on this appeal, in reality, is not merely an expectation that their interests be considered, but an expectation that the Board would take further positive steps to restructure the purchase in a way that would provide a satisfactory purchase price to the shareholders and preserve the high market value of the debentures. At this point, the second, softer expectation asserted approaches the first alleged expectation of maintaining the investment grade rating of the debentures.

[106] The difficulty with this proposition is that there is no evidence that it was reasonable to suppose it could have been achieved. BCE, facing certain takeover, acted reasonably to create a competitive bidding process. The process attracted three bids. All of the bids were leveraged, involving a substantial increase in Bell Canada's debt. It was this factor that posed the risk to the trading value

compte. L'un des administrateurs, M. Pattison, a rencontré les représentants des détenteurs de débentures, Phillips, Hager & North. Les administrateurs ont répondu à l'expression de ces inquiétudes en affirmant qu'ils respecteraient les dispositions contractuelles rattachées aux débentures, mais aucune autre assurance n'a été donnée.

[104] Les administrateurs ont manifestement pris en considération les intérêts des détenteurs de débentures et, cela fait, ils ont conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures. Cela ne constituait pas une « omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme nous l'avons vu, il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée. En l'espèce, le Conseil d'administration a pris en compte les intérêts des plaignants. Cela fait, et après avoir examiné ses options dans les circonstances difficiles auxquelles il faisait face, il a pris la décision qui lui paraissait servir le mieux des intérêts de la société.

[105] Ce que les plaignants font valoir en réalité dans le présent pourvoi, ce n'est pas simplement qu'ils s'attendaient à ce qu'on tienne compte de leurs intérêts, mais bien qu'ils comptaient que le Conseil d'administration adopte des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Sur ce point, la seconde attente, plus limitée, rejoint la première attente alléguée, soit le maintien de la cote de placements admissibles des débentures.

[106] La difficulté rattachée à cette prétention est que rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint. Dans la perspective d'une prise de contrôle certaine, BCE a agi de façon raisonnable pour créer un processus de soumissions concurrentiel. Le processus a suscité trois offres. Toutes les offres comportaient un emprunt, qui accroîtrait substantiellement

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of the debentures. There is no evidence that BCE could have done anything to avoid that risk. Indeed, the evidence is to the contrary.

l'endettement de Bell Canada. C'est ce facteur qui mettait à risque la valeur des débentures. Rien dans la preuve n'indique que BCE aurait pu faire quoi que ce soit pour écarter ce risque. En fait, la preuve démontrait le contraire.

[107] We earlier discussed the factors to consider in determining whether an expectation is reasonable on a s. 241 oppression claim. These include commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests. In our view, all these factors weigh against finding an expectation beyond honouring the contractual obligations of the debentures in this particular case.

[107] Il a déjà été fait mention de facteurs à prendre en considération pour déterminer si une attente est raisonnable dans le cadre d'une demande de redressement pour abus fondée sur l'art. 241, notamment les pratiques commerciales, la taille, la nature et la structure de la société, les rapports entre les parties, les pratiques antérieures, l'omission de négocier une protection, les conventions et déclarations, ainsi que la conciliation des intérêts opposés. De l'avis de la Cour, tous ces facteurs militent contre la conclusion qu'il existait en l'espèce une attente allant au-delà du respect des obligations contractuelles rattachées aux débentures.

[108] Commercial practice — indeed commercial reality — undermines the claim that a way could have been found to preserve the trading position of the debentures in the context of the leveraged buyout. This reality must have been appreciated by reasonable debentureholders. More broadly, two considerations are germane to the influence of general commercial practice on the reasonableness of the debentureholders' expectations. First, leveraged buyouts of this kind are not unusual or unforeseeable, although the transaction at issue in this case is noteworthy for its magnitude. Second, trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant where the debentureholders, it may be noted, generally represent some of Canada's largest and most reputable financial institutions, pension funds and insurance companies.

[108] Les pratiques commerciales — en fait la réalité commerciale — affaiblissent la prétention qu'il aurait été possible de trouver une façon de préserver la valeur marchande des débentures dans le cadre d'une acquisition par emprunt. Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité. Plus généralement, deux considérations sont pertinentes en ce qui concerne l'influence des pratiques commerciales générales sur le caractère raisonnable des attentes des détenteurs de débentures. Premièrement, les acquisitions par emprunt de ce type n'ont rien d'inhabituel ou d'imprévisible, bien que la transaction en cause en l'espèce se démarque par son ampleur. Deuxièmement, les actes de fiducie peuvent inclure des dispositions concernant un changement de contrôle et la cote financière dans les cas où ces protections ont été négociées. Des protections de ce type auraient assuré aux détenteurs de débentures un droit de vote, peut-être par l'intermédiaire de leur fiduciaire, sur l'acquisition par emprunt, comme l'a souligné le juge de première instance. Le défaut de négocier des mesures de protection revêtait de l'importance dans un cas où, soulignons-le, les détenteurs de débentures étaient en règle générale des institutions financières, des caisses de retraite et des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada.

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[109] The nature and size of the corporation also undermine the reasonableness of any expectation that the directors would reject the offers that had been presented and seek an arrangement that preserved the investment grade rating of the debentures. As discussed above (at para. 74), courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation, rather than those relating to interests in a large, public corporation. Bell Canada had become a wholly owned subsidiary of BCE in 1983, pursuant to a plan of arrangement which saw the shareholders of Bell Canada surrender their shares in exchange for shares of BCE. Based upon the history of the relationship, it should not have been outside the contemplation of debentureholders acquiring debentures of Bell Canada under the 1996 and 1997 trust indentures, that arrangements of this type had occurred and could occur in the future.

[109] La nature et la taille de la société viennent également ébranler la prétention selon laquelle il aurait été raisonnable de s'attendre à ce que les administrateurs rejettent les offres présentées et recherchent un arrangement susceptible de préserver la cote de placements admissibles des débentures. On a déjà signalé (au par. 74) qu'il est possible que les tribunaux accordent plus de latitude quant aux attentes raisonnables dans le cas d'une petite société fermée que dans celui d'une société ouverte de plus grande taille. Bell Canada était devenue une filiale en propriété exclusive de BCE en 1983, en vertu d'un plan d'arrangement par lequel les actionnaires de Bell Canada cédaient leurs actions en échange d'actions de BCE. Compte tenu de l'historique du rapport en cause, les détenteurs de débentures de Bell Canada de 1996 et 1997 devaient savoir, lorsqu'ils les ont acquises, que des arrangements de ce type avaient déjà été conclus et pouvaient l'être dans l'avenir.

[110] The debentureholders rely on past practice, suggesting that investment grade ratings had always been maintained. However, as noted, reasonable practices may reflect changing economic and market realities. The events that precipitated the leveraged buyout transaction were such realities. Nor did the trial judge find in this case that representations had been made to debentureholders upon which they could have reasonably relied.

[110] Les détenteurs de débentures invoquent les pratiques antérieures, affirmant que la cote de placements admissibles avait toujours été maintenue. Rappelons toutefois que les pratiques raisonnables peuvent changer au gré des fluctuations de l'économie et des conditions du marché. Les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie de ces conditions. Le juge de première instance n'a pas non plus conclu que des déclarations auxquelles les détenteurs de débentures auraient pu raisonnablement se fier leur avaient été faites.

[111] Finally, the claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.

[111] Enfin, il faut examiner la demande sous l'angle de l'obligation des administrateurs de résoudre les conflits entre les parties intéressées de façon équitable, au mieux des intérêts de la société.

[112] The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. The evidence, accepted by the trial judge, was that Bell Canada needed to undertake significant changes to continue to be successful, and that privatization

[112] À l'époque, les intérêts de la société concordaient sans doute avec l'acceptation de l'offre. BCE avait été mise en jeu, et la dynamique du marché rendait l'acquisition inévitable. La preuve, acceptée par le juge de première instance, indiquait que Bell Canada devait procéder à des changements substantiels pour continuer à

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would provide greater freedom to achieve its long-term goals by removing the pressure on short-term public financial reporting, and bringing in equity from sophisticated investors motivated to improve the corporation's performance. Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

prospérer, et que la fermeture de la société élargirait la marge de manœuvre nécessaire à l'atteinte de ses objectifs à long terme en supprimant la pression à court terme créée par les obligations de communication de l'information financière au public et en permettant l'injection de capitaux propres par des investisseurs avisés soucieux d'améliorer le rendement de la société. Dans la mesure où il conclut que la décision des administrateurs se situe dans l'éventail des solutions raisonnables qu'ils auraient pu choisir en soupesant des intérêts opposés, le tribunal ne poursuivra pas son examen pour déterminer si cette décision est la solution parfaite.

[113] Considering all the relevant factors, we conclude that the debentureholders have failed to establish a reasonable expectation that could give rise to a claim for oppression. As found by the trial judge, the alleged expectation that the investment grade of the debentures would be maintained is not supported by the evidence. A reasonable expectation that the debentureholders' interests would be considered is established, but was fulfilled. The evidence does not support a further expectation that a better arrangement could be negotiated that would meet the exigencies that the corporation was facing, while better preserving the trading value of the debentures.

[113] Considérant tous les facteurs pertinents, la Cour conclut que les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. Comme l'a dit le juge de première instance, l'allégation selon laquelle on pouvait s'attendre au maintien de la cote de placements admissibles des débentures n'est pas étayée par la preuve. On a démontré que les détenteurs de débentures pouvaient raisonnablement s'attendre à ce que leurs intérêts soient pris en compte, mais cette attente a trouvé satisfaction. La preuve ne permet pas de conclure à une attente plus grande, à savoir qu'il était possible de négocier un meilleur arrangement répondant aux exigences auxquelles la société faisait face, tout en préservant mieux la valeur marchande des débentures.

[114] Given that the debentureholders have failed to establish that the expectations they assert were reasonable, or that they were not fulfilled, it is unnecessary to consider in detail whether conduct complained of was oppressive, unfairly prejudicial, or unfairly disregarded the debentureholders' interests within the terms of s. 241 of the *CBCA*. Suffice it to say that "oppression" in the sense of bad faith and abuse was not alleged, much less proved. At best, the claim was for "unfair disregard" of the interests of the debentureholders. As discussed, the evidence does not support this claim.

[114] Les détenteurs de débentures n'ayant pas démontré que leurs prétendues attentes étaient raisonnables, ou qu'elles avaient été frustrées, il n'est pas utile d'examiner en détail la question de savoir si le comportement dont ils se plaignent constituait un abus, un préjudice injuste ou une omission injuste de tenir compte de leurs intérêts au sens de l'art. 241 de la *LCSA*. Disons simplement que l'« abus », dans son sens où il implique la mauvaise foi, n'a pas été allégué et encore moins prouvé. Au mieux, on a plaidé l'« omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme cela a été dit plus tôt, cette prétention n'est pas étayée par la preuve.

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C. *The Section 192 Approval Process*

[115] The second remedy relied on by the debentureholders is the approval process for complex corporate arrangements set out under s. 192 of the *CBCA*. BCE brought a petition for court approval of the plan under s. 192. At trial, the debentureholders were granted standing to contest such approval. The trial judge concluded that "[i]t seem[ed] only logical and 'fair' to conduct this analysis having regard to the interests of BCE and those of its shareholders and other stakeholders, if any, whose interests are being arranged or affected": (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 151. On the basis of Corporations Canada's *Policy concerning Arrangements Under Section 192 of the CBCA*, November 2003 ("Policy Statement 15.1"), the trial judge held that the s. 192 approval did not require the Board to afford the debentureholders the right to vote. He nonetheless considered their interests in assessing the fairness of the arrangement. After a full hearing, he approved the arrangement as "fair and reasonable", despite the debentureholders' objections that the arrangement would adversely affect the trading value of their securities.

[116] The Court of Appeal reversed this decision, essentially on the ground that the directors had not given adequate consideration to the debentureholders' reasonable expectations. These expectations, in its view, extended beyond the debentureholders' legal rights and required the directors to consider whether the adverse impact on the debentureholders' economic interests could be alleviated or attenuated. The court held that the corporation had failed to discharge the burden of showing that it was impossible to structure the sale in a manner that avoided the adverse economic effect on debentureholdings, and consequently had failed to establish that the proposed plan of arrangement was fair and reasonable.

C. *Le processus d'approbation prévu à l'art. 192*

[115] La seconde voie de droit empruntée par les détenteurs de débentures est le processus d'approbation des arrangements complexes établi par l'art. 192 de la *LCSA*. BCE a présenté une demande d'approbation sous le régime de cette disposition. À l'instruction, les détenteurs de débentures ont été autorisés à contester la demande. Le juge de première instance a conclu qu'[TRADUCTION] « [i]l n'est que logique et "équitable" de procéder à cette analyse en tenant compte des intérêts de BCE et des intérêts de ses actionnaires et autres parties intéressées, le cas échéant, dont les intérêts sont visés ou touchés par l'arrangement » : (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 151). En se fondant sur la *Politique à l'égard des arrangements pris en vertu de l'article 192 de la LCSA* de Corporations Canada, datant de novembre 2003 (« Énoncé de politique 15.1 »), le juge de première instance a conclu que le processus d'approbation prévu à l'art. 192 n'obligeait pas le Conseil d'administration à accorder un droit de vote aux détenteurs de débentures. Il a néanmoins pris leurs intérêts en compte dans l'évaluation du caractère équitable de l'arrangement. Après une audition complète, il a approuvé l'arrangement, l'estimant « équitable et raisonnable » en dépit des objections des détenteurs de débentures selon lesquelles il aurait un effet préjudiciable sur la valeur marchande de leurs titres.

[116] La Cour d'appel a infirmé cette décision, concluant essentiellement que les administrateurs n'avaient pas suffisamment tenu compte des attentes raisonnables des détenteurs de débentures, lesquelles ne s'arrêtaient pas, selon elle, à leurs droits, mais commandaient aux administrateurs d'examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Elle a jugé que la société ne s'était pas acquittée du fardeau de prouver qu'il était impossible de structurer la vente de façon à éviter les effets financiers préjudiciables sur les débentures et, par suite, qu'elle n'avait pas établi que le plan d'arrangement proposé était équitable et raisonnable.

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[117] Before considering what must be shown to obtain approval of an arrangement under s. 192, it may be helpful to briefly return to the differences between an action for oppression under s. 241 of the *CBCA* and a motion for approval of an arrangement under s. 192 of the *CBCA* alluded to earlier.

[118] As we have discussed (at para. 47), the reasoning of the Court of Appeal effectively incorporated the s. 241 oppression claim into the s. 192 approval proceeding, converting it into an inquiry based on reasonable expectations.

[119] As we view the matter, the s. 241 oppression remedy and the s. 192 approval process are different proceedings, with different requirements. While a conclusion that the proposed arrangement has an oppressive result may support the conclusion that the arrangement is not fair and reasonable under s. 192, it is important to keep in mind the differences between the two remedies. The oppression remedy is a broad and equitable remedy that focuses on the reasonable expectations of stakeholders, while the s. 192 approval process focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged. Moreover, in an oppression proceeding, the onus is on the claimant to establish oppression or unfairness, while in a s. 192 proceeding, the onus is on the corporation to establish that the arrangement is "fair and reasonable".

[120] These differences suggest that it is possible that a claimant might fail to show oppression under s. 241, but might succeed under s. 192 by establishing that the corporation has not discharged its onus of showing that the arrangement in question is fair and reasonable. For this reason, it is necessary to consider the debentureholders' s. 192 claim on these appeals, notwithstanding our earlier conclusion that the debentureholders have not established oppression.

[117] Avant d'examiner la question de la preuve exigée pour l'approbation d'un arrangement en vertu de l'art. 192, il peut être utile de revenir brièvement à la question, déjà abordée, des différences entre la demande de redressement pour abus prévue à l'art. 241 de la *LCSA* et la demande d'approbation d'un arrangement fondée sur l'art. 192.

[118] Comme on l'a vu (au par. 47), le raisonnement de la Cour d'appel a eu pour effet d'amalgamer la demande de redressement pour abus de l'art. 241 et la procédure d'approbation prévue à l'art. 192 et de convertir cette dernière en un examen axé sur les attentes raisonnables.

[119] La Cour estime que la demande de redressement pour abus de l'art. 241 et le processus d'approbation de l'art. 192 constituent des recours différents comportant des exigences différentes. Bien que la conclusion que l'arrangement proposé a des conséquences abusives puisse étayer celle qu'il ne s'agit pas d'un arrangement équitable et raisonnable au sens de l'art. 192, il importe de garder à l'esprit les différences entre les deux recours. La demande de redressement pour abus est un recours en equity, d'une grande portée, qui met l'accent sur les attentes raisonnables des parties intéressées, alors que le processus d'approbation prévu à l'art. 192 est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif, et tient principalement compte des intérêts des parties dont les droits sont visés par l'arrangement. De plus, dans le cadre d'une demande de redressement pour abus, c'est au plaignant qu'il incombe de prouver l'abus ou l'injustice, tandis que c'est à la société qu'il appartient d'établir que l'arrangement est « équitable et raisonnable » dans le cadre de la procédure prévue à l'art. 192.

[120] Il ressort de ces différences qu'un plaignant pourrait ne pas réussir à prouver l'abus au sens de l'art. 241, mais néanmoins avoir gain de cause sous le régime de l'art. 192 en établissant que la société ne s'est pas acquittée du fardeau de prouver que l'arrangement est équitable et raisonnable. C'est pourquoi la Cour doit examiner les prétentions soumises par les détenteurs de débentures dans le cadre de l'art. 192, en dépit de sa conclusion antérieure selon laquelle ils n'ont pas établi l'abus.

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[121] Whether the converse is true is not at issue in these proceedings and need not detain us. It might be argued that in theory, a finding of s. 241 oppression could be coupled with approval of an arrangement as fair and reasonable under s. 192, given the different allocations of burden of proof in the two actions and the different perspectives from which the assessment is made. On the other hand, common sense suggests, as did the Court of Appeal, that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable. We leave this interesting question to a case where it arises.

[121] La Cour n'a pas à se demander en l'espèce si l'inverse est vrai. Compte tenu des différences entre les deux recours en ce qui concerne le fardeau de la preuve et la perspective dans laquelle l'examen est effectué, on pourrait soutenir qu'il est possible, en théorie, de conclure à l'existence d'un abus au sens de l'art. 241 tout en approuvant l'arrangement en application de l'art. 192. Par contre, le bon sens donne à penser, comme l'a fait la Cour d'appel, qu'on peut difficilement conclure à la fois qu'il y a abus et que l'arrangement est équitable et raisonnable. Cette intéressante question devra toutefois être résolue dans le cadre d'une affaire où elle se posera.

(1) The Requirements for Approval Under Section 192

(1) La preuve exigée pour l'approbation selon l'art. 192

[122] We will first describe the nature and purpose of the s. 192 approval process. We will then consider the philosophy that underlies s. 192 approval; the interests at play in the process; and the criteria to be applied by the judge on a s. 192 proceeding.

[122] La Cour commencera par décrire la nature et l'objet du processus prévu à l'art. 192. Elle examinera ensuite la philosophie sous-jacente à l'approbation requise par cette disposition, les circonstances dans lesquelles elle s'applique, les intérêts en jeu dans le processus et les critères que le juge doit appliquer pour trancher une demande présentée en vertu de l'art. 192.

(a) *The Nature and Purpose of the Section 192 Procedure*

a) *La nature et l'objet de la procédure prévue par l'art. 192*

[123] The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: *Companies Act Amending Act, 1923*, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ("Detailed Background Paper").

[123] Le processus d'approbation établi à l'art. 192 remonte à une loi de 1923 qui visait à permettre aux sociétés de modifier leur capital-actions : *Loi de 1923 modifiant la Loi des compagnies*, S.C. 1923, ch. 39, art. 4. Cette loi avait pour but de permettre des modifications aux droits des actionnaires tout en protégeant les actionnaires. En 1974, les plans d'arrangement n'ont pas été inclus dans la *LCSA*, parce que le législateur les jugeait superflus et craignait qu'ils puissent être utilisés pour évincer les actionnaires minoritaires. Après avoir constaté que ces plans offraient un moyen pratique et souple de réaliser des transactions complexes, le législateur a ajouté à la *LCSA* une disposition les régissant, en 1978 : Consommation et Corporations Canada, *Exposé détaillé d'une Loi modifiant la Loi sur les corporations commerciales canadiennes* (1977), p. 5 (« Exposé détaillé »).

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[124] In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.

[124] La souplesse de cette disposition lui a valu d'être élargie pour s'appliquer, non seulement à la réorganisation du capital-actions, mais plus généralement aux réaménagements d'une société. Suivant le par. 192(1) de la loi actuelle, un arrangement s'entend de la modification des statuts d'une société, de la fusion de deux sociétés ou plus, du fractionnement de l'activité commerciale d'une société, d'une opération de fermeture ou d'éviction, de la liquidation ou de la dissolution d'une société ou de toute combinaison de ces transactions.

[125] This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76. One of these advantages is that it permits the purchaser to buy shares of the target company without the need to comply with provincial takeover bid rules.

[125] Il ne s'agit pas là d'une liste exhaustive, et les tribunaux lui ont donné une interprétation large. L'article 192 est de plus en plus utilisé dans le cadre d'un changement de contrôle en raison des avantages qu'il comporte pour l'acquéreur : C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), p. 76. Il permet notamment à l'acquéreur d'acheter des actions de la société ciblée sans avoir à se conformer aux règles provinciales régissant une OPA.

[126] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company.

[126] Le processus prévu à l'art. 192 s'applique, en général, aux changements de contrôle qui présentent deux caractéristiques : l'arrangement est appuyé par les administrateurs de la société ciblée et il vise la remise, à l'acquéreur ou à la société ciblée, d'une partie ou de la totalité des actions.

[127] Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.

[127] Fondamentalement, la procédure prévue à l'art. 192 repose sur le principe selon lequel la décision sur une transaction qui modifiera les droits des détenteurs de valeurs mobilières ne constitue pas une décision de simple gestion des affaires de la société, qui relève des administrateurs. L'article 192 crée deux mécanismes pour surmonter cet obstacle. Premièrement, les propositions d'arrangement peuvent généralement être soumises aux détenteurs de valeurs mobilières pour approbation. Bien que l'art. 192 n'exige pas expressément un vote des détenteurs de valeurs mobilières, comme on le verra, leur vote constitue une caractéristique importante du processus d'approbation des plans d'arrangement. Deuxièmement, les plans d'arrangement doivent être approuvés par le tribunal à la suite d'une audience à laquelle peuvent participer les parties dont les droits sont touchés.

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(b) *The Philosophy Underlying Section 192*

[128] The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose rights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated:

> . . . the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.

(Detailed Background Paper, at p. 6)

[129] Although s. 192 was initially conceived as permitting and has principally been used to permit useful restructuring while protecting minority shareholders against adverse effects, the goal of ensuring a fair balance between different constituencies applies with equal force when considering the interests of non-shareholder security holders recognized under s. 192. Section 192 recognizes that major changes may be appropriate, even where they have an adverse impact on the rights of particular individuals or groups. It seeks to ensure that the interests of these rights holders are considered and treated fairly, and that in the end the arrangement is one that should proceed.

(c) *Interests Protected by Section 192*

[130] The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.

[131] Section 192 clearly contemplates the participation of security holders in certain situations.

b) *La philosophie qui sous-tend l'art. 192*

[128] Comme cela a été mentionné, l'art. 192 a pour but de permettre la réalisation de changements substantiels dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés. Le juge qui procède à l'examen exigé par l'art. 192 ne doit pas perdre de vue l'esprit de cette disposition, qui consiste à établir un juste équilibre entre des intérêts opposés. Le ministre de Consommation et Corporations Canada a présenté ainsi l'objectif de la disposition relative aux arrangements introduite dans la *LCSA* en 1978 :

> . . . le projet de loi tente d'atteindre un juste équilibre entre une gestion souple et le traitement équitable des actionnaires minoritaires, d'une façon qui corresponde aux autres pratiques de modification de structure stipulées dans la Partie XIV.

(Exposé détaillé, p. 5-6)

[129] Bien que l'art. 192 ait été conçu initialement et utilisé principalement pour permettre des restructurations utiles tout en protégeant les actionnaires minoritaires contre leurs effets préjudiciables, l'objectif du maintien d'un juste équilibre entre les différentes parties touchées s'applique avec autant de force lorsqu'il s'agit des droits de détenteurs de valeurs mobilières non-actionnaires visés à l'art. 192. L'article 192 reconnaît que des changements substantiels peuvent être opportuns même s'ils ont des effets préjudiciables sur les droits de personnes ou groupes particuliers. Il vise à garantir le traitement équitable et la prise en compte des intérêts de ces titulaires de droits et, en définitive, à confirmer que l'arrangement devrait être mis en œuvre.

c) *Les intérêts protégés par l'art. 192*

[130] La procédure prévue à l'art. 192 visait initialement à protéger les actionnaires touchés par la restructuration de la société. Bien que cet objet demeure fondamental, cette protection s'est par la suite étendue à d'autres détenteurs de valeurs mobilières, dans certaines circonstances.

[131] L'article 192 envisage clairement la participation des détenteurs de valeurs mobilières dans

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Section 192(1)(*f*) specifies that an arrangement may include an exchange of securities for property. Section 192(4)(*c*) provides that a court can make an interim order "requiring a corporation to call, hold and conduct a meeting of holders of securities". The Director appointed under the *CBCA* takes the view that, at a minimum, all security holders whose legal rights stand to be affected by the transaction should be permitted to vote on the arrangement: Policy Statement 15.1, s. 3.08.

certaines situations. L'alinéa 192(1)*f*) précise qu'un arrangement peut inclure l'échange de valeurs mobilières contre des biens. L'alinéa 192(4)*c*) énonce que le tribunal peut rendre une ordonnance enjoignant à la société « de convoquer et de tenir une assemblée des détenteurs de valeurs mobilières ». Le directeur nommé en vertu de la *LCSA* est d'avis, au moins, que tous les détenteurs de valeurs mobilières dont les droits sont touchés par la transaction doivent être autorisés à voter sur l'arrangement : Énoncé de politique 15.1, par. 3.08.

[132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.

[132] Une question difficile se pose toutefois : l'art. 192 s'applique-t-il uniquement aux détenteurs de valeurs mobilières dont les *droits* sont touchés par la proposition ou aussi à ceux dont les droits demeurent intacts, mais dont les *intérêts financiers* risquent de subir un préjudice.

[133] The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

[133] L'objet de l'art. 192, exposé précédemment, laisse croire que cette disposition ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. La procédure établie par l'art. 192 a été conçue et généralement perçue comme visant à permettre aux sociétés d'effectuer des changements qui ont une incidence sur des *droits* des parties. C'est la modification des droits qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Le fait que le processus d'approbation d'un arrangement soit axé sur les droits et la demande de redressement pour abus sur les attentes raisonnables de parties est une distinction cruciale. La demande de redressement pour abus est fondée sur le traitement inéquitable des parties intéressées, plutôt que sur leurs droits au sens strict.

[134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

[134] Toutefois, cette règle générale n'écarte pas la possibilité que, dans certaines circonstances — par exemple en présence d'un risque d'insolvabilité ou de réclamations de certains actionnaires minoritaires —, des intérêts qui ne constituent pas des droits à strictement parler soient pris en considération : Énoncé de politique 15.1, par. 3.08, faisant état de « circonstances particulières ».

[135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary

[135] Il n'est pas nécessaire pour trancher les pourvois de statuer sur ce qui constituerait exactement

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circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

des « circonstances particulières » autorisant la prise en compte de simples intérêts dans l'examen d'une demande fondée sur l'art. 192. La Cour est d'avis qu'une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, ce type de circonstances.

(d) *Criteria for Court Approval*

d) *Les critères d'approbation*

[136] Section 192(3) specifies that the corporation must obtain court approval of the plan. In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval.

[136] Le paragraphe 192(3) exige que la société fasse approuver le plan par un tribunal. Pour statuer sur la demande d'approbation, le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir. Il faut que l'arrangement lui-même, considéré substantiellement et objectivement, soit de nature à pouvoir être approuvé.

[137] In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable: see *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Q.B.), at p. 444. This may be contrasted with the s. 241 oppression action, where the onus is on the claimant to establish its case. On these appeals, it is conceded that the corporation satisfied the first two requirements. The only question is whether the arrangement is fair and reasonable.

[137] La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable : voir *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (B.R.), p. 444. En comparaison, c'est le plaignant qui doit prouver ses prétentions dans le cas de la demande de redressement pour abus prévue par l'art. 241. Le respect des deux premières conditions n'est pas contesté en l'espèce. La seule question en litige est celle du caractère équitable et raisonnable de l'arrangement.

[138] In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. It is through this two-pronged framework that courts can determine whether a plan is fair and reasonable.

[138] Pour conclure, sous le régime de l'art. 192, que la décision des administrateurs au sujet de l'arrangement proposé est équitable et raisonnable, le tribunal doit être convaincu que l'arrangement : a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. C'est en appliquant ce cadre d'analyse à deux volets que les tribunaux peuvent établir si un plan est équitable et raisonnable.

[139] In the past, some courts have answered the question of whether an arrangement is fair and reasonable by applying what is referred to as the

[139] Certains tribunaux ont déjà statué sur le caractère équitable et raisonnable d'un arrangement en appliquant le test dit de l'appréciation

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business judgment test, that is whether an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest would reasonably approve the arrangement: see *Trizec*, at p. 444; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. However, while this consideration may be important, it does not constitute a useful or complete statement of what must be considered on a s. 192 application.

commerciale, qui consiste à déterminer si un homme ou une femme d'affaires intelligent et honnête, membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt, approuverait raisonnablement l'arrangement : voir *Trizec*, p. 444; *Pacifica Papers Inc. c. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. Toutefois, bien que cette question puisse être importante, elle ne constitue pas un énoncé utile et complet des éléments à considérer pour l'examen d'une demande fondée sur l'art. 192.

[140] First, the fact that the business judgment test referred to here and the business judgment rule discussed above (at para. 40) are so similarly named leads to confusion. The business judgment *rule* expresses the need for deference to the business judgment of directors as to the best interests of the corporation. The business judgment *test* under s. 192, by contrast, is aimed at determining whether the proposed arrangement is fair and reasonable, having regard to the corporation and relevant stakeholders. The two inquiries are quite different. Yet the use of the same terminology has given rise to confusion. Thus, courts have on occasion cited the business judgment test while saying that it stands for the principle that arrangements do not have to be perfect, i.e. as a deference principle: see *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] Q.J. No. 16158 (QL), 2007 QCCS 6830. To conflate the business judgment test and the business judgment rule leads to difficulties in understanding what "fair and reasonable" means and how an arrangement may satisfy this threshold.

[140] Premièrement, la similitude d'appellation du test de l'appréciation commerciale qui nous intéresse ici et de la règle de l'appréciation commerciale examinée précédemment (au par. 40) sème la confusion. La *règle* de l'appréciation commerciale exprime la nécessité de faire preuve de retenue à l'égard de l'appréciation par les administrateurs de ce qui sert le mieux les intérêts de la société. Le *test* de l'appréciation commerciale pour l'application de l'art. 192, quant à lui, vise à déterminer si l'arrangement proposé est équitable et raisonnable compte tenu des intérêts de la société et des parties intéressées. Ces deux analyses diffèrent passablement. Or, la similitude des termes employés pour les désigner sème la confusion. Ainsi, il est arrivé que des tribunaux citent le test de l'appréciation commerciale à l'appui du principe selon lequel il n'est pas nécessaire que les arrangements soient parfaits, c.-à-d. en tant que principe de retenue judiciaire : voir *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] J.Q. n° 16158 (QL), 2007 QCCS 6830. Lorsqu'on confond le test de l'appréciation commerciale et la règle de l'appréciation commerciale, il devient plus difficile de comprendre le sens de l'expression « équitable et raisonnable » et la façon dont un arrangement peut satisfaire à cette condition.

[141] Second, in instances where affected security holders have voted on a plan of arrangement, it seems redundant to ask what an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest, would do. As will be discussed below (at para. 150), votes on arrangements are an important indicator of whether a plan is fair and reasonable.

[141] Deuxièmement, lorsque les détenteurs de valeurs mobilières dont les droits sont touchés ont voté en faveur d'un plan d'arrangement, il paraît redondant de se demander ce que ferait une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt. Comme on le verra plus loin (au par. 150), les

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However, the business judgment test does not provide any more information than does the outcome of a vote. Section 192 makes it clear that the reviewing judge must delve beyond whether a reasonable business person would approve of a plan to determine whether an arrangement is fair and reasonable. Insofar as the business judgment test suggests that the judge need only consider the perspective of the majority group, it is incomplete.

votes tenus au sujet d'arrangements constituent un indicateur important de leur caractère équitable et raisonnable. Toutefois, le critère de l'appréciation commerciale n'est pas plus éclairant que le résultat d'un vote. L'article 192 établit clairement que, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement qui lui est soumis, le juge doit aller au-delà de la question de savoir si un homme ou une femme d'affaires raisonnable l'approuverait. Dans la mesure où le critère de l'appréciation commerciale donne à entendre qu'il suffit au juge d'adopter le point de vue du groupe majoritaire, il est incomplet.

[142] In summary, we conclude that the business judgment test is not useful in the context of a s. 192 application, and indeed may lead to confusion.

[142] En résumé, la Cour conclut que le critère de l'appréciation commerciale n'est pas utile dans le contexte de l'application de l'art. 192, et qu'il peut même semer la confusion.

[143] The framework proposed in these reasons reformulates the s. 192 test for what is fair and reasonable in a way that reflects the logic of s. 192 and the authorities. Determining what is fair and reasonable involves two inquiries: first, whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. In approving plans of arrangement, courts have frequently pointed to factors that answer these two questions as discussed more fully below: *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (Que. Sup. Ct.); *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[143] Le cadre proposé dans les présents motifs reformule le critère d'appréciation du caractère équitable et raisonnable pour l'application de l'art. 192 en accord avec la logique de cette disposition et la jurisprudence. L'appréciation du caractère équitable et raisonnable suppose deux examens. Le premier consiste à déterminer si l'arrangement poursuit un objectif commercial légitime, et le second s'il répond d'une façon juste et équilibrée aux objections de ceux dont les droits sont visés. Les tribunaux appelés à approuver un arrangement ont souvent mentionné des facteurs qui répondaient à ces deux questions, comme cela sera expliqué plus loin : *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. c. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (C.S. Qué.); *PetroKazakhstan Inc. c. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[144] We now turn to a more detailed discussion of the two prongs.

[144] Passons maintenant à un examen plus détaillé de chacun de ces deux volets.

[145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation.

[145] Le volet de l'analyse du caractère équitable et raisonnable qui se rapporte à l'objectif commercial légitime reconnaît que l'arrangement doit procurer à la société un avantage qui compense l'atteinte aux droits. Autrement dit, le tribunal doit être convaincu que l'intérêt de la société justifie le fardeau imposé par l'arrangement aux détenteurs de

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The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

valeurs mobilières. Le plan proposé doit en outre servir les intérêts de la société dans la perspective de la continuité de l'entreprise, critère qui peut avoir une portée plus réduite que le critère de ce qui est « au mieux des intérêts de la société » utilisé pour définir l'obligation fiduciaire imposée aux administrateurs par l'art. 122 de la *LCSA* (voir les par. 38-40).

[146] The valid purpose inquiry is invariably fact-specific. Thus, the nature and extent of evidence needed to satisfy this requirement will depend on the circumstances. An important factor for courts to consider when determining if the plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that

> while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, the lower the degree of necessity, the higher the degree of scrutiny that should be applied. [Emphasis added; p. 223.]

If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

[146] L'examen de l'objectif commercial légitime est invariablement lié aux faits. Par conséquent, la nature et l'étendue de la preuve requise pour répondre à ce critère variera suivant les circonstances. Un important facteur à considérer pour établir si un plan d'arrangement poursuit un objectif commercial légitime est celui de la nécessité de l'arrangement pour la poursuite des activités de la société. Cette nécessité est fonction des conditions du marché, notamment sur les plan de la technologie, de la réglementation et de la concurrence. L'existence de solutions de rechange et la réaction du marché au plan constituent des indices de la nécessité du plan. Le degré de nécessité de l'arrangement a une incidence directe sur la rigueur de l'examen. Dans *Canadian Pacific*, la juge Austin a conclu :

> [TRADUCTION] . . . bien que les tribunaux soient disposés à exercer leur compétence malgré l'absence de nécessité suffisante pour la société, moins la nécessité est grande, plus l'examen doit être rigoureux. [Nous soulignons; p. 223.]

Si le plan d'arrangement est nécessaire pour que la société continue d'exister, les tribunaux seront plus enclins à l'approuver en dépit de ses effets préjudiciables sur certains détenteurs de valeurs mobilières. À l'inverse, si la situation financière ou commerciale de la société ne requiert pas l'arrangement, les tribunaux se montreront plus circonspects et procéderont à un examen minutieux pour s'assurer qu'il ne sert pas uniquement les intérêts d'une partie intéressée en particulier. Par conséquent, la nécessité relative de l'arrangement peut en justifier les effets négatifs sur les intérêts des détenteurs de valeurs mobilières touchés.

[147] The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.

[147] Le second volet de l'analyse du caractère équitable et raisonnable est axé sur la question de savoir si les objections de ceux dont les droits sont visés ont été résolues de façon juste et équilibrée.

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[148] An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[149] The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.

[150] An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Gen. Div.).

[151] Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and

[148] Un plan d'arrangement peut susciter des objections lorsqu'il existe des tensions entre les intérêts de la société et ceux de détenteurs de valeurs mobilières ou lorsque différents groupes dont les droits sont touchés ont des intérêts opposés. Le juge doit être convaincu que l'arrangement établit un juste équilibre compte tenu des intérêts continus de la société et des circonstances de l'affaire. Pour cela, il devra souvent procéder à une pondération complexe en déterminant si des mesures d'accommodement ou de protection appropriées ont été offertes aux parties concernées. Toutefois, comme l'a indiqué le juge Forsyth dans *Trizec*, par. 36,

> [TRADUCTION] le tribunal doit prendre garde de ne pas s'attacher aux besoins particuliers d'un groupe donné et s'efforcer de traiter équitablement tous ceux qui sont touchés par la transaction compte tenu des circonstances. Le caractère équitable de l'arrangement doit s'apprécier globalement ainsi qu'à l'égard de chacune des différentes parties intéressées.

[149] Il faut se demander si le plan, considéré dans cette perspective, est équitable et raisonnable. Pour répondre à cette question, les tribunaux ont tenu compte de divers facteurs, selon la nature de l'affaire. Aucun de ces facteurs n'est déterminant à lui seul et la pertinence de chacun varie d'un cas à l'autre, mais ils fournissent des indications utiles.

[150] Le fait que la majorité des détenteurs de valeurs mobilières aient voté en faveur du plan constitue un facteur important. Le caractère équitable et raisonnable d'un plan qui ne recueille qu'une minorité ou une faible majorité des voix peut être mis en doute, tandis qu'une majorité substantielle a l'effet inverse. Bien que le résultat du vote des détenteurs de valeurs mobilières ne soit pas déterminant pour l'approbation judiciaire du plan, les tribunaux attribuent un poids considérable à ce facteur. Il s'agit d'un indice capital permettant de savoir si les parties touchées estiment que l'arrangement est équitable et raisonnable : *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Div. gén.).

[151] En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de

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acting in his or her own interest, might reasonably approve of the plan: *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec.*

[152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.

[154] We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's

la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan : *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] La proportionnalité du compromis entre les divers détenteurs de valeurs mobilières, la situation des détenteurs de valeurs mobilières avant et après l'arrangement et les effets de l'arrangement sur les droits des divers détenteurs de valeurs mobilières sont aussi des indices de son caractère équitable : voir *Canadian Pacific*; *Trizec*. Les tribunaux peuvent également tenir compte de la réputation des administrateurs et conseillers qui défendent l'arrangement et ses modalités. Ainsi, les tribunaux ont déjà tenu compte du fait qu'un plan avait été approuvé par un comité spécial d'administrateurs indépendants, de l'existence d'une opinion formulée par un spécialiste de renom sur le caractère équitable du plan et des moyens auxquels les actionnaires avaient accès pour exprimer leur dissidence et obtenir une évaluation : voir *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (C.S.J. Ont.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] Les facteurs susmentionnés représentent les éléments pris en considération jusqu'à maintenant pour l'examen des demandes prévues à l'art. 192. Cette énumération n'est pas exhaustive, mais vise simplement à donner un aperçu des facteurs retenus par les tribunaux pour établir si un plan avait résolu de façon raisonnable les objections soulevées et les conflits entre parties intéressées. Beaucoup de ces facteurs pourront aussi indiquer si le plan poursuit un objectif commercial légitime. L'appréciation globale du caractère équitable et raisonnable d'un arrangement dépend des faits et peut faire intervenir différents facteurs suivant les circonstances.

[154] Cela mène donc à la conclusion suivante : pour qu'un plan d'arrangement soit déclaré équitable et raisonnable, le juge doit être convaincu qu'il poursuit un objectif commercial légitime et qu'il répond adéquatement aux objections et aux conflits entre différentes parties intéressées. Pour décider si un arrangement répond à ces critères, le juge tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société,

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continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.

[155] As has frequently been stated, there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision: *Trizec*; *Maple Leaf Foods*. The court on a s. 192 application should refrain from substituting their views of what they consider the "best" arrangement. At the same time, the court should not surrender their duty to scrutinize the arrangement. Because s. 192 facilitates the alteration of legal rights, the Court must conduct a careful review of the proposed transactions. As Lax J. stated in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.), at para. 153: "Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."

(2) Application to These Appeals

[156] As discussed above (at paras. 137-38), the corporation on a s. 192 application must satisfy the court that: (1) the statutory procedures are met; (2) the application is put forward in good faith; and (3) the arrangement is fair and reasonable, in the sense that: (a) the arrangement has a valid business purpose; and (b) the objections of those whose rights are being arranged are resolved in a fair and balanced way.

[157] The first and second requirements are clearly satisfied in this case. On the third element, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate before this Court focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way.

l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés.

[155] Comme cela a souvent été dit, il n'existe pas d'arrangement parfait. Ce qui est requis, c'est que la décision soit raisonnable au regard des circonstances particulières de l'espèce, et non qu'elle soit parfaite : *Trizec*; *Maple Leaf Foods*. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception de ce qui constituerait le « meilleur » arrangement. Mais ils ne doivent pas pour autant renoncer à s'acquitter de leur obligation d'examiner l'arrangement. Étant donné que l'art. 192 facilite la modification de droits, le tribunal doit procéder à un examen attentif des transactions proposées. Comme la juge Lax l'a déclaré dans *UPM-Kymmene Corp. c. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (C.S.J. Ont.), par. 153 : [TRADUCTION] « Bien qu'il n'y ait pas lieu de scruter les décisions du conseil d'administration à la loupe dans la perspective idéale que permet le recul, il faut tout de même les examiner. »

(2) Application aux présents pourvois

[156] Comme il a déjà été mentionné (aux par. 137-138), la société qui soumet une demande en vertu de l'art. 192 doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande est soumise de bonne foi et (3) l'arrangement est équitable et raisonnable au sens où a) il poursuit un objectif commercial légitime et b) il répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés par l'arrangement.

[157] En l'espèce, les deux premières conditions sont indiscutablement remplies et, en ce qui concerne la troisième, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat, devant la Cour, porte donc sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée.

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[158] The debentureholders argue that the arrangement does not address their rights in a fair and balanced way. Their main contention is that the process adopted by the directors in negotiating and concluding the arrangement failed to consider their interests adequately, in particular the fact that the arrangement, while upholding their contractual rights, would reduce the trading value of their debentures and in some cases downgrade them to below investment grade rating.

[158] Suivant les détenteurs de débentures de Bell Canada, l'arrangement ne tient pas compte de leurs droits d'une façon équitable et équilibrée. Leur principal argument porte que le processus adopté par les administrateurs pour négocier et conclure l'arrangement n'a pas tenu suffisamment compte de leurs intérêts, plus particulièrement parce que l'arrangement, bien qu'il maintienne leurs droits contractuels, réduirait la valeur marchande de leurs débentures et, dans certains cas, leur ferait perdre leur cote de placements admissibles.

[159] The first question that arises is whether the debentureholders' economic interest in preserving the trading value of their bonds was an interest that the directors were required to consider on the s. 192 application. We earlier concluded that authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances. We further suggested that the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.

[159] La première question qui se pose est de savoir si les administrateurs étaient tenus de prendre en considération les intérêts financiers des détenteurs de débentures quant au maintien de la valeur marchande de leurs titres dans le cadre de l'application de l'art. 192. La Cour a conclu précédemment qu'il ressort des principes et de la jurisprudence que l'art. 192 concerne généralement les droits, en l'absence de circonstances particulières. Elle a aussi indiqué que la diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits sont demeurés intacts ne constitue habituellement pas ce type de circonstances.

[160] Relying on Policy Statement 15.1, the trial judge in these proceedings concluded that the debentureholders were not entitled to vote on the plan of arrangement because their legal rights were not being arranged; "[t]o do so would unjustly give [them] a veto over a transaction with an aggregate common equity value of approximately $35 billion that was approved by over 97% of the shareholders" (para. 166). Nevertheless, the trial judge went on to consider the debentureholders' perspective.

[160] En s'appuyant sur l'Énoncé de politique 15.1, le juge de première instance a conclu que les détenteurs de débentures ne devaient pas se voir accorder le droit de voter sur le plan d'arrangement parce qu'il ne visait pas leurs droits : [TRADUCTION] « Leur accorder ce droit [leur] conférerait injustement un droit de veto sur une transaction d'une valeur totale d'environ 35 milliards de dollars d'actions ordinaires, approuvée par plus de 97 p. 100 des actionnaires » (par. 166). Le juge a néanmoins tenu compte du point de vue des détenteurs de débentures.

[161] We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding

[161] Selon la Cour, le juge de première instance pouvait à bon droit conclure ainsi. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures

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that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

ne constituaient pas une catégorie touchée pour l'application de cette disposition. Le juge de première instance était donc fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures, comme il l'a fait, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement en vertu de l'art. 192.

[162] The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

> . . . the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 162, quoting (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, at para. 199)

[162] Il faut ensuite se demander si le juge de première instance a conclu à tort que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. Le juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés. Il a indiqué que les détenteurs de débentures, s'ils l'avaient désiré, auraient pu négocier des mesures de protection contre l'accroissement de la dette ou les risques de changement dans la structure de la société. Il a ajouté :

> [TRADUCTION] . . . la preuve révèle que leurs droits [des détenteurs de débentures] ont effectivement été pris en compte et évalués. Le Conseil d'administration a conclu, à juste titre, que les actes de fiducie de 1976, 1996 et 1997 ne renfermaient aucune stipulation concernant un changement de contrôle et que, par ailleurs, aucun changement de contrôle de Bell Canada n'était envisagé, de sorte que les détenteurs de débentures ne pouvaient raisonnablement s'attendre à ce que BCE rejette une transaction qui maximisait la valeur actionnariale parce qu'elle avait des effets négatifs pour eux.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 162, citant (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, par. 199)

[163] We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of

[163] La Cour ne décèle aucune erreur dans ces conclusions. L'arrangement ne modifie pas fondamentalement les droits des détenteurs de débentures. L'investissement et le rendement prévus par contrat demeurent inchangés. La fluctuation de la valeur marchande des débentures associée à une variation de l'endettement est un phénomène commercial bien connu. Les détenteurs de débentures

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the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada: necessity was established. No superior arrangement had been put forward, and BCE had been assisted throughout by expert legal and financial advisors, suggesting that the proposed arrangement had a valid business purpose.

ne se sont pas prémunis contractuellement contre une telle éventualité. La diminution éventuelle de la valeur marchande de leurs titres par suite de l'arrangement prévoyant l'accroissement de l'endettement constituait un risque prévisible, et non des circonstances particulières. Il était clair pour le juge que, pour la continuité de la société, l'approbation d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. La nécessité était établie. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance, ce qui donne à croire que l'arrangement poursuivait un objectif commercial légitime.

[164] Based on these considerations, and recognizing that there is no such thing as a perfect arrangement, the trial judge concluded that the arrangement had been shown to be fair and reasonable. We see no error in this conclusion.

[164] En s'appuyant sur ces considérations, et reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu que le caractère équitable et raisonnable de l'arrangement avait été démontré. Cette conclusion n'est à notre avis entachée d'aucune erreur.

[165] The Court of Appeal's contrary conclusion rested, as suggested above, on an approach that incorporated the s. 241 oppression remedy with its emphasis on reasonable expectations into the s. 192 arrangement approval process. Having found that the debentureholders' reasonable expectations (that their interests would be considered by the Board) were not met, the court went on to combine that finding with the s. 192 onus on the corporation. The result was to combine the substance of the oppression action with the onus of the s. 192 approval process. From this hybrid flowed the conclusion that the corporation had failed to discharge its burden of showing that it could not have met the alleged reasonable expectations of the debentureholders. This result could not have obtained under s. 241, which places the burden of establishing oppression on the claimant. By combining s. 241's substance with the reversed onus of s. 192, the Court of Appeal arrived at a conclusion that could not have been sustained under either provision, read on its own terms.

[165] Comme cela a déjà été précisé, l'opinion contraire de la Cour d'appel procédait d'un raisonnement qui amalgamait la demande de redressement pour abus de l'art. 241, axé sur les attentes raisonnables, et le processus d'approbation d'un arrangement établi à l'art. 192. Après avoir conclu que les attentes raisonnables des détenteurs de débentures (que le Conseil d'administration tienne compte de leurs intérêts) n'avaient pas été satisfaites, la cour a associé cette conclusion au fardeau de preuve imposé à la société par l'art. 192. Elle a ainsi combiné les éléments substantiels de la demande de redressement pour abus au fardeau de la preuve applicable dans le cadre d'une demande d'approbation sous le régime de l'art. 192. De ce croisement a découlé la conclusion que la société ne s'était pas acquittée de son obligation de démontrer qu'il n'était pas possible de répondre aux attentes raisonnables des détenteurs de débentures. L'application de l'art. 241, qui impose au plaignant l'obligation de prouver l'abus, n'aurait pas pu produire un tel résultat. En combinant les éléments substantiels de l'art. 241 au fardeau de preuve inversé prévu à l'art. 192, la Cour d'appel est parvenue à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier.

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VI. Conclusion

[166] We conclude that the debentureholders have failed to establish either oppression under s. 241 of the *CBCA* or that the trial judge erred in approving the arrangement under s. 192 of the *CBCA*.

[167] For these reasons, the appeals are allowed, the decision of the Court of Appeal set aside, and the trial judge's approval of the plan of arrangement is affirmed with costs throughout. The cross-appeals are dismissed with costs throughout.

Appeals allowed with costs. Cross-appeals dismissed with costs.

Solicitors for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada: Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Solicitors for the appellant/respondent on cross-appeals 6796508 Canada Inc.: Woods & Partners, Montréal.

Solicitors for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders: Fishman, Flanz, Meland, Paquin, Montréal.

Solicitors for the respondent/appellant on cross-appeals Group of 1997 Debentureholders: McMillan, Binch, Mendelsohn, Toronto.

Solicitors for the respondent Computershare Trust Company of Canada: Miller, Thomson, Pouliot, Montréal.

Solicitor for the intervener Catalyst Asset Management Inc.: Christian S. Tacit, Kanata.

Solicitors for the intervener Matthew Stewart: Langlois, Kronström, Desjardins, Montréal.

VI. Conclusion

[166] La Cour est d'avis que les détenteurs de débentures n'ont établi ni qu'il y avait eu abus au sens de l'art. 241 de la *LCSA* ni que le juge de première instance a commis une erreur en approuvant l'arrangement sous le régime de l'art. 192 de la *LCSA*.

[167] Pour ces motifs, les pourvois sont accueillis, la décision de la Cour d'appel est annulée et l'approbation du plan d'arrangement par le juge de première instance est rétablie, avec dépens devant toutes les cours. Les pourvois incidents sont rejetés avec dépens devant toutes les cours.

Pourvois principaux accueillis avec dépens. Pourvois incidents rejetés avec dépens.

Procureurs des appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada : Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Procureurs de l'appelante/intimée aux pourvois incidents 6796508 Canada Inc. : Woods & Partners, Montréal.

Procureurs des intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996 : Fishman, Flanz, Meland, Paquin, Montréal.

Procureurs de l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997 : McMillan, Binch, Mendelsohn, Toronto.

Procureurs de l'intimée la Société de fiducie Computershare du Canada : Miller, Thomson, Pouliot, Montréal.

Procureur de l'intervenante Catalyst Asset Management Inc. : Christian S. Tacit, Kanata.

Procureurs de l'intervenant Matthew Stewart : Langlois, Kronström, Desjardins, Montréal.

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SUPERIOR COURT

2014 QCCS 180 (CanLII)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-039230-103

DATE: January 28, 2014

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

RAMZI MAHMOUD ALHARAYERI
Plaintiff
v.
HANS PETER BLACK
DAVID TAHMASSEBI
ROB ROY
ANDRUS WILSON
Defendants
and
WI2WI CORPORATION
Mise-en-cause

JUDGMENT

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[1] The Court is seized with an action in oppression by the Plaintiff Ramzi Mahmoud Alharayeri ("**Ramzi**")[1] against the Defendants Hans Peter Black ("**Black**"), David Tahmassebi ("**Tahmassebi**"), Rob Roy ("**Roy**") and Andrus Wilson ("**Wilson**"), who were, at all relevant times, directors of the Mise-en-cause Wi2Wi Corporation ("**Wi2Wi**"). Ramzi seeks damages in the amount of $4,692,539.98 which sum represents,

[1] Both sides referred to the Plaintiff as Ramzi during the trial.

according to him, the value of his shares in Wi2Wi which he was unable to realize because of the Defendants' conduct.

BACKGROUND FACTS

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[2] In 2005, Ramzi was an executive with 20 years experience in the computer business. He was at that time the Vice-President of the Original Equipment Manufacturing ("**OEM**") division of Actiontec Electronics, Inc. ("**Actiontec**"), which was involved in the manufacture of Wi-Fi modules (the "**Old Products**"). Ramzi was interested in developing a multiple functioning system-in-package for cell phones that would incorporate Wi-Fi, Bluetooth and GPS as three distinct layers in one chip (the "**New Products**"). Actiontec was reluctant to embark in this new venture, and Ramzi therefore proposed that he purchase the OEM division in a management buy-out and develop the New Products on his own.

[3] In order to proceed with the management buy-out, Ramzi required financing. In July or August 2005, he was introduced to Palos Capital ("**Palos**"), which was a Montréal-based money management firm. Palos proposed a reverse takeover using a shell company, Sargeant Bay Capital Inc. ("**Sargeant Bay**"), which already had $650,000 from investors and was looking for a transaction in which to invest those funds. The steps in the reverse takeover were that Ramzi would incorporate a company to acquire the OEM division of Actiontec, that Palos would find additional investors through Sargeant Bay, and that Sargeant Bay would then acquire Ramzi's company and issue shares to Ramzi.

[4] Ramzi proceeded to acquire the OEM division from Actiontec through a company called Wi2Wi Inc. in October 2005 for US $3 million, which was financed by Palos.

[5] Meanwhile, Palos was trying to find $5 million from investors. Ramzi, with the assistance of Palos, Richard Groome ("**Groome**") and Wilson prepared a forecast and a business plan for Wi2Wi. The forecast prepared in November 2005 showed that revenue from the Old Products, whether from existing clients or from new clients, was expected to be relatively stable at $3 to $5 million per quarter, and that revenue from the New Products was expected to start slowly in the second quarter of 2006 and to increase quickly to almost $30 million in 2007, over $75 million in 2008, and $200 million in 2009. The business plan also provided that Wi2Wi would go public in the first quarter of 2006. The search for investors did not go well, and Palos was able to find only US $3.5 million out of the $5 million that it had hoped to find.

[6] Nevertheless, the reverse takeover of Wi2Wi Inc. by Sargeant Bay proceeded in December 2005, with the resulting entity being Wi2Wi. As part of the reverse takeover, Ramzi exchanged his 4.5 million common shares of Wi2Wi Inc. for a total of 4.5 million shares of Wi2Wi: 2 million common shares, 1 million Class A Convertible Preferred Shares (the "**A Shares**") and 1.5 million Class B Convertible Preferred Shares (the "**B Shares**"). As more fully set out below, the A Shares were convertible into common

shares if certain financial targets were met for the financial year 2006, and the B Shares were convertible into common shares if certain financial targets were met in the 2007 financial year. There were also Class C Convertible Preferred Shares (the "**C Shares**") that were issued as an incentive to those involved in finding new investors for Wi2Wi. The A, B and C Shares were non-participating, non-voting, non-transferable and non-assignable.

[7] The fact that the financing was not going as well as planned brought about two consequences. First, it meant that Wi2Wi had less cash than originally planned. The money raised by Palos was largely used to finance the purchase from Actiontec. This lack of cash came to be a constant theme in the history of Wi2Wi. Through 2006, sales continued on the Old Products, although the rhythm of those sales was not as high as forecast, and work continued on the development of the New Products. The development of the New Products did not proceed as quickly as Ramzi had foreseen in the November 2005 forecast. Wilson suggested in his testimony that this was due to Ramzi's poor management, and Ramzi suggested that the delays in the development of the New Products were due to the cash difficulties under which Wi2Wi operated. It is not necessary, for the purposes of this judgment, to come to any conclusion on that issue. It is sufficient to note that the revenues from the Old Products were lower than expected (although margins were high because that part of the business appears to have been operated quite efficiently), and development of the New Products was slower than expected.

[8] The second consequence of the difficulties in finding adequate financing was that Wi2Wi was not able to go public in 2006 as planned. This made it more difficult for Wi2Wi to find financing going forward. It also made it difficult for Ramzi to sell any of his shares.

[9] In early 2007, two events occurred which planted the seeds for the present litigation. Both of these events relate to Mitec Telecom Inc. ("**Mitec**"), a publicly-traded company in the telecom field in which Palos was a significant shareholder. The first event is that, sometime late in 2006 or early in 2007, Palos came up with the idea that a merger or other transaction between Mitec and Wi2Wi might be a good fit for both companies. The second event is that Ramzi had a need for cash for personal reasons and he went to Palos in early 2007 to see if Palos might be interested in buying some of his shares in Wi2Wi. This seems to have occurred at about the same time that Palos thought that Wi2Wi and Mitec might be a good fit, and Palos therefore suggested that Mitec might be interested in buying some of Ramzi's shares.

[10] The result of these two events is that there were parallel negotiations between Mitec and Ramzi for the acquisition of Wi2Wi and for the acquisition of some of Ramzi's shares in Wi2Wi. The issue of when Ramzi disclosed to the Board of Wi2Wi that he was involved in negotiations with Mitec to sell some of his shares in Wi2Wi was contested at trial, and the discussion of that specific issue is set out below.

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[11] At this stage, it is sufficient to note the following steps that took place in discussions between Mitec and Wi2Wi. In a memorandum dated March 12, 2007[2], Mitec expressed an interest in acquiring 51% of Wi2Wi with an option to purchase the remaining 49%. Mitec was estimating Wi2Wi's value at US $26 million, such that it would issue shares of Mitec worth US $13 million for the first tranche of Wi2Wi shares. The exercise price for the option to purchase the remaining 49% of Wi2Wi at the end of 2007 would be US $15 million to US $25 million in Mitec shares, depending on Wi2Wi's 2007 revenue, for a total consideration between US $28 million and US $38 million.

[12] That initial memorandum evolved into a draft letter of intent sent by Mitec to Wi2Wi on March 17, 2007. The draft letter of intent provided that Mitec would acquire 100% of the shares of Wi2Wi for a purchase price of approximately US $25 million in Mitec shares, with a further US $20 million in warrants being issued entitling the shareholders of Wi2Wi to acquire additional shares of Mitec at a nominal cost if the revenue for Wi2Wi for the first four quarters after the closing exceeded US $40 million, for a total consideration between US $25 million and US $45 million.

[13] After further discussions between the parties, that draft evolved into a letter of intent sent by Mitec to Wi2Wi on April 10, 2007 (the "**First LOI**"). The First LOI provided for an "Initial Consideration" of approximately US $25 million and an "Adjustment Consideration" equal to 90% of the gross revenue between US $25 million and US $42 million and 50% of the gross revenue between US $42 million and US $60 million, for a total consideration between US $25 million and US $50 million payable in Mitec shares. Paragraph 7 of the First LOI was entitled "Governance" and provided that Ramzi would be appointed President of Mitec's U.S. operations and Executive Vice-President of Mitec, and that the board of directors would be made up of Ramzi, the President of Mitec Dan Piergentili ("**Piergentili**"), three Mitec nominees and three Wi2Wi nominees.

[14] At the same time, Ramzi and Mitec were negotiating the sale of some of Ramzi's shares. The share purchase agreement is dated March 30, 2007 and was apparently signed on April 2, 2007 (the "**Ramzi SPA**"), and it refers to a letter of intent signed on March 23, 2007. According to Ramzi, Mitec was interested in purchasing 1 million of his common shares but he ultimately sold only 300,000 common shares. The purchase price was US $750,000, or US $2.50 per share, payable in cash, with a warrant that would entitle Ramzi to receive up to a maximum of a further US $500,000 of Mitec shares if Mitec purchased at least 90% of the outstanding Wi2Wi shares within 120 days and if the price under that transaction was higher than US $2.50 per share. If Mitec did not acquire 90% of the outstanding Wi2Wi shares within 120 days, the warrant expired.

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[2] The Board discussed a memorandum from Mitec at its March 2, 2007 meeting. It appears that this memorandum was prepared prior to that meeting and that the March 12, 2007 date was a computer generated date on a subsequent copy of the memorandum.

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[15] There were two further provisions in the Ramzi SPA that are worth highlighting at this stage. First, under paragraph 5.2(a), Ramzi "shall enter into and shall cause the other shareholders of the Corporation to enter into the Wi2Wi Purchase Agreement", which was defined as an agreement whereby Mitec acquired at least 90% of the outstanding shares of Wi2Wi. Further, under paragraph 5.2(b), Ramzi granted to Mitec an option to purchase all or a portion of the balance of his shares at a price of US $3.00 per share payable in Mitec shares, in the event that the "Wi2Wi Purchase Agreement" does not close within 120 days.

[16] Through April and May 2007, Mitec and Wi2Wi proceeded with their due diligence of one another. One of the issues that came up at the Board of Wi2Wi in this context was how to deal with the A, B and C Shares in the context of the transaction with Mitec. Mitec was proposing to purchase all of the shares of Wi2Wi, so it was a question of how to divide the price amongst the shareholders of Wi2Wi. Ramzi's right to convert the A Shares was dependent on Wi2Wi's financial results for the 2006 financial year, which had ended on September 30, 2006. The audited financial statements for the 2006 financial year are dated April 16, 2007, but at the May 16, 2007 Board meeting, Black said that he had seen draft financial statements but not the final financial statements. Ramzi testified that he forwarded the final financial statements to the Board the next day. There is no record that the Board ever approved those financial statements, or that they were ever presented to the shareholders at an annual meeting. Ramzi took the position that his A Shares should be converted into common shares and should be included in the sale to Mitec pursuant to the First LOI on the same basis as the common shares. Ramzi's right to convert the B Shares was dependent on Wi2Wi's financial results for the year ending September 30, 2007. Ramzi recognized that he had no right to convert the B Shares in May 2007, and various options were under discussion.

[17] Also at the end of May 2007, Ramzi negotiated the sale to Intermec, Wi2Wi's sole remaining customer for the Old Products, of Wi2Wi's manufacturing rights to certain of the Old Products. The proceeds of the sale were US $1.3 million and the sale essentially put an end to the old business.

[18] It is on May 31, 2007 that things start to go off the rails. On that date, there was a dinner attended by the Defendants Wilson and Black and by Piergentili, without Ramzi being present. Amongst other things, they discussed the Ramzi SPA. Piergentili testified that he was surprised to learn that the Board was not aware of the details of the deal, and Wilson testified that he was shocked to learn the details. These disclosures led to a flurry of emails on June 1, which culminated in Ramzi's resignation as Chief Executive Officer of Wi2Wi. It is clear from Ramzi's testimony that he had not expected his resignation to be accepted, but it was. He tried to withdraw the resignation, but the Board refused. Mitec was advised of this development and, after some back and forth with Wi2Wi, Mitec terminated the First LOI on June 29.

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[19] On June 7, 2007, the Board received a copy of the Ramzi SPA and indicated to both Ramzi and Mitec that it would not approve the transfer of the shares. As a result, the Ramzi SPA was amended and restated (the "**Amended SPA**") to eliminate the undertaking to cause the other shareholders to sell their shares to Mitec and the option to buy the balance of Ramzi's shares. Further, the price was reduced from US $2.50 per share to US $1.50 per share. Because Ramzi was not able to reimburse the cash he had received in consideration for the shares, the number of shares was increased from 300,000 to 500,000 so that the total purchase price remained US $750,000.

[20] On July 23, 2007, Mitec issued a second letter of intent to Wi2Wi (the "**Second LOI**"). As a result of the due diligence and the ongoing delays in the development of the New Products, Mitec reduced the purchase price to US $13.2 million in Mitec shares with additional consideration corresponding dollar to dollar to any gross revenue in excess of US $14 million, up to a maximum of US $25 million inclusive of the initial consideration. The governance clause found in the First LOI was not found in the Second LOI.

[21] The Board met to discuss the Second LOI. The Board was not happy with the price or with the disappearance of the governance clause, but did not completely close the door to Mitec.

[22] With discussions with Wi2Wi at a standstill, Mitec went back to Ramzi and on September 6, 2007 offered him US $0.50 per share for his remaining common shares and US $100 for his A and B Shares, for a total consideration of US $750,100 (the "**September 6 Offer**"). At the same time as the September 6 Offer was submitted to Ramzi, Mitec sent a copy to Wi2Wi, and the Board indicated that it would be prepared to consent to the purchase if the A and B Shares were surrendered by Mitec to Wi2Wi, and if :

> "Mitec shall concurrently offer to all existing Wi2Wi shareholders the Common Shares of Wi2Wi that it shall purchase under the Offer, on the basis which is pro rata to the then existing ownership position in Wi2Wi held by each Wi2Wi shareholder. Such offer shall remain open for a period of 10 days following closing of the Transaction."

[23] Those conditions were acceptable to Mitec, but Ramzi rejected the September 6 Offer because the price was too low. One week later, on September 13, 2007, Mitec came back with a new offer at US $1.50 per common share plus US $100 for the A and B Shares (the "**September 13 Offer**") which Ramzi accepted. The Board indicated that it would approve the transaction on the same conditions as it had been prepared to approve the September 6 Offer.

[24] Mitec then proceeded to a due diligence of Wi2Wi and it found that the situation was much worse than it had expected. It appeared that Wi2Wi was even at risk of missing its payroll at the end of September. In those circumstances, Mitec offered on September 27, 2007 to make a loan to Wi2Wi of up to $1 million, with a first tranche of

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$250,000 advanced immediately. The loan provided for a six month term and 12% interest, with all of Wi2Wi's intellectual property given as security. As a further condition, a shareholders meeting was to be called within 48 hours of receiving the first tranche with all existing Board members resigning, such that a new Board would be elected by the majority of the shareholders and a new management restructuring team would be appointed by the new Board.

[25] The Board refused this loan offer and instead proceeded on September 28, 2007 with a private placement of convertible secured notes (the "**Private Placement**"). Pursuant to the Private Placement, each shareholder was entitled to subscribe for $1.00 of convertible secured notes of Wi2Wi (the "**Notes**") for every two common shares of Wi2Wi currently owned. The Notes had a six month term and 10% interest, and were secured on all of the assets of Wi2Wi including its intellectual property. Further, the Notes were convertible into common shares of Wi2Wi at the rate of 50,000 common shares per $1,000 principal amount of Notes, which represented a conversion price of $0.02 per common share.

[26] The Private Placement also included a negative covenant whereby Wi2Wi undertook not to enter into any merger or consolidation while any amount remained outstanding under the Notes.

[27] On October 5, 2007, Mitec terminated the September 13 Offer. The termination of the September 13 Offer appears to have been based on the results of the due diligence, because on October 9, Mitec made a new offer to Ramzi (the "**October 9 Offer**"). The new price was US $0.50 per common share with no mention of the A or B Shares. Mitec had incorporated into its offer the Board's condition about offering the common shares to the other shareholders on a pro rata basis but added that it would have the option to purchase the shares not taken up by the other shareholders.

[28] Ramzi was prepared to accept that offer. The Board considered it at their meeting on October 14, 2007, and took the position that Mitec could not acquire more than 8% of Ramzi's shares, regardless of how many shares were taken up by the other shareholders. The October 15 delay for the Private Placement passed without Ramzi or Mitec having exercised the right to subscribe for the Notes, and Mitec ultimately walked away from the October 9 Offer.

[29] It appears that Ramzi has had very little to do with Wi2Wi since October 15, 2007. He has sent emails to ask for the conversion of his A and B Shares but he did not participate in the shareholders meetings of March 28, 2008 or March 24, 2010. He testified that he had not received notice of either meeting.

[30] The latest evidence with respect to Wi2Wi is a press release dated July 9, 2012. This press release announced a reverse takeover of Wi2Wi by International Sovereign Energy Corp. ("**ISEC**") whereby it was expected that 4.481 Wi2Wi shares would be exchanged for one new ISEC share. The plan of arrangement also provided for the

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cancellation of the issued and outstanding A and B Shares. The press release suggests that Wi2Wi has finally succeeded in marketing the New Products, although for the year ended December 31, 2011, Wi2Wi had total revenue of only US $4,930,000. Finally, it is interesting to note from this press release that the defendants Black and Tahmassebi were still Directors of Wi2Wi as of July 9, 2012.

[31] Finally, there was evidence that Mitec, on the other hand, had essentially ceased its operations.

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THE CLAIM

[32] Ramzi alleges the following acts by the Defendants:

> "The Defendants have violated the Plaintiff's reasonable expectation to be treated fairly and the cumulative effects of their conduct have been oppressive to the Plaintiff for the following reasons:
>
> (a) The Directors refusal to finalize the conversion of the Plaintiff's Series A shares;
>
> (b) The Directors refusal to finalise the conversion of the Plaintiff's Series B shares;
>
> (c) The Directors unreasonable refusal to allow the Plaintiff's sale of 300,000 common shares in 2007;
>
> (d) The Directors frustration of Mitec Telecom Inc. ("Mitec")'s offers to purchase the Corporation's shares;
>
> (e) The Directors efforts to dilute the Plaintiff's shares in the Corporation;
>
> (f) The Directors refusals to call shareholder meetings; and
>
> (g) The Directors refusals to disclose Wi2Wi's financial information.

[33] Ramzi alleges that this conduct amounts to "oppression" under Section 241 of the Canada Business Corporation Act (the "**CBCA**")[3], which provides in part as follows:

> (1) A complainant may apply to a 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

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[3] R.S.C. 1985, c. C-44.

(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,

(a) an order restraining the conduct complained of;

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

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

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

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

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

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

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

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

(j) an order compensating an aggrieved person;

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

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(l) an order liquidating and dissolving the corporation;

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

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

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[34] Ramzi has sued the four Defendants, who were directors of Wi2Wi at the relevant time.

[35] Ramzi seeks damages in the amount of $4,692,539.98, which represents, according to him, the value of his common shares, A Shares and B Shares as of September 6, 2007. He seeks an order that he remit his share certificates to whomever the Defendants designate upon payment of that sum.

TRIAL AND PROCEDURAL ISSUES

[36] Ramzi testified at the trial, and he called as witnesses Piergentili from Mitec, Groome from Notre-Dame Capital Inc. ("**Notre-Dame**"), a shareholder of Wi2Wi, and Hubert Marleau ("**Marleau**") from Palos.

[37] The only Defendant to testify was Wilson, and the Defendants did not call any other witnesses.

[38] There was one pre-trial issue which had an impact on the trial. Ramzi had made a motion for permission to re-amend his motion to institute proceedings on October 15, 2013, which was granted in part by my colleague Mr. Justice Schrager on October 22, 2013. In that judgment, amendments to add (1) allegations with respect to the conditions imposed by the Board on the October 9 Offer and (2) allegations that Black's sons had acquired shares in October 2007 as *prête-noms* for Black, were not allowed by Mr. Justice Schrager. I allowed evidence to be made with respect to the October 9 Offer and evidence with respect to the shareholders of Wi2Wi is in the Court record, but those two matters are not specifically alleged as acts of oppression.

GENERAL PRINCIPLES APPLICABLE TO OPPRESSION CASES

[39] The general principles applicable to oppression cases are well established and are not contested by any of the parties. Essentially, as established by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*,[4] there is a two-pronged inquiry.

[40] The first prong of the inquiry is to establish whether the petitioner's reasonable expectations were breached. With respect to the concept of reasonable expectations, the Court explained that stakeholders enter into relationships with and within

[4] [2008] 3 S.C.R. 560, paragraphs 56 to 68.

corporations on the basis of understandings and expectations upon which they are entitled to rely, provided that they are 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. The Court added that fair treatment is most fundamentally what shareholders are entitled to "reasonably expect".

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[41] Once a breach of reasonable expectations is established, the second prong is to consider whether the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. The Court held that "oppression" means conduct that is coercive and abusive and suggests bad faith, that "unfair prejudice" may admit of a less culpable state of mind that nevertheless has unfair consequences, and that "unfair disregard" means ignoring an interest as being of no importance, contrary to the petitioner's reasonable expectations.

[42] With those principles in mind, I will look at Ramzi's reasonable expectations and the conduct of the Defendants in relation of each alleged act of oppression, and then consider the remedy sought by Ramzi.

ANALYSIS OF THE SPECIFIC ALLEGATIONS OF OPPRESSION

a) Failure to convert the A Shares

[43] As part of the reverse takeover of Wi2Wi Inc. by Sargeant Bay, 1 million A Shares were issued to Ramzi. The conversion right attached to the A Shares is defined as follows in paragraph 5.1(a) of Schedule A of Wi2Wi's articles of incorporation:

> "the Class A Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $3,500,000 for its 2006 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class A Convertible Preferred Shares;"

[44] Ramzi's reasonable expectation would be that his A Shares would be converted into common shares if that test is met.

[45] The articles call for a determination by the auditors as to whether the test was met. We have no evidence of a specific determination by the auditors, other than note (14)(b) to the audited financial statements for the year ended September 30, 2006, which provides as follows:

> "The Class A Convertible Preferred Shares were convertible into a like number of common shares in the event the Company achieved gross margins of $3.5 million for its 2006 financial year, pursuant to the Share Purchase Agreement between the shareholder of Wi2Wi Inc. and Wi2Wi Corporation on December 12, 2006 (the Agreement). The Agreement does not define gross margin. In the

> absence of any specific definitions or interpretations in the Agreement, management has presumed gross margin equals revenues less cost of revenues per the financial statements prepared pursuant to Canadian GAAP. Based upon that, management has concluded that the Class A Convertible Preferred Shares are currently convertible into 1.0 million common shares at the option of the holder for five years from the date the Company notifies the holder."

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[46] The language included by the auditors in note (14)(b) of the 2006 audited financial statements was reproduced word for word in note (15)(b) of the 2007 audited financial statements and in note 12 of the 2008 and 2009 audited financials statements, with the only difference being that in 2007, the following sentence was added at the end of the note:

> "Subsequent to the end of fiscal 2006, a dispute arose over the conversion rights."

That sentence is not found in the 2008 and 2009 financial statements.

[47] The formula described in the notes is that gross margin equals revenues less cost of revenues. I take judicial notice of the fact that this is a fairly standard definition of gross margin. It is also consistent with the internal financial statements of Wi2Wi for the period ended June 30, 2007 produced in the record where the difference between "Income" and "Cost of Goods Sold" is labelled as "Gross Profit". Moreover, the CEO of Wi2Wi at the time of the 2007 audited financial statements was the Defendant Wilson, and "management" in 2007 used the same definition for gross margin as "management" in 2006. I will therefore accept that formula.

[48] The consolidated statement of operations included in the 2006 audited financial statements shows revenues of $12,038,000 and cost of revenues of $7,584,000, for a difference of $4,454,000 which is not labelled in the consolidated statement of operations but which corresponds to the definition which I have accepted for gross margin.

[49] Based on the foregoing, I conclude that the test as set out in paragraph 5.1(a) of the articles was met.

[50] There is a procedure in section 5.1 for the conversion of the A Shares. Essentially, the auditors determine whether Wi2Wi achieved a gross margin of $3,500,000 for its 2006 financial year, then Wi2Wi provides written notice to the holders of the A Shares of the financial results for the 2006 financial year "forthwith following the approval of the Corporation's audited financial statements for said financial year by the Board of Directors", and then the holder of the A Shares has five years from receipt of the Corporation's notice to send his notice accompanied by the share certificates representing his A Shares.

[51] This procedure was not followed. The auditors audited the financial statements but, other than referring to management's position in note (14)(b), made no specific determination of Wi2Wi's gross margins for 2006. Further, the evidence is to the effect that the Board never approved the 2006 audited financial statements and never sent notice to Ramzi of the 2006 results. Finally, Ramzi has never sent a formal notice asking for the conversion of the A Shares, although he did make frequent requests at Board meetings, in emails, and otherwise.

[52] Ramzi certainly cannot be faulted for the failure to follow the procedure. The Defendants cannot invoke their failure to approve the audited financial statements and their failure to issue a notice to Ramzi to justify their failure to convert the A Shares.

[53] Wilson gave two reasons to justify the failure to convert the A Shares.

[54] First, in his testimony and as appears from the minutes of the Board, there were some doubts expressed as to the validity of the numbers in the 2006 audited financial statements. I note, however, that the numbers in the 2006 audited financial statements have never been amended or restated, and that those exact numbers are used as the comparative numbers in the 2007 financial statements which were approved by the Board and submitted to the shareholders in early 2008 after Ramzi's resignation. Whatever doubts may have existed as to the 2006 numbers proved not to be well-founded. I therefore dismiss that argument.

[55] Wilson also suggested in his testimony that the A Shares were not converted because Wi2Wi had potential claims against Ramzi arising from his mismanagement of Wi2Wi, which claims were set out in the demand letter sent to Ramzi in August 2007. Even if Wi2Wi had claims against Ramzi (and I note that whatever claims it may have had were never pursued), those claims cannot justify a failure to convert the shares. There can be no compensation between the conversion of shares and a monetary debt. Further, the A Shares and the alleged debt have different sources: the A Shares were issued to Ramzi as a shareholder as part of the reverse takeover, and the potential claims against him relate to mismanagement as an employee. In any event, Wi2Wi would not have lost any rights by converting the A Shares. It could still have seized the common shares or refused the transfer of the common shares to a third party and therefore ensured that Ramzi had assets against which it could execute a judgment. For all of these reasons, the second argument is rejected.

[56] I therefore conclude that the A Shares should have been converted into one million common shares.

[57] The fact is, however, that they were not converted and that there have been subsequent corporate steps which have affected the shares of Wi2Wi, namely the dilution of the common shares as a result of the Private Placement in October 2007 and the subsequent reverse takeover by ISEC which apparently involved the conversion of

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4.481 Wi2Wi common shares for one new ISEC common share as well as the cancellation of the A Shares.

[58] In my view, Ramzi had a second reasonable expectation in relation to the A Shares, which is that the Board would consider his rights as holder of the A Shares in any transaction involving the shares of Wi2Wi and ensure that any such transaction did not unfairly prejudice him as the holder of the A Shares. It is important to note that the A Shares (and the B Shares) were non-participating, non-voting, non-transferable and non-assignable, but they were convertible into common shares. It was reasonable for Ramzi to rely on the Board to protect his rights prior to conversion, because he could not do so himself.

[59] As set out below, the Private Placement had a hugely dilutive effect on the value and voting rights of the common shares. In those circumstances, the Board should have taken steps to ensure that the A Shares were not prejudiced. There are a variety of ways in which that could have been done, but the Board acted in complete disregard for the rights of the holders of the A Shares. It is interesting to note that the Board did take steps to protect the holders of options to purchase common shares, which included the Directors themselves, and to protect Wilson who held C Shares, but that it took no steps whatsoever to protect the holder of the A Shares.

[60] I will not discuss the transaction with ISEC, because there is no evidence as to what exactly happened and it was not pleaded as a ground of oppression.

[61] In my view, therefore, there are two related acts of oppression, namely the failure to convert the A Shares into common shares, and the failure to consider Ramzi's rights as holder of the A Shares in the context of the Private Placement in October 2007 and to ensure that he was not prejudiced by the Private Placement.

b) Failure to convert the B Shares

[62] The condition for the conversion of the B Shares is set out in paragraph 5.2(a) of Schedule A of Wi2Wi's articles of incorporation as follows :

> "the Class B Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $11,000,000 for its 2007 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class B Convertible Preferred Shares;"

[63] As with respect to the A Shares, Ramzi's reasonable expectations would be that (1) the B Shares would be converted into common shares if the condition in the articles is met; and (2) the Board would ensure that, prior to their conversion, the B Shares would not be prejudiced by any corporate transaction.

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[64] Wi2Wi's audited financial statements for the 2007 financial year are dated February 25, 2008 and were submitted to the shareholders at a meeting March 28, 2008. Note 15(B) of the 2007 audited financial statements provides as follows:

> "The Class B Convertible Preferred Shares were convertible into a like number of Common Shares only in the event the Corporation achieved gross margins of $11.0 million for its 2007 financial year pursuant to the Agreement. The Agreement does not define gross margin. In the absence of any specific definitions or interpretations in the Agreement, management has presumed gross margin equals revenues less costs of revenues per the financial statements prepared pursuant to the Canadian GAAP. Based upon that, management concluded that the target was not met."

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[65] The comment about the target not having been met was not reproduced in the 2008 and 2009 audited financial statements.

[66] The consolidated statement of operations for the 2007 financial year shows revenues of $454,000 and cost of revenues of $1,160,000 for a negative gross margin of $706,000. However, as appears from note 5 to the financial statements, these revenues and cost of revenues are limited to the New Products because the sale of the Old Products was classified as "discontinued operations" following the sale of that business to Intermec on May 31, 2007. As further appears from note 5, the sales of Old Products for the period from October 1, 2006 to May 31, 2007, generated revenues of $4,357,000 and had a cost of revenues of $2,014,000 for a gross margin of $2,343,000, which is not included in the gross margin in the consolidated statement of operations but rather is included in a line further down in the statement called "Net income (loss) from discontinued operations, net of income taxes (note 5)".

[67] For the purposes of paragraph 5.2(a) of the articles, the gross margin for the first 8 months of the financial year should not be excluded merely because those operations were discontinued. Therefore the gross margin for the year was $2,343,000 from the sale of Old Products less the loss of $706,000 on the sale of New Products for a combined gross margin of $1,637,000.

[68] As a result, the condition set out in paragraph 5.2(a) of the articles was not met. In those circumstances, paragraph 5.2(g) provided that "the number of Common Shares into which the Class B Convertible Preferred Shares may be converted shall be reduced on a *pro rata* basis". In other words, the number of common shares to be issued is equal to $1,637,000 divided by $11 million and multiplied by 1.5 million common shares, which results in 223,227 common shares.

[69] With respect to the 2007 financial year, the audited financial statements were approved by the Board of Directors on or about February 25 or 26, 2008, but no notice was issued to Ramzi. As a result, Ramzi did not issue the shareholder notice required by the articles. It is clear, however, that Ramzi did request the conversion of his B Shares on numerous occasions and I find that those attempts are sufficient to satisfy

the articles and that the Defendants cannot rely on their failure to send a notice to justify the failure to convert the B Shares.

[70] The complicating factor with respect to the B Shares is that the various transactions with Mitec were being negotiated and the Private Placement took place prior to the date on which the Board approved the 2007 financial statements. As a result, Ramzi did not have the right to convert the B Shares prior to these events.

[71] In those circumstances, the Board was required to consider the B Shares in the context of the negotiations with Mitec and the Private Placement and to ensure that the rights of the holder of the B Shares were not prejudiced by either the sale to Mitec or the Private Placement. This does not mean that the Board was required to call a shareholders meeting to amend the bylaws and accelerate the conversion of the B Shares into common shares prior to the sale to Mitec, as Ramzi appears to have suggested on a number of occasions. Indeed, there was an email from Stephen Kelly of Ogilvy Renault, as it then was, the corporate attorneys of Wi2Wi, on May 29, 2007, setting out three different ways in which the B Shares could be dealt with in the context of the transaction with Mitec. Any of those approaches would have been sufficient to protect Ramzi's rights as holder of the B Shares. In fact, no steps were taken to protect his rights, but none of the transactions with Mitec went forward and therefore the point is moot.

[72] However, the Private Placement in October 2007 did go forward. As set out more fully below, the conversion of the Notes had a very serious dilutive effect on the common shares and on their voting rights and value, and therefore, by ricochet, had a similar effect on the B Shares. No steps whatsoever were taken by the Board to protect the holder of the B Shares from that prejudice. As described below, the Board did take steps to protect the option holders and Wilson as holder of some of the C Shares, but did nothing with respect to the B Shares. I find that this conduct by the Board amounts to an unfair disregard for the rights of the holder of the B Shares and therefore constitutes oppression. For the purposes of the remedy, I will give effect to the fact that the B Shares would have been converted into 223,227 common shares.

c) Refusal to approve the Ramzi SPA

[73] Pursuant to the articles of Wi2Wi, "No share in the share capital of the Corporation shall be transferred nor assigned without the approval of the directors certified by a resolution of the Board of Directors."

[74] Ramzi's reasonable expectation would be that such approval would not be unreasonably withheld by the Directors or, as he put it in his plan of argument, that "the Wi2Wi Board could not unduly interfere in a possible sale of his personal shares to an outside party."

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[75] The transaction which the directors failed to approve is the Ramzi SPA whereby he sold 300,000 common shares to Mitec for US $2.50 each for a total of US $750,000. The Ramzi SPA is dated March 30, 2007 and the testimony is to the effect that it was signed on April 2, 2007.

[76] The parties hotly debated when the Board was informed of this transaction. Ramzi takes the position that he informed the Board of this potential transaction at the meeting on March 22, 2007, that he emailed the Board with respect to this transaction on March 23 and 24, 2007, and that he had further discussion of the transaction at the Board level on March 25 and April 6. Wilson, the only Board member to testify, said that he had no knowledge of the transaction until his meeting with Piergentili on May 31, 2007 and that the Board did not actually see a copy of the Ramzi SPA until June 7, 2007.

[77] I do not accept Ramzi's version of the events. His discussions with Mitec must have been well advanced by March 22 because the parties signed a letter of intent on March 23. The minutes of the Board on March 22, however, do not refer specifically to a sale to Mitec and they suggest that Ramzi was being careful not to disclose that he was negotiating a sale to Mitec: "Mr Alharayeri disclosed to the board that he is in the process of looking for an outside party to purchase some of his common shares of Wi2Wi".

[78] Ramzi also pointed to an email exchange between Ramzi and the Board on March 23 and 24 where he said that he "thought of an idea" that involved adding to "the term sheet" a requirement that Mitec purchase upon signing "the term sheet" 500,000 shares from Wi2Wi and 500,000 shares from Ramzi personally "at the final agreed on price for this transaction".

[79] It is clear to me that "the term sheet" is a reference to the First LOI, a draft of which had been received the previous week and had been discussed at the Board meeting on March 22. It appears that Ramzi was looking for a way to sell some of his shares as part of the sale of Wi2Wi to Mitec as opposed to going through with the Ramzi SPA, for which a letter of intent was signed that same day. He clearly knew that the Ramzi SPA was problematic.

[80] However, when Board members objected to including a provision requiring Mitec to buy up-front some of his shares for cash when the other shareholders would be receiving Mitec shares, Ramzi backed off this suggestion and proceeded instead with the Ramzi SPA.

[81] The next Board meeting was March 25, after Ramzi had signed the letter of intent for the Ramzi SPA. Again, his disclosure to the Board was very limited: "At the closure of the meeting, Mr. Alharayeri announces he will be seeking out the opportunity to sell a portion of his common shares to an outside party."

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[82] He then signed the Ramzi SPA on April 2, 2007. It provides that the delivery of a Board resolution approving the transfer of the shares is a condition, but Mitec waived that condition provided that Ramzi uses his best efforts to obtain the approval within 90 days, failing which the value of the warrant (which gives him additional consideration in the event the Wi2Wi deal is done at a price higher than US $2.50 per share) is reduced by 50%.

[83] The April 6 Board minutes are somewhat ambiguous: "The board actively participated in an open discussion regarding the possible sale transaction of a portion of Mr. Alharayeri's common shares to Mitec Telecom." It is not clear if this is referring to the possibility of requiring Mitec to purchase some of Ramzi's shares up-front and for cash in the First LOI or if it is referring to the Ramzi SPA. It seems more likely that "the possible sale transaction" is a reference to the First LOI which was then under negotiation, because the Ramzi SPA had already been signed and was hardly a "possible sale transaction" and because the next sentence in the minutes is: "The board agreed to have Mr. Andy Wilson help Mr. Alharayeri in negotiations with <u>this possible transaction</u> and report to the board of any findings." (emphasis added) The evidence established clearly that Wilson was involved in the negotiation of the deal between Wi2Wi and Mitec and not in any dealings between Ramzi and Mitec. Moreover, Wilson testified that the Board again rejected the idea of adding the sale of Ramzi's personal shares up-front and for cash to the First LOI.

[84] On the other hand, Wilson testified that he was not aware of the sale from Ramzi to Mitec until the dinner meeting with Piergentili on May 31. That does not appear to be accurate either. The agenda for the Board meeting on May 16, 2007 includes as an agenda item "Approval of a name transfer of 300,000 shares to Mitec", and the minutes indicate that the sale was disclosed:

> "Ramzi moves to approve the name transfer and Hans wants to table it due to the exchange agreement issues. He wants to move it to later in the meeting when Amar is on the line. Ramzi says that he signed an agreement on April 2, he announce that he sold. He says that this only a name transfer the agreement is already done. Hans asked Norm how do you feel about this, they want to listen to the agreement first. Hans says that he does not have a problem with this but it makes sense to revisit later in the meeting."

The name Mitec is not mentioned in that portion of the minutes but it was previously disclosed in the agenda. The minutes do not include any discussion of the issue later in the meeting.

[85] In his testimony, Wilson attempted to attack the reliability of the May 16 minutes. It is true that the May 16 minutes are not in the same format as the earlier minutes that were filed in the Court record and that they do not appear to have been prepared by Linda Arends, who was the assistant secretary and who prepared the earlier minutes filed in the Court record. However, these are nevertheless part of Wi2Wi's corporate

records and given that no attempt has been made to correct them in the seven years since they were prepared, I am prepared to treat them as accurate.

[86] On the other hand, Ramzi alleges in his motion that the Board approved the transaction at the May 16 meeting and subsequently arbitrarily rescinded its approval of the sale. I do not accept that characterization. Nothing in the minutes suggests that the Board approved the transaction on May 16. Although Ramzi appears to have disclosed the fact of a transaction with Mitec at the May 16 meeting, he did not disclose the details, and there is no suggestion that the Board had any knowledge of the special conditions included in the Ramzi SPA until Wilson and Black had the discussion with Piergentili on May 31 and until they received a copy of the Ramzi SPA on June 7. The Board minutes of June 15, 2007 are very clear:

> "Mr. Al-Harayeri then asked the directors what their concerns were with the recent situation involving his alleged partial transfer of shares to Mitec. Mr. Steinberg responded that Mr. Al-Harayeri had not disclosed what he did to the board, had not told the board that he had agreed to an option for the sale of all and not only a portion of his shareholdings in the Corporation and that Mr. Al-Harayeri had made an undertaking to Mitec that Mr. Al-Harayeri would cause the other shareholders of the Corporation to accept a transaction with Mitec, that globally the situation is totally different from what had been presented to the board by Mr. Al-Harayeri and that, in Mr. Steinberg's view, Mr. Al-Harayeri had conducted himself in a wholly inappropriate manner."

[87] More specifically, once it had the details of the Ramzi SPA, the Board was concerned by the following specific provisions:

1) The price was US $2.50 per share in cash with a warrant for the difference between US $2.50 and the price ultimately paid to the shareholders of Wi2Wi in a transaction with Mitec, to be paid in Mitec shares;

2) The covenant by Ramzi in paragraph 5.2(a) that he enter into and cause the other shareholders of Wi2Wi to enter into a definitive sale of 90% or more of the issued and outstanding shares of Wi2Wi to Mitec; and

3) The granting in paragraph 5.2(b) by Ramzi of an exclusive and irrevocable option in favour of Mitec to purchase all or a portion of the balance of his common shares at a price of US $3.00 per share payable in Mitec shares.

[88] The Board was entitled to react negatively to these provisions, as they suggest that Ramzi was in a conflict of interest as he negotiated his sale and the larger transaction between Wi2Wi and Mitec in parallel.

[89] First, Ramzi was getting a better deal than the other shareholders in that the price of US $2.50 was being paid up-front and in cash whereas the other shareholders were getting Mitec shares in payment at a later date. Moreover, even though the price

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of US $2.50 per share was lower than the price in the First LOI (which was almost US $3.00 per share assuming the conversion of the A, B and C Shares and more than US $4.00 per share based on the then issued common shares), it was clear to all parties by June 17 that the Wi2Wi/Mitec deal was not going to be done for US $25 million. The price in the Second LOI, which was dated July 23, 2007, was approximately US $1.50 per share assuming the conversion of the A, B and C Shares or US $2.25 per share based on the then issued common shares.

[90] Of greater concern was the clause whereby the CEO of the corporation "shall enter into and shall cause the other shareholders of the Corporation to enter into" the deal with Mitec. This raises serious conflict issues as to whether Ramzi will be acting in the best interests of the shareholders when he negotiates and recommends acceptance of a deal with Mitec.

[91] Finally, the option to purchase all of his shares at a price of US $3.00 per share in the event that the deal with Wi2Wi did not close was also problematic because of the size of Ramzi's shareholding. The Board had concerns about a creeping takeover of Wi2Wi by Mitec in which the control premium would go exclusively to Ramzi rather than having the same price paid to all of the shareholders.

[92] In my view, the Board did not act unreasonably in refusing to approve the transfer of shares pursuant to the Ramzi SPA.

[93] Subsequent to the Board's refusal, the deal was renegotiated to eliminate the aspects which were problematic, and the Amended SPA was executed by Ramzi and Mitec and was approved by the Board on July 6, 2007. The changes from the Ramzi SPA to the Amended SPA are as follows :

1) The price of the shares was reduced from US $2.50 to US $1.50, and the number of shares sold was increased from 300,000 to 500,000 such that Ramzi would not be required to reimburse any portion of the purchase price;

2) Ramzi's undertaking to cause other shareholders to enter into the deal to sell Wi2Wi to Mitec was deleted; and

3) Mitec's option to purchase all of Ramzi's shares if the deal between Wi2Wi and Mitec did not go forward was also deleted.

[94] The origin of the price reduction is not altogether clear. Ramzi and Piergentili suggested that the Board imposed the price decrease on Mitec, but that appears unlikely because it would not be in the Board's interest to lower the valuation of Wi2Wi. Further, the Second LOI by Mitec for all of the shares of Wi2Wi in July substantially reduced the price offered. As a result, I am of the view that the price was not something which was imposed by the Board but it appears to have been Mitec's decision both because its valuation of Wi2Wi was decreasing and because the Amended SPA was

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not as favourable a deal for Mitec. As for the elimination of the other two provisions, the Board appears to have acted reasonably.

[95] In my view there was no oppression relating to the Ramzi SPA.

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d) Frustration of Mitec's offers to purchase Wi2Wi's shares

[96] Leaving aside the memorandum in February or March 2007 and the draft of the First LOI dated March 17, 2007, there were five formal offers from Mitec to Wi2Wi or to Ramzi, none of which resulted in a completed transaction:

- The First LOI dated April 10, 2007,
- The Second LOI dated July 23, 2007,
- The September 6 Offer,
- The September 13 Offer, and
- The October 9 Offer.

[97] With respect to the offers for all of Wi2Wi (the First and Second LOI), Ramzi's reasonable expectation would be that the Board would act reasonably in considering any such offer and in attempting to negotiate a deal if it was in the best interests of the corporation. With respect to the offers for Ramzi's shares (the September 6, September 13 and October 6 Offers), Ramzi's reasonable expectation is that the Board would not unreasonably withhold its approval.

[98] I will examine the circumstances surrounding the failure of each offer, in order to see whether there is anything contrary to his reasonable expectations.

[99] The First LOI was sent to by Mitec to Wi2Wi on April 10, 2007. It was accepted by Wi2Wi and the parties began to work on their due diligence. The First LOI was terminated by Mitec on June 29, 2007, citing Ramzi's resignation as a material adverse change in the business and direction of Wi2Wi. The evidence also discloses that Mitec was concerned about the delays in the development of the New Products and had doubts as to the value of Wi2Wi expressed in the First LOI. There is no basis on which the Board can be held responsible for the termination of the First LOI.

[100] The Second LOI from Mitec to Wi2Wi is dated July 23, 2007. Under the Second LOI, the "Initial Consideration" was dropped from US $25 million to US $13.2 million, and the "Adjustment Consideration" was dropped from 90% of gross revenue between US $25 million and US $42 million plus 50% of gross revenue between US $42 million and US $60 million, to 100% of gross revenue between US $14 million and US $25 million. These very significant adjustments in the price appear to have been triggered

by the due diligence that Mitec carried out at Wi2Wi, and in particular the delays in the launch of the New Products. Further, the Second LOI did not include the governance provisions found in the First LOI, such that the Second LOI was more of a takeover by Mitec than a merger of equals. For these reasons, the Board did not consider the Second LOI to be acceptable, although the Board remained open to doing a deal with Mitec.

Given the deference that the Court is required to show to the Board's business judgment, I see no basis on which to conclude that the Board's refusal of the Second LOI was unreasonable.

[101] Mitec then changed its focus to the balance of Ramzi's shares. In the September 6 Offer, Mitec offered to purchase the balance of Ramzi's shares for US $0.50 per common share (for a total of US $750,000) and US $100 for the A and B Shares. The Board was concerned that this offer would result in a creeping takeover of Wi2Wi by Mitec, and so it imposed certain conditions on Mitec, the most important of which were that the A and B Shares would be surrendered by Mitec to Wi2Wi for cancellation and that the common shares acquired by Mitec would be offered to all existing Wi2Wi shareholders on a basis which was pro rata to the then existing ownership position in Wi2Wi held by each Wi2Wi shareholder. Both of these conditions were acceptable to Mitec, but Ramzi declined the September 6 Offer because he did not consider the price to be high enough. There is therefore no oppression by the Board in the failure of this offer.

[102] Mitec then made the September 13 Offer at US $1.50 per share for the common shares (US $2,250,000 total) and US $100 for the A and B Shares. This offer was acceptable to Ramzi, and the Board was prepared to approve it on the same conditions as the September 6 Offer. In the course of its due diligence in relation to this offer, Mitec discovered the extent of Wi2Wi's financial problems. As a result, Mitec made the loan offer to Wi2Wi on September 27 which was refused and Wi2Wi instead proceeded with the Private Placement on September 28, 2007. Mitec terminated the September 13 Offer on October 5.

[103] I am satisfied that Mitec terminated the September 13 Offer on October 5 because it had concluded that the price which it had offered Ramzi was too high given the financial state of Wi2Wi. This conclusion flows from the fact that Mitec came back on October 9 with a further offer at US $0.50 per share. I do not believe that Mitec's termination of the September 13 Offer was in any way due to the conditions imposed by the Board or to the Private Placement. I therefore conclude that there was no oppression in the failure of the September 13 Offer.

[104] The final offer made by Mitec to Ramzi was the October 9 Offer. The new price was US $0.50 per common share with no mention of the A or B Shares. Mitec had incorporated into its offer the Board's condition dating back to September 6 about offering the common shares to the other shareholders on a pro rata basis, but it added

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an important change – it provided that it was purchasing "a minimum of 8% or up to 100%" of Ramzi's common shares, and added:

> Upon signing of this agreement Mitec shall offer on a pro rate basis to the outstanding Wi2Wi share holders the opportunity to purchase the Vendors shares at the same price. This offer will be extended for 10 days at which point Mitec will have the option to purchase those shares that remain outstanding. (Emphasis added)

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[105] Mitec's calculation appears to have been that the other shareholders would be unlikely to pick up Ramzi's shares because (1) they had just participated in the Private Placement to preserve their existing shares, and (2) they would have to participate in the Private Placement again with respect to the new shares to preserve their value.

[106] Ramzi was prepared to accept that offer. The Board considered it at their meeting on October 14, 2007. The Board was concerned with the possibility of a creeping takeover by Mitec if Mitec had the right to purchase the shares not taken up by other shareholders. Ultimately, the Board took the position that it would not allow Mitec to acquire more than 8% of Ramzi's shares, regardless of the position taken by the other shareholders. The October 15 delay for the Private Placement passed without Ramzi or Mitec having exercised the right to subscribe for the Notes and Mitec walked away from the October 9 Offer.

[107] The October 9 Offer was made after the Private Placement, and must have been made with the intention by Mitec that it would subscribe for the Notes under the Private Placement. I therefore conclude that the failure of October 9 Offer was not related to the Private Placement. Rather, the final straw for Mitec appears to have been the Board's decision that it would not allow Mitec to buy more than 8% of Ramzi's shares regardless of how many other shareholders agreed to participate in the transaction. Mitec walked away from the deal shortly thereafter.

[108] The issue therefore is whether the Board acted reasonably in limiting Mitec's right to acquire Ramzi's shares. Mitec had already acquired 500,000 common shares, which represented 8.8% of the issued and outstanding common shares. The remaining 1,500,000 common shares held by Ramzi (ignoring the A and B Shares) represented a further 26.3%. Considering that Mitec's allies, including in particular Palos, owned some shares and had influence with respect to other shares, the Board was concerned that the Ramzi shares would give Mitec effective control without Mitec ever paying a control premium to the other shareholders.

[109] In my view, this was a legitimate concern for the Board. I therefore conclude that the Board did not act unreasonably in relation to the failure of the October 9 Offer. I also note that, as set out above, Ramzi did not plead the failure of the October 9 Offer as a ground of oppression.

e) The dilution of Ramzi's shares as a result of the Private Placement

[110] The Private Placement provided that each shareholder was entitled to subscribe for $1.00 of Notes for every two common shares of Wi2Wi then owned. The Notes were convertible into common shares of Wi2Wi at the rate of 50,000 common shares per $1,000 principal amount of Notes, which means that the conversion price was $0.02 per common share.

[111] If every shareholder participated in the Private Placement, Wi2Wi would issue approximately $2,900,000 in Notes which would be convertible into approximately 145 million common shares. In other words, Wi2Wi's capital would increase by $2,900,000 but the number of common shares would increase from 5,807,760 to over 150,000,000.

[112] The effect of the Private Placement on any shareholder who did not participate would be devastating. If, for example, every shareholder except Ramzi participated in the Private Placement, Wi2Wi would issue approximately $2,150,000 in Notes which would be convertible into approximately 107 million common shares. Ramzi's percentage shareholding (looking only at the common shares and ignoring the A and B Shares) was 25.8% before the Private Placement and would drop to 1.3% if he was the only shareholder who did not participate. The value of his shares would also drop – he had an offer at U.S. $0.50 before the Private Placement's dilutive effect, but the Private Placement was at $0.02 and the Board speculated in October 2007 that the next round of financing after the Private Placement would be at $0.05 per common share, which in fact it was in May 2008.

[113] This extreme dilutive effect was intentional. As Wilson explained in his testimony, Wi2Wi was in danger of missing the next payroll and it was imperative that every shareholder participate in the Private Placement.

[114] In fact, the Private Placement accomplished its goal. The 2008 and 2009 audited financial statements disclose that Wi2Wi issued $1,922,000 in Notes and that all of those Notes were converted into common shares, which means that 96,100,000 common shares were issued. The effect on Ramzi, who did not participate, was that his shareholding dropped from 25.8% of the common shares to 1.5%.

[115] The issue is whether this breached Ramzi's reasonable expectations and whether the Defendants' conduct constituted oppression.

[116] In terms of Ramzi's reasonable expectations, he cannot be said to have had the expectation that he would never be diluted. The Business Plan dated November 2005 provided for the issuance of 2 million common shares and the intention from the outset was to take Wi2Wi public, which would necessarily result in dilution of Ramzi's ownership position. At best, he can be said to have had the reasonable expectation that he would not be unfairly diluted. Ramzi states in his plan of argument that he had

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the reasonable expectation that "he would not be excessively diluted and that his shares would not be rendered valueless in a rights offering."

[117] In terms of when the issuance of shares constitutes oppression, Ramzi relies in particular on two decisions of the Québec courts, namely *Re Sabex Internationale Ltée*[5] and *Segal c. Blatt*[6]. In my view, these cases are not particularly helpful in resolving the present matter.

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[118] In *Sabex*, the Court granted the petitioners an injunction to prevent a share offering to the shareholders at a reduced price. The Court found that the corporation was intended to be held 50/50 but that the majority had acquired control through "des manoeuvres habiles qui ne respectaient pas l'esprit de l'entente originale" (paragraph 47). Further, the Court was not satisfied that there was a proper purpose for the share offering and found instead that the majority was seeking to take advantage of the very difficult financial situation of the petitioners to increase its control position.

[119] In *Segal*, the Court ordered the corporation to purchase the petitioner's shares which had been diluted as the result of a share offering. However, the Court concluded that the dilutive share offering was carried out "without his knowledge and, indeed, behind his back" (paragraph 38).

[120] The author Markus Koehnen[7] provides very useful guidance. He states a number of guiding principles, which I would summarize as follows:

- The motive behind the share issue is of great importance. A share issuance motivated by an improper purpose is oppressive. However, a share issue may be oppressive even where the purpose was proper. The Courts will examine the balance between corporate benefit and individual harm.

- Extending the offering to all shareholders reduces the likelihood of oppression, but is not determinative. The share issue will be oppressive where the decision to issue shares is motivated by the knowledge that the applicant cannot accept the invitation to participate.

- Where the proponents of the share issuance benefit by obtaining increased control of the corporation, Courts will view the transaction with much greater suspicion.

- Issuing shares in the face of another dispute with the applicant creates an inference of oppression that requires strong evidence of a legitimate corporate purpose to overcome.

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[5] [1979] J.Q. no 367 (S.C.).
[6] 2007 QCCS 1488, affirmed except on issue of share valuation: 2008 QCCA 1094.
[7] *Oppression and Related Remedies* (2004), pages 137 to 145.

- Share offerings at a discount to book value, without a proper assessment of value or for otherwise inadequate consideration, are also oppressive.

[121] The various factors cut both ways in this case.

[122] The key factors in favour of the validity of the Private Placement are the purpose of the Private Placement and the fact that it was offered on the same terms to all of the shareholders (other than the holders of the A, B and C Shares, as discussed above).

[123] In terms of the purpose, the testimony of Wilson, confirmed by the testimony of Piergentili and Marleau, made it clear that Wi2Wi was in desperate financial circumstances in September 2007 and was at risk of missing payroll and closing its doors. This is further confirmed by the Mitec loan offer on September 27, and the Board minutes on September 28 ("quickly running out of cash", "critical that the payroll be met", "cash crunch", "brink of a zero-cash position", "ensure that the Corporation could pursue its operations", "emergency financing", "current critical financial situation").

[124] There is no evidence of any improper purpose, such as the dilution of Ramzi or any other shareholder. The Board knew of Ramzi's difficult financial circumstances and need for cash earlier in 2007 and it is fair to assume that the Board would have assumed that Ramzi was still in difficult financial circumstances in October.

[125] However, the assumption under which all of the parties operated in October was that Mitec would buy Ramzi's common shares and would participate in the Private Placement. This is reflected in Ramzi's reaction to the Private Placement:

> Email of September 29, 2007 to Ogilvy Renault:
>
> "I want to subscribe myself but as you know I signed a LOI to sell my shares. Do you have subscriptions forms or paper work to fill/forward to Mitec since they are buying my shares."
>
> Email of October 1, 2007 to Ogilvy Renault:
>
> "Mitec ... want to execute on the LOI in place and finalize the purchase but will need from you in writing an email that will allow for an extension till the 15th so we can finish the paper work and allow them to participate in this round with the shares they will purchase."

[126] It is also reflected in the Board minutes of October 14, 2007:

> "The directors then discussed whether Mitec's strategy was not to purchase shares, with the view of then purchasing additional convertible secured notes..."

[127] There is no evidence that the Board issued the Private Placement in the belief that Ramzi's shares would not participate and would therefore be diluted. In my view, the purpose of the Private Placement was a proper one.

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[128] The Private Placement by its terms was open to all shareholders and it was received by Mitec and by Ramzi. It was drafted in a discriminatory way – "significant shareholders that have recently been involved in negotiations concerning the Corporation" were given only 3 days to respond while "all other shareholders" had an additional two weeks. Mitec objected to the shorter delay and Wi2Wi eliminated it, with the result that all shareholders were treated equally.

[129] However, there are elements that bring the Private Placement into question, particularly the benefits to the Defendants and the very low conversion price.

[130] The Private Placement did benefit the Defendants personally to varying degrees. The Board accelerated the conversion of Wilson's 100,000 C Shares (but not the C Shares held by others) to allow him to participate in the Private Placement and issued to him 100,000 common shares despite the doubts expressed by the auditors in February 2007 as to whether the test for conversion had been met. Note (15)(b) to the 2007 audited financial statements provides:

> "Per management, the actual amount of debt and equity raised prior to June 30, 2006 was $3.5 million or 69.8% of the goal, and therefore, the pro rated number of [the 300,000] Class C Convertible Preferred Shares convertible into common shares is 209,400."

[131] The Board also adopted a new stock option plan in October 2007 to ensure that option holders (mostly employees but also the Defendants as directors) were not affected by the Private Placement. A greater number of new options were granted at US $0.05 to replace the original options which were granted at $1.25 to take into account the dilution of the shares.

[132] Finally, the Defendants Black and Wilson participated in the Private Placement and thereby benefited from the dilution of the shareholders who did not participate, including Ramzi.

[133] On the other hand, the Defendant Roy sold most of his shares on October 1, 2007, prior to the Private Placement, and he did not participate in the Private Placement with the balance of his shares, so he was diluted. He sold his shares to Alexander Richard Black and Hans Arthur Black, who are said to be "associates" of Black (as that term is defined in s. 2 of the CBCA) and who participated in the Private Placement with the result that as of February 1, 2008, Black and his "associates" held 59.06% of the issued common shares of Wi2Wi.[8]

[134] The Defendant Tahmassebi was not a shareholder.

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[8] That figure is somewhat misleading because not all Notes had been converted into common shares as of that date. If all of the conversion rights had been exercised, Black and his "associates" would have held 24.6% of the issued common shares.

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[135] The bigger issue is the conversion price of $0.02 per common share. Koehnen suggest that "share offerings at a discount to book value, without a proper assessment of value or for otherwise inadequate consideration are also oppressive." (*supra*, p. 143)

[136] I note at the outset that neither party presented any expert evidence on the value of Wi2Wi's common shares or the adequacy of the $0.02 conversion price.

[137] Based on the audited financial statements of Wi2Wi for the year ended September 30, 2007, the book value of the common shares was negative and therefore the $0.02 conversion price was not at a discount to book value.

[138] However, there is other evidence in the file that suggests a higher value. The common shares were issued at $0.75 and $1.25. Ramzi sold some of his common shares to Mitec in July 2007 for US $1.50. The evidence closest in time to the Private Placement is the October 9 Offer, which provided a price of US $0.50. This offer was made by Mitec after it had conducted its due diligence and it was accepted by Ramzi, and in my view, it represents the best evidence of the value of the common shares in October 2007. It is also interesting to note that the value of US $0.50 is somewhat confirmed by Black's comment at the October 23, 2007 Board meeting that "any further round of financing would be expected at 5 cents" and by the fact that the next shares issued by Wi2Wi in May 2008 were at US $0.05.[9]

[139] On the other hand, the desperate financial circumstances in which Wi2Wi found itself suggest that the common shares had no value unless funds were raised through the Private Placement.

[140] Wilson acknowledged that the conversion price was low, but argued that the low conversion price was necessary to ensure the participation of the shareholders. Groome also commented that the conversion price was low and suggested that it was too low, but he did not go any further and there is no evidence that anyone objected to the conversion price at the time of the Private Placement.

[141] If I accept that the shares were worth US $0.50, is that sufficient to find that a Private Placement with a conversion price of $0.02 was oppressive? I do not believe so. I am persuaded that Wi2Wi urgently required the cash, that all of the shareholders were invited to participate in the Private Placement and were given an equal opportunity to participate, and that, in the exercise of its business judgment, the Board chose a low conversion price as a means to elicit a higher rate of participation. I dismiss this ground.

9 The weighted average of 5,807,760 shares at US $0.50 and 96,100,000 shares at $0.02 is $0.049 or 4.9 cents.

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f) The refusals to call shareholder meetings

[142] Ramzi's reasonable expectation was that the directors would call shareholder meetings, at least as often as prescribed under the CBCA.

[143] Section 133 of the CBCA requires an initial annual meeting of the shareholders not later than eighteen months after the corporation comes into existence, and subsequent meetings not later than fifteen months after holding the last preceding annual meeting and no later than six months after the end of the corporation's preceding financial year.

[144] The evidence indicates that shareholder meetings took place on March 28, 2008 and March 24, 2010, but that there were no shareholder meetings in 2007 notwithstanding numerous requests from Ramzi and at least one request from Notre-Dame, writing on its own behalf and "on behalf of a group of significant shareholders."

[145] I cannot, however, conclude that this failure to call a shareholder meeting was oppressive. Ramzi, as the holder of more than 5% of the issued shares of Wi2Wi, had the right under s. 143(1) of the CBCA to formally requisition the directors to call a meeting of shareholders. If the directors failed to call a meeting within 21 days after receiving the requisition, Ramzi had the right under s. 143(4) to call the meeting. Ramzi did not exercise this right.

[146] I do not see how the failure to call a shareholder meeting can be oppressive in circumstances where the shareholder has the right to call a meeting and does not exercise that right.

[147] This ground is dismissed.

g) Refusal to disclose Wi2Wi's financial information

[148] Ramzi's reasonable expectation was that the Board would provide at least the financial information required by the CBCA.

[149] The CBCA imposes an obligation on the directors to place financial statements before the shareholders at every annual meeting (s. 155(1)) and to send a copy of the financial statements to the shareholders at least 21 days before the meeting (s. 159(1)). A shareholder also has the right to examine the financial statements of the corporation at its registered office on request (s. 157(1)).

[150] The company did not fully comply with those obligations. There is no evidence that the 2006 financial statements were ever approved by the Board or placed before the shareholders. The 2007 financial statements were approved by the Board and placed before the shareholders on March 28, 2008, which was within the six month

delay after year-end. The 2008 financial statements were approved by the Board and placed before the shareholders with the 2009 financial statements on March 24, 2010, which was within the six month delay after year-end for the 2009 financial statements but was one year late for the 2008 financial statements.

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[151] I am not, however, convinced that the failure to issue financial statements is oppressive in these particular circumstances, where there is no evidence of a complaint at the time and no evidence of any request to consult financial information. Moreover, even if the financial information was not provided to Ramzi, it appears that Mitec was always provided adequate financial information for its due diligence such that the failure to provide financial information to Ramzi did not prejudice the potential transactions with Mitec.

[152] This ground is dismissed.

h) Conclusion on oppression

[153] As a result, I conclude that Ramzi has proven oppression in relation to the failure to convert the A and the B Shares and the failure to ensure that Ramzi's rights as the holder of the A and B Shares were not prejudiced by the Private Placement.

REMEDY

[154] The Court has a very broad discretion to fashion an appropriate remedy. The list of remedies in s. 241(3) of the CBCA is long and does not limit that discretion.

[155] Ramzi has asked the Court to condemn the four Defendants, who were directors of Wi2Wi throughout the relevant period, to pay him $4,692,539.98 in damages, which is the equivalent in Canadian dollars of US $1.50 per share for his common shares (1,500,000) plus the common shares into which he says his A Shares (1,000,000) plus his B Shares (470,056.47) should have been converted. He also asks for interest and the additional indemnity from September 6, 2007, even though the action was not instituted until May 14, 2010 and was served on or about July 6, 2010. Finally, he asks that he be ordered to remit the shares to whomever the Defendants designate.

[156] This proposed remedy raises a number of issues:

a) Did the oppressive conduct cause the damage claimed?

b) Is the damage properly evaluated?

c) Is the damage claimed against the proper parties?

d) What is the appropriate way to deal with the residual value of the shares?

e) From what date should interest and the additional indemnity be awarded?

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a) Causation

[157] Because of the failure to convert the A Shares into common shares, Ramzi had A Shares rather than common shares at the time of the September 6, September 13 and October 9 Offers and at the time of the Private Placement. The B shares were not convertible until February or March 2008.

[158] The September 6 and September 13 Offers were US $0.50 and US $1.50 respectively per common share and US $100 for all of the A and B Shares. The October 9 Offer was US $0.50 for the common shares with no offer for the A and B shares. None of those deals closed.

[159] The Private Placement was offered to all holders of common shares. It did not include any offer or any other provisions for the holders of A or B Shares. As a result, the A and B Shares remained convertible into 1,223,227 common shares, but the value and voting power of those common shares dropped dramatically as a result of the dilution pursuant to the Private Placement. There was nothing that the holder of the A and B Shares could do to avoid that loss.

[160] In my view, it is not a defence to argue that the dilution would have occurred even if the A and B Shares had been converted into common shares, because Ramzi would not have exercised his rights under the Private Placement. That is speculative in nature. Mitec might have been more interested in Ramzi's shares and might have pursued them more aggressively if he had more of them. Ramzi might have called the shareholder's meeting if he was in a better position to control the outcome of the meeting. As Gascon, J., as he then was, stated in *Segal*, *supra*, paragraph 39:

> "Respondents' contention that Mr. Segal would have refused to invest further even if called upon to do so is certainly not an excuse to ignore his rights as a shareholder."

[161] Moreover, there were other ways to deal with the A and B Shares in the Private Placement other than immediate conversion, such as making them convertible into a greater number of common shares (which was essentially the approach taken with respect to the options). That was not dependent on Ramzi's participation in the Private Placement and would have avoided the loss that he suffered.

[162] As a result, I conclude that the causal link between the oppression and the loss on the A and B Shares has been established.

b) Valuation of the loss

[163] Ramzi claims that the value of the common shares before the Private Placement was US $1.50 based on the September 13 Offer. That is clearly not an appropriate measure – Mitec terminated that offer following the due diligence in which it learned of Wi2Wi's precarious financial position. In my view, the best indication of value is the October 9 Offer's price of US $0.50 per common share. Using the conversion rate on September 6, 2007 (the only exchange rate in the record), this is equal to $0.53.

[164] Applying that value to the 1,223,227 common shares into which Ramzi's A and B Shares were convertible, the total loss was $648,310.

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c) Proper defendants

[165] Ramzi has chosen to sue Black, Tahmassebi, Roy and Wilson, who were directors of Wi2Wi throughout the relevant period. Wi2Wi is a mise-en-cause, but no conclusion is sought against the corporation.

[166] The issue of when it is appropriate to order that the directors personally pay damages was canvassed at length by the Ontario Court of Appeal in *Budd v. Gentra Inc.*[10], where Doherty J.A. stated the test as follows :

> "[46] ... A director or officer may be personally liable for a monetary order under [s. 241 of the C.B.C.A.] if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties.
>
> [47] In deciding whether an oppression action claiming a monetary order reveals a reasonable cause of action against directors or officers personally, the court must decide:
>
> * Are there acts pleaded against specific directors or officers which, taken in the context of the entirety of the pleadings, could provide the basis for finding that the corporation acted oppressively within the meaning of s. 241 of the C.B.C.A.?
>
> * Is there a reasonable basis in the pleadings on which a court could decide that the oppression alleged could be properly rectified by a monetary order against a director or officer personally?
>
> [48] The first requirement seems self-evident. No person should have to defend a lawsuit absent allegations which identify the conduct of that person said to render him or her liable to the plaintiff. This statement of claim utterly fails to deal with the director defendants or management defendants on an individual basis.

[10] [1998] O.J. No. 3109.

Rather, they are treated as a single entity, each indistinguishable from the other, and all serving as the cat's paw of the controlling shareholders. Nowhere does the appellant allege that any named director or officer did or failed to do any specified act or participated in any identified way in any of the decisions or manoeuvres which the appellant relies on in support of his claim. The claim does no more than identify the individuals as directors or officers of Royal Trustco at some unspecified time. There is no attempt to connect any individual director or officer to the alleged corporate oppression.

...

[52] Even if the appellant had alleged specific acts against specific directors or officers, I would still hold that the claim as framed does not reveal a reasonable cause of action against them personally. As indicated above, the remedial reach of s. 241 is long, but it is not unlimited. Any order made must "rectify the matter complained of" by the parties seeking the remedy. To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression."

[167] In my view, each of the Defendants was involved in the oppressive conduct, although it is Black and Wilson who play the lead roles in the discussions at the Board level. Moreover, although all of the Defendants benefitted from the changes to the stock option plan, it is the Defendants Black and Wilson who participated in the Private Placement and benefitted from the dilution of Ramzi's A and B Shares. Wilson also benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the test had been met. In the circumstances, I consider that it is "fit" to order the Defendants Black and Wilson personally to pay the damages to Ramzi.

d) Residual value of the shares

[168] Ramzi cannot keep the shares and their value.

[169] There are two ways to deal with the A and B Shares – either I deduct their value after the Private Placement from their value before the Private Placement to calculate the damages, or I order Ramzi to return them.

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[170] The best indication of the value of the common shares after the Private Placement is $0.05 per share, based on Black's comment at the October 23, 2007 Board meeting and the subsequent issuance of shares in May 2008 at US $0.05. As pointed out above, the figures of US $0.50 and $0.05 are consistent.

[171] However, Ramzi never had the ability to obtain that value because his A and B Shares were never converted into common shares. Moreover, and although I do not have complete evidence on the subject, it appears that the reverse takeover of Wi2Wi by ISEC, if it indeed happened, may have resulted in the exchange of Wi2Wi common shares for ISEC shares and the cancellation of the A and B Shares.

[172] As a result, I do not consider it appropriate to reduce the damages awarded to Ramzi by the value of the A and B Shares because that value is too uncertain. Instead, I will order Ramzi to remit the share certificates for the A and B Shares to the Defendants Black and Wilson or to whomever they designate.

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e) Interest

[173] Ramzi asks for interest and the additional indemnity from September 6, 2007, even though the action was not instituted until May 14, 2010 and was served on or about July 6, 2010. I was not given any explanation for the almost three year delay in the institution of the action.

[174] In the circumstances, I will order that interest and the additional indemnity be calculated only from the date of service of the action.

FOR THESE REASONS, THE COURT;

GRANTS in part the Plaintiff's motion;

ORDERS the Defendants Black and Wilson solidarily to pay to the Plaintiff the sum of $648,310 with interest and the additional indemnity from the date of service of the action;

ORDERS the Plaintiff, upon payment of the amount set out above, to remit the share certificates for the A and B Shares to the Defendants Black and Wilson or to whomever they designate;

WITH COSTS against the Defendants Black and Wilson.

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STEPHEN W. HAMILTON, J.S.C.

Me Éric Cadi
Me Emma Lambert
for the Plaintiff

Me Éric Lefebvre
Me Chrystal Ashby
for the Defendants

Date of hearing: November 20, 21, 22, 25, 26, 27, 29, 2013

Unofficial English Translation

Black c. Alharayeri **2015 QCCA 1350**

COURT OF APPEAL

2015 QCCA 1350 (CanLII)

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-024260-143
(500-11-039230-103)

DATE: August 19, 2015

CORAM: THE HONOURABLE YVES-MARIE MORISSETTE, J.C.A.
JACQUES DUFRESNE, J.C.A.
CLAUDE C. GAGNON, J.C.A.

HANS PETER BLACK
and
ANDRUS WILSON
APPELLANTS / INCIDENTAL RESPONDENTS – Defendants
v.

RAMZI MAHMOUD ALHARAYERI
RESPONDENT / INCIDENTAL APPELLANT – Plaintiff

JUDGMENT

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[1] The appellants and the respondent appeal from a judgment of the Superior Court, District of Montreal (the Honourable Mr. Justice Stephen W. Hamilton), rendered on January 28, 2014, which ordered them solidarily to pay to the respondent compensation of $648,310 with interest and the additional indemnity. The respondent cross-appeals, asking that the amount of the order be set at $1,932,698.66;

[2] For the attached reasons of Morissette, J.A., with which Dufresne and Gagnon, JJ.A., agree, **THE COURT**:

[3] **DISMISSES** the main appeal with costs against the appellants/incidental respondents;

[4] **DISMISSES** the cross-appeal with costs against the respondent/incidental appellant.

YVES-MARIE MORISSETTE, J.C.A.

JACQUES DUFRESNE, J.C.A.

CLAUDE C. GAGNON, J.C.A.

Mtre Eric Christian Lefebvre
Mtre Chrystal Ashby
Norton Rose Fulbright Canada
For the appellants/incidental respondents

Mtre Douglas Mitchell
Mtre Emma Lambert
Irving Mitchell Kalichman
For the respondent/incidental appellant

Date of hearing: May 27, 2015

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REASONS OF MORISSETTE, J.A.

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[5] In a proceeding under section 241 of the *Canada Business Corporations Act*[1] ("*CBCA*"), the Superior Court, District of Montreal (the Honourable Mr. Justice Stephen W. Hamilton), ordered the appellants solidarily to pay the respondent compensation of $648,310 with interest and the additional indemnity.[2] They appeal from the judgment. As for the respondent, he cross-appeals, asking that the amount of the order be set at $1,932,698.66.

- I -

[6] The period most relevant to the dispute is the year 2007. The respondent (identified as "Ramzi" in the trial judgment) had been a shareholder of the impleaded party Wi2Wi Corporation (the "impleaded party" or "Wi2Wi") since its creation in 2005.[3] He was also President and Chief Executive Officer, a position from which he resigned on June 1, 2007. The appellants Wilson and Black were shareholders of the impleaded party and had been members of its Board of Directors since July 2005 and May 2006, respectively. After the respondent resigned, Wilson became the impleaded party's acting President and Chief Executive Officer. In addition, the appellant Black was Chairman of the impleaded party's Audit Committee, which consisted of two members of the Board of Directors, in this case the two appellants.

[7] The circumstances that gave rise to the dispute and on which the trial judge based his ruling can be summarized here briefly. For a better understanding of the issues raised by the appeal, I shall provide various details of the circumstances in my discussion of each issue in the reasons that follow.

[8] The respondent is an experienced executive in the electronics and computer hardware industry. From 2005 to June 2007, he was the directing mind of the impleaded party, which had been created to develop and market a new product (a microchip card) based on a design by the respondent. Early in 2007, the respondent, who was seeking cash for himself personally, began talks with Mitec Telecom Inc. ("Mitec"), a telecommunications company that was interested in acquiring his shares of the

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1 R.S.C. (1985), ch. C-44.

2 2014 QCCS 180.

3 Wi2Wi was created as the result of a reverse takeover by Capital Sargeant Bay Inc., a corporation constituted in July 2004 of which the respondent was a shareholder. In December 2005, Capital Sargeant Bay Inc. changed its name and became Wi2Wi in a transaction described by the trial judge at paragraph 6 of his reasons. As a result of the transaction, the respondent held in the share capital of the impleaded party's two million common shares, one million Class A preferred shares, and one million and a half Class B preferred shares. His holdings will be discussed later in these reasons.

impleaded party. Negotiations began, during which Mitec made several offers from April 10 until October 14, 2007, to purchase blocks of or all of the common shares held by the respondent.

[9] From mid-April until mid-October 2007, all of Mitec's offers, with one exception,[4] failed to come to fruition, either because the parties could not agree on the terms of a firm agreement or because the impleaded party's Board of Directors prevented such agreement. It must be noted that, under a provision of the impleaded party's articles, "[n]o share in the share capital of the Corporation shall be transferred nor (*sic*) assigned without the approval of the directors certified by a resolution of the Board of Directors". Among the other points raised against the defendants at trial, the respondent accused them of having oppressively prevented the transfer of his common shares to Mitec.

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[10] Moreover, apart from his common shares, the respondent also held Class A preferred shares and Class B preferred shares in the impleaded party, all of which shares were convertible into common shares on certain terms. At trial, the respondent alleged, *inter alia*, that the defendants had failed to make such conversions even though, according to him, the conditions to do so had been met and he was entitled to receive common shares in exchange for his preferred shares. He also alleged that they had considerably diluted the relative weight of the common shares that he was entitled to receive by carrying out a private placement approved by the impleaded party's Board of Directors at a meeting held on September 28, 2007.

- II-

[11] First, I shall reproduce the most relevant excerpts from section 241 of the *CBCA*. They read as follows:

> **241. (1)** A complainant may apply to a 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

> **241. (1)** Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.
>
> **(2)** Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur

[4] On July, 3 2007, the impleaded party's Board of Directors approved the sale of 500,000 of the 2,000,000 common shares then owned by the respondent at the price of $1.50 a share.

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.

égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

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

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

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

(*a*) an order restraining the conduct complained of;

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

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

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

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

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

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

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

a) empêcher le comportement contesté;

b) nommer un séquestre ou un séquestre-gérant;

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

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

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

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

g) enjoindre à la société, sous réserve du paragraphe (6), ou à toute autre personne, de rembourser aux

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

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

(*j*) an order compensating an aggrieved person;

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

(*l*) an order liquidating and dissolving the corporation;

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

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

détenteurs une partie des fonds qu'ils ont versés pour leurs valeurs mobilières;

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

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

j) indemniser les personnes qui ont subi un préjudice;

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

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

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

n) soumettre en justice toute question litigieuse.

[12] Commenting on this provision of the Act in *BCE Inc. v. 1976 Debentureholders*[5] ("*BCE*"), the Supreme Court of Canada highlighted several general considerations that I believe should be reiterated here. Although I will not reproduce the citations in the excerpt, I shall cite side by side the French and English versions of the judgment to dispel any ambiguity that could result from the use of the words "fair" and "*équité*" in the passage in question:[6]

[58] First, oppression is an equitable remedy. It seeks to ensure fairness – what is "just and equitable". It gives a

[58] Premièrement, la demande de redressement pour abus est un recours en equity. Elle vise à rétablir la justice –

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5 [2008] 3 S.C.R. 560, 2008 CSC 69.

6 This unanimous judgment by the Court was rendered in English: *ibid.*, at 572. The nuance conveyed by the English word "fair" evokes a broader power than that connoted by the words "equity" and "*équité*" used side by side in the French translation.

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court broad, equitable jurisdiction to enforce 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....	ce qui est « juste et équitable ». Elle confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité.... Par conséquent, les tribunaux saisis d'une demande de redressement pour abus doivent tenir compte de la réalité commerciale, et pas seulement de considérations strictement juridiques....
[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.	[59] Deuxièmement, comme beaucoup de recours en equity, le sort d'une demande de redressement pour abus dépend des faits en cause. On détermine ce qui est juste et équitable selon les [page 591] attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu. Un comportement abusif dans une situation donnée ne sera pas nécessairement abusif dans une situation différente.

[13] Another leading case on the scope of this provision is worthy of note, namely, the judgment of the Court of Appeal of Ontario in *Budd v. Gentra*.[7] Doherty, J.A., on behalf of a unanimous Court, wrote:

> [47] In deciding whether an oppression action claiming a monetary order reveals a reasonable cause of action against directors or officers personally, the court must decide:
>
>> Are there acts pleaded against specific directors or officers which, taken in the context of the entirety of the pleadings, could provide the basis for finding that the corporation acted oppressively within the meaning of s. 241 of the C.B.C.A.?
>>
>> Is there a reasonable basis in the pleadings on which a court could decide that the oppression alleged could be properly rectified by a monetary order against a director or officer personally?
>
> [48] The first requirement seems self-evident. No person should have to defend a lawsuit absent allegations which identify the conduct of that person said

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7 [1998] O.J. No. 3109 (Ont. C.A.).

> to render him or her liable to the plaintiff. This statement of claim utterly fails to deal with the director defendants or management defendants on an individual basis. Rather, they are treated as a single entity, each indistinguishable from the other, and all serving as the cat's paw of the controlling shareholders. Nowhere does the appellant allege that any named director or officer did or failed to do any specified act or participated in any identified way in any of the decisions or manoeuvres which the appellant relies on in support of his claim. The claim does no more than identify the individuals as directors or officers of Royal Trustco at some unspecified time. There is no attempt to connect any individual director or officer to the alleged corporate oppression.
>
> ...
>
> [52] ...To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression.

The same passages appear at paragraph [166] of the judgment *a quo*, immediately before certain conclusions of fact that the appellants challenge in their appeal.

[14] *Budd v. Gentra* set out several useful guideposts for analyzing the oppression remedy under section 241 of the *CBCA*. This is particularly true in the case of a hypothetical personal order against the directors of a corporation. Relying on this judgment, which reviewed the case law then in existence, one author provides the following description of situations that lend themselves to this hypothesis:[8]

> 14.1.1.1. Where directors obtain a personal benefit financial benefit from their conduct.
>
> 14.1.1.2. Where directors have increased their control of the corporation by the oppressive conduct.
>
> 14.1.1.3. Where directors have breached a personal duty they as directors.

[8] Markus Koehnen, *Oppression and Related Remedies* (Toronto: Carswell, 2004) at 201 (citations omitted). The trial judge borrows an analysis from this author at paragraph [120] of his reasons.

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14.1.1.4. Where directors have misused a corporate power.

14.1.1.5. Where a remedy against the corporation would prejudice other security holders.

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[15] I would like to cite one last principle. Gascon, J.A., as he then was, recently wrote in a unanimous decision that an appellate court hearing a dispute based on section 241 of the *CBCA* should interfere sparingly and show deference, given the discretionary nature of the power conferred by this provision:[9]

> [36] As a result, appellate courts owe a high degree of deference to judgments rendered on oppression remedies. They should interfere sparingly with the exercise of that discretion, that is, merely in circumstances where it is established that it was exercised in an abusive, unreasonable or non judicial manner.[10] The Court should avoid substituting its opinion for that of the trial judge. It should intervene only when faced with errors of law or decisions rendered on the basis of erroneous principles or irrelevant considerations, or where the judgment is so clearly wrong as to amount to an injustice. On questions of fact, the standard of review of palpable and overriding error must be strictly applied.

- III -

[16] At this stage, it appears appropriate to summarize the debate at trial.

[17] The respondent raised seven distinct arguments in Superior Court, which he had set out in the first version of his motion to institute proceedings. He worded them as follows:

> 15. The Defendant Directors have violated the Plaintiff's reasonable expectation to be treated fairly and the cumulative effects of their conduct has been oppressive to the Plaintiff for the following reasons:
>
> (a) The Directors refusal to finalize the conversion of the Plaintiff's Series A shares;
>
> (b) The Directors refusal to finalise [sic] the conversion of the Plaintiff's Series B shares;
>
> (c) The Directors unreasonable refusal to allow the

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9 *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136 (citations and footnotes omitted).

10 *Spitzer v. Magny*, 2012 QCCA 2059, at para. [3]; *Sanimal v. Produits de viande Levinoff ltée,* 2005 QCCA 265, at paras. [29]–[31].

Plaintiff's sale of 300,000 common shares in 2007;

(d) The Directors frustration of Mitec Telecom Inc. ("**Mitec**")'s offers to purchase the Corporation's shares;

(e) The Directors efforts to dilute the Plaintiff's shares in the Corporation;

(f) The Directors refusal to call shareholder meetings; and

(g) The Directors refusal to disclose Wi2Wi's financial information.

These arguments reappear in identical form in each of the subsequent amended versions of the motion to institute proceedings.

[18] Although the judgment *a quo* allowed the respondent's remedy, it disregarded most of the arguments referred to directly above. It ruled in the respondent's favour on the first and second arguments; in relation to the fifth, which it disregarded, it briefly reviewed the rights that the respondent enjoyed as a result of his Class A and Class B preferred shares. On this specific point, the judge faulted the appellants for not having taken any measures to preserve the rights in question when, in September 2007, the impleaded party's Board of Directors (including, of course, the appellants) resolved to refinance it by means of a private placement in which only the impleaded party's shareholders were invited to take part. The details of the analysis are as follows.

[19] First, the judge reiterated the general principles that should guide the court when it applies section 241 of the *CBCA*. In particular, he referred to the two-pronged inquiry that the Supreme Court set out in these terms in *BCE*:[11]

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

Having adopted this formula, the judge proceeded to analyze the circumstances of the matter from each of these standpoints.

11 *Supra* note 5.

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[20] In accordance with the articles of the impleaded party in effect at the relevant time, the respondent's Class A preferred shares were governed by the terms and conditions set forth in article 5.1:

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> 5. CONVERSION RIGHTS
>
> 5.1 The holders of the Class A Convertible Preferred Shares may, at their option, by written notice (the "**Class A Shareholder Notice**") as hereinafter provided, convert all, but not less than all, of their Class A Convertible Preferred Shares into Common Shares of the Corporation upon the following terms and conditions:
>
> (a) the Class A Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $3,500,000 for its 2006 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class A Convertible Preferred Shares;

As for his Class B preferred shares, they were subject to the following rules:

> 5.2 The holders of the Class B Convertible Preferred Shares may, at their option, by written notice (the "**Class B Shareholder Notice**") as hereinafter provided, convert all, but not less than all, of their Class B Convertible Preferred Shares into Common Shares of the Corporation upon the following terms and conditions:
>
> (a) Class B Convertible Preferred Shares will be convertible into a like number of Common Shares only in the event the Corporation achieves gross margins of $11,000,000 for its 2007 financial year, the whole as determined by the auditors of the Corporation whose determination shall be binding upon the Corporation and the holders of the Class B Convertible Preferred Shares;
>
> ...
>
> (g) in the event that the Corporation's sales and/or gross margin targets set forth in paragraph 5.2(a) above are not met, then the number of Common Shares into

> which the Class B Convertible Preferred Shares may be converted shall be reduced on a *pro rata* basis, the number of Common Shares issuable to be determined by the auditor of the Corporation and to be provided for in the Corporation's Class B Notice which shall be binding on the holders of the Class B Convertible Preferred Shares.

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[21] Concerning the Class A shares, the judge concluded that the respondent could legitimately expect that they be replaced by common shares in accordance with the formula provided because the objective set out in clause 5.1 (a) had been achieved for the fiscal year ended September 30, 2006. The appellant Wilson testified that the board members had doubts about the validity of the 2006 financial statements and that the board had never approved them. But, as the judge pointed out, the same note that specified in the 2006 financial statements that the Class A shares were henceforth convertible into one million common shares also appeared in the financial statements for 2007, 2008 and 2009. And the figures in the 2006 financial statements also appeared for comparison purposes in the 2007 financial statements, which were approved by the Board of Directors and submitted "as is" to the shareholders.

[22] The judge also rejected the argument that in 2007 the impleaded party had reasons to expect that it would claim compensation from the respondent: this potential claim could not justify the alleged compensation when the respondent insisted in 2007 that his preferred shares be converted into common shares.

[23] As for the Class B shares, the judge was aware that the financial objective set by clause 5.2 (a) was not reached during the reference period; according to the 2007 financial statements, available February 25, 2008, the real gross earnings were $1,637,000 and therefore far below the stipulated target of $11 million. But clause 5.2 (g) also provides that, in such an event, "the number of Common Shares into which the Class B Convertible Preferred Shares may be converted shall be reduced on a *pro rata* basis". It follows that, for the 1.5 million class B shares held by the respondent, conversion on a *pro rata* basis entitled him to 223,227 common shares.

[24] The judge's conclusions after applying the test referred to at paragraph [19], above, are found in the following passages of his reasons:

> [44] Ramzi's reasonable expectation would be that his A Shares would be converted into common shares if [the test of clause 5.1 (a)] is met.
>
> ...
>
> [58] In my view, Ramzi had a second reasonable expectation in relation to the A Shares, which is that the Board would consider his rights as holder of the A

> Shares in any transaction involving the shares of Wi2Wi and ensure that any such transaction did not unfairly prejudice him as the holder of the A Shares.
>
> ...
>
> [63] As with respect to the A Shares, Ramzi's reasonable expectations would be that (1) the B Shares would be converted into common shares if the condition in the articles is met; and (2) the Board would ensure that, prior to their conversion, the B Shares would not be prejudiced by any corporate transaction.

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The judge concluded that these reasonable expectations were breached in a manner that unfairly prejudiced the respondent.

[25] As I have already stated, the judge then rejected the respondent's arguments concerning what he considered the directors' oppressive refusal to approve the various offers made by Mitec to purchase his shares of the impleaded party. These arguments are no longer in dispute and they need not be considered further.

[26] Then, continuing his analysis, the judge rejected the respondent's fifth argument as formulated ("The Directors efforts to dilute the Plaintiff's shares in the Corporation"). Given that this aspect of the file is related to the fate of the Class A and Class B shares, it deserves clarification. The judge emphasized that the impleaded party's financial position in 2007 showed why, on September 28 of that year, the Board of Directors used a radical measure to provide a rapid and substantial injection of capital into the business. The means chosen was a private placement: any holder of common shares was given the opportunity to make an investment in consideration for a note that would involve conversion of each $1,000 so advanced into 50,000 common shares of the impleaded party (in other words, the shares so acquired would be purchased for $0.02 each). As the judge explained, this strategy made it possible to resolve the impleaded party's serious liquidity problem[12] because it rapidly provided $1,922,000 of new money, but it also involved the issuance of 96,100,000 more common shares. The respondent, who was short of funds at the time and could not take part in the private placement, saw his share of the impleaded party's common share capital fall from 25.8% to 1.5%, hence the dilution of his share capital referred to in his application for oppression remedy. At paragraphs [115] to [141] of his reasons, the judge explained why, in his view, the private placement was a business decision that was justified in the circumstances. This was a finding of fact that the respondent wisely did not question in his cross-appeal.

[27] Lastly, the judge used just a few paragraphs to rule on the respondent's final two arguments concerning the refusal to call a shareholders' meeting in 2007 and the failure

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[12] In this regard, the judge quoted the minutes of a meeting of the impleaded party's Board of Directors, held on September 28, 2007, during which the situation was referred to in the following terms: "quickly running out of cash", "critical that the payroll be met", "cash crunch", "brink of a zero-cash position", "ensure that the Corporation could pursue its operations", "emergency financing" and "current critical financial situation".

to approve the audited financial statements for 2006. Although the evidence shows some irregularities of this type, the judge believed that the situations were in no way oppressive and that they alone did not justify the respondent's bringing an action.

[28] As can be seen, the judgment is finely shaded, especially the distinct handling of the respondent's first, second, and fifth arguments.

- IV -

[29] The main appeal raises four questions. Before setting them out, I believe it advisable to cite a short excerpt from the appellants' factum to place the discussion properly in context:

> 3. In his ruling, the first instance judge found that the treatment of the Plaintiff's preferential shares amounted to oppression. As such, he granted in part the action against the Appellants ... and ordered them solidarily to pay to Plaintiff a sum of $648,310 with interest and the additional indemnity from the date of service....
>
> 5. Although they do not agree with the characterization of the events that transpired as oppression, the Appellants do not specifically challenge the first judge's findings in this regard, but rather that nothing warranted their personal condemnation to a monetary award.

[30] The first two questions raised by the appellants concern their personal liability: (i) Did the trial judge err by concluding at paragraph [167] of his reasons that the appellants' "lead roles in the discussions at the Board level" justified that they be held personally liable as directors of the impleaded party? (ii) Did the trial judge violate the *audi alteram partem* rule in concluding that the appellants had obtained a personal benefit from the failure to convert the respondent's preferred shares by relying on facts that had not been alleged and arguments that had not been raised?

[31] The two other questions concern the assessment of the prejudice: (iii) Did the trial judge err by not taking into account the dilution caused by the private placement when he assessed the existence of a causal connection between the failure to convert the respondent's preferred shares into common shares on the one hand and the monetary loss alleged by the respondent on the other? And (iv) Did the trial judge err in his determination of the value of the common shares that would have been substituted for the respondent's preferred shares, and did he err by failing to estimate the residuary value of the preferred shares?

[32] In this part of the appeal, the appellants argue that the file as heard at first instance did not demonstrate that they had personally committed oppressive or wrongful acts toward the respondent. They argue that the allegations in the action were general and covered only the impleaded party's Board of Directors or the defendants

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collectively, or in other words the two appellants and the defendants Roy and Tahmassebi, who were both exonerated at trial. Thus, was the trial judge mistaken when he attributed the actions referred to at paragraph [167] of his reasons to the appellants? The paragraph reads as follows:

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> [167] In my view, each of the Defendants was involved in the oppressive conduct, although it is Black and Wilson who play the lead roles in the discussions at the Board level. Moreover, although all of the Defendants benefitted from the changes to the stock option plan, it is the Defendants Black and Wilson who participated in the Private Placement and benefitted from the dilution of Ramzi's A and B Shares. Wilson also benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the test had been met. In the circumstances, I consider that it is "fit" to order the Defendants Black and Wilson personally to pay the damages to Ramzi.

[33] Two central ideas emerge from this passage: first, the appellants were the main instigators of the decisions that prejudiced the respondent, and second, they both obtained a personal benefit from the private placement and the dilution of the respondent's shares.

(i) The role played by the appellants

[34] Concerning the first idea, namely the lead roles played by the appellants, they challenge the basis of it. In their view, the mere fact that, according to the minutes of the Board of Directors' meetings, they were allegedly more actively involved than the other board members in discussions likely to affect the respondent's interests did not justify their being held personally liable for the board's unanimous decisions. They argue that to endorse such reasoning would hinder the frank and open discussions that should be encouraged within a board of directors. On the contrary, the *raison d'être* of such deliberations is to "salute rather than shun directors willing to forcefully voice their concerns with regard to the management of the corporation".

[35] In response to this argument, the respondent cited *Wood Estate v. Arius3D Corp.*,[13] a judgment of the Ontario Superior Court of Justice in which the plaintiff claimed compensation under section 241 of the *CBCA* from a company, four of its board members, and one of its officers (its chief financial officer). After analyzing the circumstances of the matter, D. M. Brown, J., allowed the action and individualized the order against the officer and two of the directors in their capacity as "key decision-makers"[14] who caused the oppression suffered by the plaintiff.

[36] In my view, to the extent that an issue of principle can be identified in this case, the respondent's argument must be upheld.

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[13] [2014] O.J. No. 2620 (Ont. C.S.J..).

[14] *Ibid.* at para. [135].

[37] First, the possibility of a personal order against one or more directors seems well recognized. The author Markus Koehnen wrote on this matter:[15]

> Directors and officers can be held personally liable for corporate oppression. Their liability in this regard does not depend on the breach of a specific statutory duty or common law tort but is substantially broader. Personal liability for directors and officers does not implicate corporate veil principles but involves the proper interpretation of the oppression remedy. Although the oppression remedy creates a broader personal basis of personal liability for directors than either the common law or specific provisions of statutory liability, not all oppression claims justify orders against directors. The plaintiff must make specific allegations against directors to found a claim against them; otherwise directors' liability would be engaged each time the oppression remedy was invoked.

JurisClasseur Québec reflects these observations.[16] The authors of the fascicle entitled "*Redressement en cas d'abus ou d'iniquité*", commented:[17]

> [TRANSLATION]
>
> An oppression remedy may directly concern the directors of a corporation if they were involved in the inequitable treatment of the plaintiff. ... Generally speaking, it is necessary to prove that they committed oppressive or unfair acts justifying a monetary penalty to compensate for the loss. According to the case law, such payment should be ordered when the board members have derived a personal benefit from the alleged act or when they have increased their control over the business.

[38] Moreover, the appellants' argument is accepted, it would be more difficult if not impossible to individualize the directors' liability so as to distinguish those whose actions have been oppressive (within the meaning of subsection 241(2) of the *CBCA*) from those whose actions have not. When the directors are not all equally compromised by their actions, it would risk creating a form of immunity benefiting directors at fault. Such an outcome appears to be incompatible with the broad discretionary power conferred on the Court under the *CBCA* ("to enforce not just what is legal but what is fair", as the Supreme Court wrote) as well as with the remedial purpose of the remedy governed by section 241 of the *CBCA*.

[39] Once these details are spelled out, this aspect of the appeal in a sense dissolves into a series of questions involving the weighing of evidence; to resolve them, it was open to the trial judge to consider the Corporation's documents filed into evidence –

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15 *Supra*, note 8, at 200.

16 Raymonde Crête and Phllippe D'Anjou, "*Redressement en cas d'abus ou d'iniquité*", in *JurisClasseur Québec*, *Droit des sociétés*, fascicle 14 (Montreal: LexisNexis, 2013) at 14.

17 *Ibid.* at 19.

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minutes of meetings and the register of the impleaded party's securities, for example – to determine to which of the directors the oppressive or inequitable conduct could lawfully be imputed.

[40] Several salient facts from the file provide ample support for the judge's conclusion. They are as follows.

[41] In May 2007, the appellant Black was Chairman of the impleaded party's Audit Committee, whose only members were the appellant Wilson and himself. This was when the 2006 financial statements were prepared, from which it could only be concluded that, in accordance with the corporation's articles, the respondent's Class A preferred shares were henceforth convertible into common shares.

[42] From June 2007 to February 2008, the appellant Wilson held the position of Acting Chairman and Chief Executive Officer of the impleaded party.

[43] The agenda of the meeting of the Board of Directors held on May 16, 2007, contains a passage on the "Approval of the conversion of Class A shares to common shares". It appears from the minutes of this meeting that:

> [The respondent] moves to approve the conversion of the Class A to the directors. [The appellant Black] says they have seen draft financials, but not seen the final. I (*sic*) will send the hard copies of the financials to the board. Board approval of the conversion of Class A shares will be considered after review of final financials.

[44] The following passages are from the minutes of the meeting of the Board of Directors held on the following June 15:

> Dr. Black then commented that he continued to have serious issues as to whether Mr. Al-Harayeri should receive common shares of the Corporation on conversion of the Class A shares given his recent conduct and the directors discussed this at length.

And later:

> Mr. Wilson suggested that the board continue to review all facts surrounding Mr. Al-Harayeri's conduct in the current circumstances and decided whether they should proceed with the conversion of the Class A shares into common shares.

[45] According to the same source, at the meeting of the Board of Directors of July 17, the advisability of converting the respondent's preferred shares into common shares was again the subject of discussion by one of the appellants. The minutes state:

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> Dr. Black indicated that Mr. Al-Harayeri had not been forthcoming with the other directors and there was doubt whether the Corporation should, as a matter of course, agree to a conversion of the Class A Shares held by Mr. Al-Harayeri and the directors then discussed this at further length.

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[46] As the trial judge affirmed, the financial statements for 2006 were never adopted by the Board of Directors, but the reference in them to the possibility of converting Class A shares was repeated in the financial statements of subsequent years and the figures in the 2006 financial statements were used in the 2007 financial statements.

[47] We now come to the impact of the private placement on the respondent's holdings (the advisability of the financing transaction for the impleaded party is not challenged here, as attention should instead be focussed on the role played by the appellants and the personal benefit they obtained from the initiative). The following elements should be pointed out:

— As of July 24, 2007, the appellant Black was given the task of proposing for the impleaded party a means of financing other than a merger with Mitec.

— On September 13, at a meeting of the Board of Directors, the appellant Wilson took a position on the impleaded party's financial situation. The minutes read as follows:

> Mr. Wilson then describes that the Corporation has been slow to pay certain suppliers, given the cash crunch and the Corporation may be accordingly sustaining such damage to its reputation. Mr. Wilson then indicates that the Corporation would need some type of emergency financing before the proposed transaction between Mitec and Mr. Al-Harayeri is completed and the directors then discussed this at length. It is thereafter agreed that financing should be pursued aggressively by the Corporation and the directors agree to follow up on different contacts with a view to implementing this on an accelerated timeframe.

— The minutes of the meeting of September 28 contain the following, *inter alia*:

> Mr. Steinberg [Chairman of the impleaded party] then advised the directors that discussions had been held with Mr. Wilson and Dr. Black, and that they would seek financing of the Corporation immediately so as to ensure that the Corporation could pursue its operations, provided however that the board agreed on financing terms and next steps. Mr. Steinberg then referred to a draft term sheet prepared by Mr. Wilson but indicated that it was up to the board to discuss it before taking a decision.
>
> Mr. Steinberg then indicated that he felt it was critical at this juncture to hear from all directors on the current situation.

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> Dr. Rob Roy indicated that he agreed with the views expressed by Dr. Black and Mr. Steinberg; he added that he was happy that Dr. Black, Mr. Steinberg and Mr. Wilson were taking necessary steps to ensure funding of the Corporation in the current context and he felt that this was overall the right approach to take.
>
> David Tahmassebi indicated that he concurred with the overview provided by Mr. Steinberg and Dr. Black; he indicated though that he had some questions as to how the other shareholders of the Corporation would participate in the financing.
>
> The directors then discussed the manner in which other shareholders would participate, the timing of the offering for the purposes of such participation, dilution issues and the overall effect of the proposed financing.

— Lastly, the appellant Wilson stated during his testimony:

> [T]he Ramzi issue had disappeared because he was no longer a shareholder in a position to block and be a big influence on all of the stuff that the company was doing, and the premise that we should be accepting, a creeping takeover, because the justification was good for shareholders because it got rid of the Ramzi issue, and the Ramzi issue had just taken care of itself, didn't hold water anymore.

[48] The trial judge therefore had all the evidence required to conclude that the appellants had indeed played the role that he attributed to them at paragraph [167] of his reasons; from this standpoint, his judgment contains no errors justifying its reversal.

(ii) The *audi alteram partem* rule and the benefit obtained by the appellants

[49] The first two situations identified by the author Koehnen, referred to above at paragraph [14], are clearly what the judge had in mind when he drafted the second and third sentences of paragraph [167] of his reasons, quoted above at paragraph [32]. The appellants challenged this determination on two distinct grounds. It apparently took them by surprise, in that the respondent had never alleged that they had benefited from the outcome of the decision of September 28, 2007, and that it was "completely unsupported by the evidence adduced at trial".

[50] On the first point, the appellants argued that the allegations in the application were of a general nature and would have covered only the impleaded party's Board of Directors or the defendants collectively, namely the two appellants and the defendants Roy and Tahmassebi, who were both exonerated at trial.

[51] A consideration of this ground requires first referring to the relevant allegations of the motion to institute proceedings. The motion, filed in May 2010 and then amended four times, alleged the following in its last version of November 2013:

> ...
>
> B. <u>THE DEFENDANTS' OPPRESSIVE CONDUCT</u>
>
> 13.1 From December 2005 to his resignation in June 2007, Plaintiff was the heart and soul of Wi2Wi as well as a significant minority shareholder;
>
> 13.2 Developing Wi2Wi into a great company was his project and ambition: he devoted night and day to the Corporation;
>
> 13.3 Having created and successfully headed the OEM Division of Actiontec since 1997, he understood Wi2Wi's clients' needs as well as the direction in which the market was heading with regards to wireless technology;
>
> 13.4 Wi2Wi could not grow without the Plaintiff's experience, know-how and expertise...;
>
> 13.5 The success of Wi2Wi thus relied entirely on Plaintiff's shoulders;
>
> 13.6 In fact, Plaintiff successfully managed Wi2Wi and was able to grow its revenue to over $12,000,000 CAD in its first year of operation as well as exceed his Series A shares' gross margin target set forth in the Share Purchase Agreement, the whole as more fully described herein below in Section C of the Plaintiff's Second Re-Amended Motion to institute proceedings;
>
> 13.7 In doing so, Plaintiff was able to negotiate, in early 2007, the merger of Wi2Wi with Mitec Telecom Inc. ("Mitec") for a very large premium and at very advantageous conditions;
>
> 13.8 Indeed, Mitec submitted a Letter of Intent to Wi2Wi's Board, offering approximately $60 million USD for the acquisition of all of Wi2Wi's outstanding common and preferred shares, bringing the Investors' initial investment from $3 million USD to just under $30 million USD in less than two (2) years, the whole as more fully described herein below in Section F of

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the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.9 Both companies complemented each other's business and the merger was to create synergies as well as permit Wi2Wi to grow better and faster;

13.10 Moreover, by exceeding the financial objectives which were set out in the Share Purchase Agreement, Plaintiff became entitles to convert his 1,000,000 Series A shares into 1,000,000 common shares bringing his stake in Wi2Wi to 3,000,000 common shares out of 6.7 million outstanding shares, the whole as appears from Exhibit P-4;

13.11 However, instead of working in the best interest of Wi2Wi and its shareholders, the Defendants:

(a) refused to finalize the conversion of the Plaintiff's Series A shares;

(b) tried to minimize the Plaintiff's return on the merger by requiring Mitec to disregard Plaintiff's Series A and B shares from the purchase price;

(c) Frustrated the merger of Wi2Wi with Mitec, thereby preventing its investors to (*sic*) cash in on their initial investment;

the whole as more fully described herein below in Sections C and F of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.12 As a result, Mitec withdrew its offer but since it was still interested in merging with Wi2Wi, it extended a new offer to the Board and submitted a second Letter of Intent, the whole as more fully described herein below in Section F of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.13 The Defendant again frustrated this second offer in their pursuit to minimize the Plaintiff's return and by demanding that Mitec first negotiate a separate deal with the Plaintiff and by trying to force the Plaintiff to accept a lower price for his shares and to surrender his Series A and B shares;

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13.14 As a result, this second offer also fell through, the whole as more fully described herein below in Section F of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.15 Instead of working in the best interest of Wi2Wi and its shareholders, the Defendants continued their oppressive conduct and acted in their own personal interest:

(a) first, they put a stop to all discussions with Mitec;

(b) then, they needlessly diluted Wi2Wi's equity, refused for a long time to call a shareholder meeting to disclose Wi2Wi's financial statements to the Plaintiff, the whole as more fully described herein below in Sections G, H and I of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.16 By diluting Wi2Wi's equity, the Defendants ensured their position on the Board by barring any shareholder, and more particularly the Plaintiff, from ever being able to replace them on the said Board and to eventually conclude a transaction with Mitec for the benefit of both Wi2Wi and its shareholders, the whole as more fully described herein below in Sections G and H of the Plaintiff's Second Re-Amended Motion to institute proceedings;

13.17 Indeed, when finally a shareholder meeting was called in March 2008, Plaintiff's stake in Wi2Wi had been diluted to the point where he could no longer fairly exercise his rights as a shareholder since he now barely owned 1% of the shares of Wi2Wi, the whole as more fully described herein below in Sections G and H of the Plaintiff's Second Re-Amended Motion to institute proceedings;

14. Given the above, the Defendants have acted in a manner that is oppressive, prejudicial, and that unfairly disregards the interests of the Plaintiff as a minority shareholder, contrary to the provisions of s. 241 of the *Canada Business Corporations Act*;

15. The Defendants have violated the Plaintiff's reasonable expectation to be treated fairly and the cumulative effects of

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their conduct has been oppressive to the Plaintiff for the following reasons:

(a) The Directors refusal to finalize the conversion of the Plaintiff's Series A shares;

(b) The Directors refusal to finalize the conversion of the Plaintiff's Series B shares;

(c) The Directors unreasonable refusal to allow the Plaintiff's sale of 300,000 common shares in 2007;

(d) The Directors frustration of Mitec Telecom Inc. ("**Mitec**")'s offers to purchase the Corporation's shares;

(e) The Directors efforts to dilute the Plaintiff's shares in the Corporation;

(f) The Directors refusal to call shareholder meetings; and

(g) The Directors refusal to disclose Wi2Wi's financial information.

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C. THE DEFENDANTS' FAILURE TO CONVERT THE PLAINTIFF'S SHARES SERIES A SHARES

16. The Plaintiff was entitled to convert his 1 million Series A shares into an equivalent number of common shares upon Wi2Wi achievement of certain gross margins in fiscal year 2006, the whole as appears from Exhibit P-4;

17. Under the Plaintiff's successful management, these margins were achieved by Wi2Wi in 2006, the whole as appears from the unsigned Consolidated 2006 Financial statements of... Wi2Wi, as well as the signed Consolidated 2006 Financial Statements of Wi2Wi, communicated herewith respectively as **Exhibit P-5** and **Exhibit P-5A**;

18. In early 2007, the Board approved the Plaintiff's conversion option, thereby entitling him to an additional 1 million common chares, for a total of 3 million out of 6.7 million issued shares, making the Plaintiff an over 40% shareholder

of the Corporation;

19. These additional common shares, although approved by the Board, were never provided to the Plaintiff, despite the fact that the Board had signed the Consolidated 2006 Financial Statements of the Corporation (Exhibit P-5A) since April 2007 which recognized Plaintiff's right to convert his 1 million Series A shares into a like number of common shares and Plaintiff's repeated requests to obtain them, the whole as appears from note 14(b) of the signed consolidated 2006 Financial Statements of the Corporation (Exhibit P-5A) and the Plaintiff's written requests communicated herewith as **Exhibit P-6**;

19.1 The right to the conversion of the Plaintiff's Series A shares into common shares was reiterated in the Board's 2010 Notice of Annual and Special Meeting of Shareholders under item "Share Capitalization", as well as in Note 10 of the Consolidated Financial Statements for the years ended September 30, 2008 and 2009, the whole as appears from the 2010 Notice of Annual and Special Meeting of Shareholders of Wi2Wi communicated herewith as **Exhibit P-22** and the Consolidated Financial Statements for the years ended September 30, 2008 and 2009 of Wi2Wi communicated herewith as **Exhibit P-23**;

19.2 This conduct by the Defendants is oppressive towards the Plaintiff;

D. <u>THE DEFENDANTS' FAILURE TO CONVERT THE PLAINTIFF'S SHARES SERIES B SHARES</u>

20. The Plaintiff was entitled to convert part of his 1.5 million Series B shares on a prorated basis as per the Share Purchase Agreement and Wi2Wi's By-Laws as amended in December 2005 and subject to the Corporation's audited 2007 financial statements, the whole as appears from Exhibits P-3 and P-4;

21. The Defendants unjustifiably refused to provide audited financial statements for the 2007 year or convert the Plaintiff's Series B shares as per the Share Purchase Agreement, thereby denying the Plaintiff an important and substantial percentage of the common shares of the

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Corporation;

21.1 As of June 1st, 2007, date of Plaintiff's resignation as CEO of Wi2Wi, Plaintiff should have been allowed to convert his 1.5 million Series B shares into 470,056.47 common shares:

1.5 million Series B shares X (3,447,080.77 ÷ 11,000,000) = 470,056.47 shares

The whole as appears from the Corporation's Balance Sheet and Profit & Loss Statement dated August 14, 2007, communicated *en liasse* herewith as **Exhibit P-27**;

21.2 This conduct by the Defendants is oppressive towards the Plaintiff;

...

G. THE DEFENDANTS' EFFORTS TO DILUTE THE PLAINTIFF'S SHARES IN THE CORPORATION

42. Without calling a shareholder meeting, on September 28, 2007, Wi2Wi issued a share offering to all shareholders, purporting to give them the opportunity to invest $1.00 CAD for every 2 common shares owned, the whole as appears from...Wi2Wi's share offering communicated herewith as **Exhibit P-18**;

43. The Directors knew the Plaintiff had insufficient capital to participate in the share offering;

44. The share offering was issued deliberately by the Directors to dilute the Plaintiff's shareholdings;

45. The board readjusted the shares of the Directors and employees who did not participate monetarily in this share offering but elected not to adjust the Plaintiff's shares, and refused to address the conversion of his Series A and B shares;

46. This conduct by the Defendants is egregiously oppressive towards the Plaintiff;

...

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[52] It can be seen that paragraph 13.15 of the motion refers explicitly to the appellants' personal interest: "...the Defendants continued their oppressive conduct and acted in their own personal interest". This allegation appeared in the first amended version of the motion in November 2010 and in all subsequent versions. Moreover, in their defence of January 25, 2011, the appellants themselves raised this matter at paragraph [122]: "[t]he business decisions at issue were i) made by the Defendants in good faith, ii) not motivated by self-interest...". In the joint declaration of the full file, dated December 10, 2012, the same terms are found under the heading "POSITION OF THE PARTIES ... DEFENDANTS / RESPONDENTS", as well as in the amended defence of November 13, 2013. The defence of January 25, 2011, elicited a response from the respondent, dated April 25, 2012, in which he alleged *inter alia*: "[t]he Defendants' acts and considerations were never in the interest of Wi2Wi and its shareholders, there (sic) main preoccupation being there (sic) self interest in Wi2Wi...", and "[t]he Defendants acted to the detriment of Wi2Wi and its shareholder in focusing mainly on their personal financial gains". In such conditions, it may be difficult to argue that the matter of the appellants' personal interest (or the advantage they derived) came as a surprise to them. The parties had indeed disputed this matter, which is not surprising in any way because, as we have seen, the law seems clear on this point: the personal advantage of directors accused of oppression under section 241 of the *CBCA* is a recognized component of the analysis.[18]

[53] The appellants, however, cited *Budd v. Gentra*[19] and made the following criticism: "[t]he Plaintiff's own Motion to institute proceedings barely contains any allegation of specific acts by Black, Roy, Tahmassebi, or Wilson". I can easily see that this judgment states an important principle – indeed, this is the reasonI cited an excerpt from it at the beginning of these reasons. But the application of this principle depends on the circumstances of each case. It is immediately apparent that the facts of *Budd v. Gentra* do not ground an analogy with those that gave rise to the this appeal. At the start of his reasons, Doherty, J.A., clearly pointed out what rendered the claim based on section 241 of the *CBCA* deficient in that case:

> [2] Farley J. struck certain parts of the appellant's statement of claim. His order terminated the appellant's action against 30 individuals described as directors of Gentra Inc. (formerly Royal Trustco Limited) and collectively referred to in the statement of claim as the "defendant directors"; 9 individuals described as officers of Gentra Inc. and collectively referred to in the claim as "management defendants"; and Ernst & Young the former auditors of Gentra. The order did not affect the action against the other defendants, Gentra Inc. and several corporate defendants referred to collectively in the claim as the "controlling shareholder defendants." The appellant appealed the order of Farley J. but subsequently

[18] *Supra* at paras. [13] and [14].
[19] *Supra* note 7.

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> abandoned his appeal against Ernst & Young. The appeal as argued involves only the claims against the director defendants and the management defendants.
>
> ...
>
> [4] I think the claim as framed fails to reveal a reasonable cause of action against the director defendants or management defendants personally and I would affirm the order of Farley J.

In the appeal file, the application concerned four directors and made the allegations against them that are reproduced at paragraph [51], above. In the matter that gave rise to *Budd v. Gentra*, the claim targeted thirty directors, nine officers, five portfolio companies, an accounting firm, and Gentra as defendants, without distinction and without specifying what would justify the individual liability of one or more of the directors or officers identified by name. It was, in short, a different situation altogether – a difference of kind, not of degree.

[54] Given the explicit reference in the motion to institute proceedings to the appellants' personal interest, the allegations against them, and the state of the law and case law to which I referred in the preceding paragraph, it cannot be concluded here that the respondent deviated from the *audi alteram partem* rule. I would even say that to argue the opposite would be audacious. The appellants had sufficient means – whether through a motion for particulars, an examination on discovery or otherwise – to garner the details of what, moreover, presented all the characteristics of an application was easily consistent with the generic terms of subsection 241(2) of the *CBCA*. At the end of his analysis, the judge rejected several of the respondent's arguments but accepted others, in whole or in part, in terms that set forth in a detailed manner how the appellants' actions were oppressive or unfair. The appellants could not expect more from a remedy under section 241 of the *CBCA*. In short, the right to be heard does not give entitlement to an accessory right to be informed of the claims of which one is the target in terms rigorously identical to those of the eventual judgment that will allow the same claims.

[55] But it is not sufficient to allege something; evidence must be adduced. The appellants go further, however, arguing that the judge's conclusion concerning their *personal* interests and benefits was "completely unsupported by the evidence adduced at trial". What is one to make of this statement?

[56] It is true that the appellants are not the only investors who have benefited from the private placement, but in ascribing liability to them the judge does not base his conclusion on their mere participation in the financing transaction, which was, moreover, legitimate. There is much more. They alone played an active role, not only by setting up the private placement but also by refusing to convert the respondent's preferred shares, when there was no parallel measure to protect his legitimate expectations. This set of background circumstances makes the direct or indirect personal benefit obtained by the

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appellants a convincing factor justifying the personal order against them under section 241 of the *CBCA*.

[57] Moreover, the benefit in question cannot be seen as limited to the value of the common shares acquired as a result of the private placement. While it is plausible that the impleaded party's financial position in the fall of 2007 and thereafter was precarious and therefore the realization of a tangible cash profit in the near future was a rather hypothetical if not illusory possibility, a personal benefit does not necessarily take the form of an economic or cash gain. It may be inferred from several decisions reviewed on such matters that the benefit obtained by a director may also consist of something other, such as increased control over the share capital of the corporation and the conduct of its business.[20] The respondent raised this matter at paragraphs 13.6 and 13.7 of his motion to institute proceedings, quoted at paragraph [51] above, and the evidence shows that the private placement enabled the appellants –albeit especially the appellant Black – to consolidate their control over the impleaded party.

[58] Returning now to the evidence, we see many business links that the appellants maintained with various persons, investment firms, and management companies.

[59] Concerning the appellant Black, we may refer to the securities register of the impleaded party,[21] while keeping two pieces of information in mind: this appellant exercised control over various corporations (Hedge Hog, Conserve Fund, The Q Settlement, and Savosa Trading Ltd.) and was an associate (within the meaning of subsection 2(1) of the *CBCA*) of his two sons, Alexander Richard Black and Hans Arthur Black. In this regard, an excerpt from the proxy circular sent on February 26, 2008, with the notice of the impleaded party's annual shareholders meeting contained the following details:

> To the knowledge of the directors and officers of the Corporation, the only persons who, as at February 1, 2008, beneficially owned or exercised control or

---

[20] See: *Budd v. Gentra*, *supra* note 7 at paras. [44] and [45]; *Downtown Eatery*, [2001] O.J. No. 1879 (Ont. C.A.), at para. [62]: ("Grad and Grosman, in terminating the operations of Best Beaver and leaving it without assets to respond to a possible judgment, should have retained a reserve to meet the very contingency that resulted. In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely held company, is clear.").

[21] On this matter, the trial judge noted the following at paragraph [38] of his reasons: "There was one pre-trial issue which had an impact on the trial. Ramzi had made a motion for permission to re-amend his motion to institute proceedings on October 15, 2013, which was granted in part by my colleague Mr. Justice Schrager on October 22, 2013. In that judgment, amendments to add (1) allegations with respect to the conditions imposed by the Board on the October 9 Offer and (2) allegations that Black's sons had acquired shares in October 2007 as *prête-noms* for Black, were not allowed by Mr. Justice Schrager. I allowed evidence to be made with respect to the October 9 Offer and evidence with respect to the shareholders of Wi2Wi is in the Court record, but those two matters are not specifically alleged as acts of oppression." The information that follows in the body of the text is corroborated at 30, 31, 56, 104, 105 and 114 of exhibit P-31A according to its page numbering (the "Securities Register" of the impleaded party).

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> direction over shares carrying more than 10% of the voting rights attached to the Common Shares of the Corporation were Ramzi Al-Harayeri, who held 1,500,000 Common Shares, representing 12.26% of the issued Common Shares, Alexander Richard Black who held 1,462,500 Common Shares, representing 11.96% of the issued Common Shares, Hans Arthur Black who held 1,462,500 Common Shares, representing 11.96% of the issued Common Shares and Hans Peter Black who through Hedge Hog and Conserve Fund, The Q Settlement and Savosa Trading Ltd. exercised control or direction over 4,300,000 Common Shares, representing 35.15% of the issued Common Shares.
>
> ...
>
> Dr. Black beneficially owns and/or controls 3,900,000 Common Shares through Hedge Hog and Conserve Fund, and 160,000 Common Shares through the Q Settlement and 240,000 Common Shares through Savosa Trading Ltd., a total of 4,300,000 Common Shares, representing 35.15% of the issued voting shares of the Corporation. Hans Peter Black is an Associate (as defined under the *Canada Business Corporations Act*) of Alexander Richard Black who holds 1,462,000 Common Shares, representing 11.96% of the issued Common Shares and Hans Arthur Black who holds 1,462,500 Common Shares, representing 11,96% of the issued Common Shares of the Corporation.

It is therefore possible to deduce from the evidence that, as of June 20, 2008, the date of the conversion of the bonds purchased by Savosa Trading Ltd. at the time of the private placement, this corporation controlled by the appellant Black held 35,270,125 common shares of the impleaded party, of which 35,030,125 were issued in the private placement. As for The Q Settlement, taking part in the private placement enabled it to acquire 6,500,000 common shares of the impleaded party. Lastly, Hedge Hog obtained 10,000,000 common shares by the same means.

[60] As for the appellant Wilson, he benefited personally from the private placement when the bonds subscribed on that occasion were converted in July 2008 into 666,675 common shares of the impleaded party.[22] After the private placement and the conversion of the bonds on July 30, 2008, the appellant Wilson, through YTW Growth Capital Limited Partnership and YTW Growth Capital Management Corporation, owned or controlled 11,093,342 common shares of the impleaded party.[23] Moreover, the proxy circular quoted in the preceding paragraph specifies:

> Mr. Wilson personally owns 26,667 Common Shares and beneficially owns and/or controls 326,667 Common Shares through YTW Growth Capital Limited Partnership and 100,000 Common Shares through YTW Growth Capital Management Corporation, of which Mr. Wilson is President.

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22 *Ibid.*, Securities Register, at 123.
23 *Ibid.* at 126-7.

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Through YTW Growth Capital Management Corporation, the appellant Wilson held Class C preferred shares, which were also convertible into common shares. The trial judge wrote on this matter:

> The Private Placement did benefit the Defendants personally to varying degrees. The Board accelerated the conversion of Wilson's 100,000 C Shares (but not the C Shares held by others) to allow him to participate in the Private Placement and issued to him 100,000 common shares despite the doubts expressed by the auditors in February 2007 as to whether the test for conversion had been met.

The two other holders of Class C shares, Mazzen Haddad and Rick Groome, did not benefit from such accelerated conversion.

[61] From the foregoing, it can only be concluded that the appellants were mistaken when they faulted the judge for ruling against them without adequate evidence. On the contrary, there was a preponderance of evidence in the file to serve as the basis for the conclusions set forth at paragraph [167] of the trial judge's reasons.

(iii) The cause of the financial prejudice alleged by the respondent

[62] In this respect, the appellants fault the judge for ruling in the respondent's favour in the absence of any evidence of a causal connection between the loss of the value of his shareholdings and the appellants' behaviour, which the judge had previously deemed oppressive. They refer more specifically to paragraph [160] of the reasons filed in Superior Court. It is useful here to quote this passage but also to place it in context along with other short excerpts from the judgment:

> [61] In my view, therefore, there are two related acts of oppression, namely the failure to convert the A Shares into common shares, and the failure to consider Ramzi's rights as holder of the A Shares in the context of the Private Placement in October 2007 and to ensure that he was not prejudiced by the Private Placement.
>
> ...
>
> [72] ...the Private Placement in October 2007 did go forward. As set out more fully below, the conversion of the Notes had a very serious dilutive effect on the common shares and on their voting rights and value, and therefore, by ricochet, had a similar effect on the B Shares. No steps whatsoever were taken by the Board to protect the holder of the B Shares from that prejudice. As described below, the Board did take steps to protect the option holders and Wilson as holder of some of the C Shares, but did nothing with respect to the B Shares. I find that this conduct by the Board amounts to an unfair disregard for the rights of the holder of the B Shares and therefore constitutes oppression. For the

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> purposes of the remedy, I will give effect to the fact that the B Shares would have been converted into 223,227 common shares.
>
> ...
>
> [159] The Private Placement was offered to all holders of common shares. It did not include any offer or any other provisions for the holders of A or B Shares. As a result, the A and B Shares remained convertible into 1,223,227 common shares, but the value and voting power of those common shares dropped dramatically as a result of the dilution pursuant to the Private Placement. There was nothing that the holder of the A and B Shares could do to avoid that loss.
>
> [160] In my view, it is not a defence to argue that the dilution would have occurred even if the A and B Shares had been converted into common shares, because Ramzi would not have exercised his rights under the Private Placement. That is speculative in nature. Mitec might have been more interested in Ramzi's shares and might have pursued them more aggressively if he had more of them. Ramzi might have called the shareholder's meeting if he was in a better position to control the outcome of the meeting....
>
> [161] Moreover, there were other ways to deal with the A and B Shares in the Private Placement other than immediate conversion, such as making them convertible into a greater number of common shares (which was essentially the approach taken with respect to the options). That was not dependent on Ramzi's participation in the Private Placement and would have avoided the loss that he suffered.
>
> [162] As a result, I conclude that the causal link between the oppression and the loss on the A and B Shares has been established.

[63] Presented schematically, the judge's reasoning consisted of the following: (i) the refusal to allow the conversion of the Class A preferred shares, combined with the failure at the time of the private placement to take any measures to protect the Class A and Class B preferred shares, constituted oppression; (ii) the direct consequence of the oppression took two forms: the loss of value of the respondent's shares (at a time when he was in active negotiations with a potential purchaser) and the dramatic reduction of their relative weight in the impleaded party's voting capital. The elements of fault, causation and damage were therefore present, and the prejudice remained to be assessed.

[64] Regarding the causal connection, it should be reiterated that this is a question of fact, in respect of which a palpable (plainly seen) and overriding (fatal to the reasoning process it underpins) error must be shown in appeal. As Gascon, J.A., as he then was, stated in the unanimous reasons he wrote on behalf of the Court in *Laval (Ville de)*

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(Service de protection des citoyens, département de police et centre d'appels d'urgence 911) v. Ducharme:[24]

> [TRANSLATION]
>
> [72] ... the case law equates the establishment of a causal connection to a purely factual matter. As the doctrine emphasizes, when the appeal questions the judge's decision on the causal connection, the Court's attitude is generally to deem the problem to be a mere matter of fact left to the sovereign assessment of the first judge, which limits the power to interfere on appeal to only those cases involving a palpable and overriding error.

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[65] Can a fault of this type be detected in the judge's analysis? In my view, this question must be answered in the negative.

[66] The appellants argue that, in any case, the respondent could not have taken part in the private placement because he was short of funds in late September and early October 2007. This assertion, which the judge described as speculative, ignored the fact that the respondent would have had funds at his disposal if he had been able to convert his Class A preferred shares into common shares and, subject to the Board's approval, sell them to the highest bidder. Moreover, the assertion disregards a plausible aspect of the story: if the respondent had had a larger block of common shares, the transaction with Mitec would have had a greater chance of taking place. It is impossible to know what the actual state of affairs would have been if the Class A shares had been converted in a timely fashion, namely several months before September 2007. But the respondent probably could have consolidated his situation and his holdings would have escaped the massive devaluation and marginalization caused by the private placement.

[67] At paragraph [161] of his reasons, *supra*, the judge refers to "the approach taken with respect to the options". There can be no doubt that the members of the Board of Directors were fully aware of the inevitable dilutive effect that the private placement would have on the shareholders' equity before the placement. The options granted to the impleaded party's employees and directors would also be affected. The minutes of the board meeting held on September 28, 2007, contain the following passage:

> The directors then discussed their concern regarding the options and how to best address the fact that, due to significant dilution of the proposed financing, new options would need to be issued to employees. The directors concurred that they could not penalize the employees. Mr. Steinberg indicated that this was a complex issue and asked Mr. Tahmassebi, as Chair of the Human Resources Committee of the Corporation, to make a recommendation on this matter. The directors agreed that any decision with respect to the options would be deferred until such time as such a recommendation was presented to the directors.

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[24] 2012 QCCA 2122.

Less than a month later, on October 23, the directors returned to this matter. The minutes state:

> Dr. Black explained that the major change was that everyone has options at $1.25, the round of note financing was done at 2 cents, and that any further round of financing would be expected at 5 cents. He then noted that the largest optionholder was the key scientist and it was important that the board move quickly to ensure retention through new option grants. Mr. Tahmassebi then explained in detail the process which led to the proposed option plan, including noting that the plan follows the standard of Silicon Valley, the shares will be grandfathered to the start date of each employee, and there will be monthly vesting over the remaining three years. Mr. Tahmassebi then noted that the key employees were [XX], to whom 2% has been allocated, and [YY] to whom they adjusted 1% to 1.5%. ... The directors then agreed they would approve the new plan, provided however they would consider any comments of [a board member who had expressed reservations] received before Thursday, October 25, 2007.

It appears from the file that these changes were made as stated. Twenty employees of the impleaded party and seven board members benefited from them.

[68] Section 241 of the *CBCA* gives a judge broad discretion to decide an application made under it. It cannot be argued in this case that the judge made a palpable and overriding error by using the evidence adduced at trial to draw the conclusions reproduced at paragraph [62] above, including those set out at paragraph [160] of his reasons.

(iv) The value of the common and preferred shares held by the respondent

[69] In the alternative, the appellants fault the trial judge for erring in his assessment of the pecuniary damages suffered by the respondent, first by attributing an excessive value to the common shares that the respondent could have obtained from the conversion of his preferred shares, and second by not taking into account the effective residual value of the same preferred shares for compensation purposes.

[70] It is appropriate to begin by quoting the passages of the judgment where the judge discussed this matter, not including the footnotes:

> [136] I note at the outset that neither party presented any expert evidence on the value of Wi2Wi's common shares or the adequacy of the $0.02 conversion price.
>
> [137] Based on the audited financial statements of Wi2Wi for the year ended September 30, 2007, the book value of the common shares was negative and therefore the $0.02 conversion price was not at a discount to book value.

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[138] However, there is other evidence in the file that suggests a higher value. The common shares were issued at $0.75 and $1.25. Ramzi sold some of his common shares to Mitec in July 2007 for US $1.50. The evidence closest in time to the Private Placement is the October 9 Offer, which provided a price of US $0.50. This offer was made by Mitec after it had conducted its due diligence and it was accepted by Ramzi, and in my view, it represents the best evidence of the value of the common shares in October 2007. It is also interesting to note that the value of US $0.50 is somewhat confirmed by Black's comment at the October 23, 2007 Board meeting that "any further round of financing would be expected at 5 cents" and by the fact that the next shares issued by Wi2Wi in May 2008 were at US $0.05.

...

[163] Ramzi claims that the value of the common shares before the Private Placement was US $1.50 based on the September 13 Offer. That is clearly not an appropriate measure – Mitec terminated that offer following the due diligence in which it learned of Wi2Wi's precarious financial position. In my view, the best indication of value is the October 9 Offer's price of US $0.50 per common share. Using the conversion rate on September 6, 2007 (the only exchange rate in the record), this is equal to $0.53.

[164] Applying that value to the 1,223,227 common shares into which Ramzi's A and B Shares were convertible, the total loss was $648,310.

...

[168] Ramzi cannot keep the shares and their value.

[169] There are two ways to deal with the A and B Shares – either I deduct their value after the Private Placement from their value before the Private Placement to calculate the damages, or I order Ramzi to return them.

[170] The best indication of the value of the common shares after the Private Placement is $0.05 per share, based on Black's comment at the October 23, 2007 Board meeting and the subsequent issuance of shares in May 2008 at US $0.05. As pointed out above, the figures of US $0.50 and $0.05 are consistent.

[171] However, Ramzi never had the ability to obtain that value because his A and B Shares were never converted into common shares. Moreover, and although I do not have complete evidence on the subject, it appears that the reverse takeover of Wi2Wi by ISEC, if it indeed happened, may have resulted in the exchange of Wi2Wi common shares for ISEC shares and the cancellation of the A and B Shares.

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> [172] As a result, I do not consider it appropriate to reduce the damages awarded to Ramzi by the value of the A and B Shares because that value is too uncertain. Instead, I will order Ramzi to remit the share certificates for the A and B Shares to the Defendants Black and Wilson or to whomever they designate.

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[71] In addition, the appellants argue that it was also necessary to take into account the judge's comments at paragraphs [91], [92] and [108] of his reasons, in which he stated that it reasonable for the appellants and the other members of the Board of Directors to have refused to authorize the sale of the respondent's shares to Mitec:[25] "...the Board was concerned that the Ramzi shares would give Mitec effective control without Mitec ever paying a control premium to the other shareholders." Given the impleaded party's share capital structure, it is understandable that the Board, to use the judge's words, "had concerns about a creeping takeover of Wi2Wi by Mitec".

[72] A few figures are also relevant to analyze the appellants' arguments on this point. Before the private placement, the impleaded party's share capital consisted of 5,807,760[26] common shares. Of that number, the respondent held 2,000,000, or 34.4% of the total. This proportion fell to 25.8% early in July 2007, when the Board of Directors approved the transfer of 500,000 of his shares, or 8.6% of the total, to Mitec. The other shareholders, who collectively formed the majority, held 3,807,760 actions, or 65.6% of the total. If, before the private placement, the respondent had been able to convert his Class A preferred shares into common shares, the number of common shares of the impleaded party would have increased to 6,807,760, of which 3,000,000, or 44% of the total, would have belonged to the respondent. The possibility of a creeping takeover was therefore not illusory because Mitec potentially had other supporters among the shareholders. In this sense, it can also be supposed, although this is conjecture, that the majority shareholders were concerned about being deprived of their control.

[73] Lastly, it should be noted that the private placement that took place from September 28 to October 15, 2007, had the potential to mobilize from the impleaded party's shareholders about $2,900,000 of capital, with a conversion rate of 50,000 common shares for each $1,000. As a result of this transaction, therefore, the impleaded party's number of common shares could increase from 5,807,760 to more than 150,000,000. In fact, the transaction generated $1,922,000, which resulted in an increase of 96,100,000 common shares in the impleaded party's share capital. From 34.4% of the total of the common shares that the respondent held in June 2007, his holdings fell to 1.47% after July (and could have eventually risen to 2.1% if he had been able to add to the 500,000 common shares that he still had after the sale to Mitec of a block of 1,000,000 common shares converted under clause 5.1 of the impleaded party's

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[25] Only the sale already referred to in note 4 received board approval.

[26] This figure is cited by the trial judge at paragraph [111] of his reasons.

articles and a block of 223,227 shares converted under clause 5.2 of the same articles[27]).

[74] That is the context in which the judge had to make a ruling.

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[75] The assessment of the pecuniary damages is above all a matter of fact; in this case, it raised no prior or incidental questions of law. As the judge noted at paragraph [136] of his reasons, the record contained no expert evidence on the value of the impleaded party's common shares or on the fairness of the price of the common shares issued in the private placement ($0.02). The judge therefore had to rely on documentary and non-expert evidence. Having concluded that oppressive behaviour took place – which was found, as stated in paragraph 5 of the appellants' factum, reproduced at paragraph [29] above – the judge was obliged to rule on the quantum of damages. That did not rule out the possibility of his setting it at zero. Even so, in the presence of uncertainty, which could not fail to be the case in a dispute such as this one, the case law expects the judge to do his best on the basis of the evidence adduced. Only recently in *Vidéotron, s.e.n.c. v. Bell ExpressVu, l.p.*,[28] a unanimous panel of the Court made the following comments on this matter:

> [TRANSLATION]
>
> [86] The difficulties or the challenge presented by the valuation exercise does not justify setting aside the ideal to be achieved, namely full restitution. As Jean-Louis Baudouin wrote [TRANSLATION] "[t]he courts are aware of the fact that mathematical precision is difficult to achieve. Their objective, therefore, is to reach just and reasonable compensation in light of all the circumstances, according to well-accepted standards set out in case law concerning calculation methods."
>
> [87] In *Provigo Distribution inc. v. Supermarché A.R.G. inc.*, *Société du Parc des îles v. Renaud* and *Banque de Montréal v. TMI-Éducation.com inc.*, this Court stated or described, as follows, the process of determining just and reasonable compensation in all the circumstances:
>
> Excerpt from *Provigo Distribution inc.*

---

27 These clauses are reproduced, *supra*, at para [20]. One can add here that if the respondent had sold 500,000 shares to Mitec but had added 1,223,227 converted common shares to the 1,500,000 shares that he already owned, his holdings would have represented 38.7% of the 7,030,987 common shares of the impleaded party.

28 2015 QCCA 422 (references omitted). The following sources are those reproduced in the text of the citation: Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8e édition, vol. 1, Éditions Yvon Blais, at 458, *Provigo Distribution*, [1998] R.J.Q. 47, 84 (C.A.), *Société du Parc des îles*, J.E. 2004-778, AZ-50227210 (C.A.) and *Banque de Montréal*, 2014 QCCA 1431.

> Several largely unforeseeable or unquantifiable factors made assessing the prejudice an extremely complicated task. This Court faces additional difficulties in its assessment of the damage because its consideration is limited to the evidence on the record. This no doubt explains the lack of strict mathematical rigour in its calculations, as the Court is forced to rely on a certain amount of approximation and estimation, as well as its own discretion. It is the role of judges to perform such tasks, however
>
> Excerpt from *Société du Parc des îles*
>
> [26] In so doing, the judge awarded damages and interest as was proper in the circumstances. Having concluded that the appellants breached their obligations in several ways, breaches that in all likelihood were prejudicial to the business operated by the respondent, he had to look in the evidence for a probable demonstration of the amount of the financial prejudice suffered by the respondent....
>
> Excerpt from *Banque de Montréal*
>
> [103] Even if the expert reports are practically useless and despite the difficulty of the task, the trial court had to determine compensation, even resorting to approximation where necessary. ....

> [88] In short, when fault is established and it is the cause of damages, the judge must [TRANSLATION] "look in the evidence for a probable demonstration of the amount of the financial prejudice suffered". Thus, [TRANSLATION] "[u]ncertainty regarding the damage in itself must be distinguished from uncertainty caused by the difficulty of precisely measuring the damage because of the nature of the legal dispute, the realities of the proceedings, or the complexity of the facts ".
>
> [89] Deference is owed to assessments of damages, such that this Court will interfere only in the case of an error of law or a palpable and overriding error by the trial judge....

[76] According to the judge's findings, which the appellants have not shown were marked by an error justifying that they be overturned on appeal, the oppression that the respondent suffered took two forms. The judge's conclusion on this point is clear:

> [153] ... I conclude that Ramzi has proven oppression in relation to the failure to convert the A and the B Shares and the failure to ensure that Ramzi's rights as the holder of the A and B Shares were not prejudiced by the Private Placement.

The decisive paragraphs on the monetary value of which the respondent was deprived as a result of these two actions by the appellants present the judge's reasoning in these terms:

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> [137] Based on the audited financial statements of Wi2Wi for the year ended September 30, 2007, the book value of the common shares was negative and therefore the $0.02 conversion price was not at a discount to book value.
>
> [138] However, there is other evidence in the file that suggests a higher value. The common shares were issued at $0.75 and $1.25. Ramzi sold some of his common shares to Mitec in July 2007 for US $1.50. The evidence closest in time to the Private Placement is the October 9 Offer, which provided a price of US $0.50. This offer was made by Mitec after it had conducted its due diligence and it was accepted by Ramzi, and in my view, it represents the best evidence of the value of the common shares in October 2007. It is also interesting to note that the value of US $0.50 is somewhat confirmed by Black's comment at the October 23, 2007 Board meeting that "any further round of financing would be expected at 5 cents" and by the fact that the next shares issued by Wi2Wi in May 2008 were at US $0.05.
>
> [Emphasis added]

Later he adds:

> [163] Ramzi claims that the value of the common shares before the Private Placement was US $1.50 based on the September 13 Offer. That is clearly not an appropriate measure – Mitec terminated that offer following the due diligence in which it learned of Wi2Wi's precarious financial position. In my view, the best indication of value is the October 9 Offer's price of US $0.50 per common share. Using the conversion rate on September 6, 2007 (the only exchange rate in the record), this is equal to $0.53.

This assessment is rational and is supported by the evidence. As we have seen, the appellants, like the other members of the Board of Directors, expected radical dilution of the security. In the wake of the private placement, they took vigorous measures to rehabilitate the options offered to the impleaded party's employees and members of the Board of Directors, but no action to preserve the respondent's rights arising from the Class A and B preferred shares. In all likelihood, the respondent could have divested himself of his common shares derived from the Class A and B preferred shares. He would have done so at the mutually negotiated price identified by the judge, if the conversion of the Class A shares had been carried out with diligence. It might also be thoughtthat he would have done so at the same price if the Class B shares had been subject to a protective measure to mitigate the dilution of their value. With the adjustment of the foreign exchange rate referred to by the judge at paragraph [163] of his reasons, the total is $648,310.

[77] In short, the judge relied on plausible evidence, namely Mitec's offer of October 9, 2007. Contrary to what the appellants argue, the purpose of the price set in this way was not to have the appellants pay instead of Mitec because of the failed offer of

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October 9, 2007. It was used solely to determine what the respondent's shares were in all likelihood worth, with no regard for the appellants' oppressive behaviour, which undermined such value.

[78] This last ground raised by the appellants is therefore without basis, as is their argument based on the residual value of the respondent's preferred shares, an argument that the trial judge completely rebutted at paragraphs [168] to [172] of his reasons.

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[79] As I stated at the beginning of these reasons, the cross-appeal concerns only the value attributed by the trial judge to the 1,223,227 common shares, which in the normal course of events would have been substituted for the respondent's preferred shares. The judge set the value at $0.53 a share, and the incidental appellant argued that he should have set it at US $1.50. Paragraphs [137], [138] and [163] of the judgment *a quo* are the relevant passages and they have already been reproduced, *supra*, at paragraph [76].

[80] The value of US $1.50 is that which appeared in the offer sent by Mitec and to the incidental appellant on September 13, 2007. This offer provided for payment of US $1.50 for each common share and an overall amount of US $100 for the Class A and B preferred shares, with the total coming to $2,250,100. This offer was subject to the following conditions, however:

> Any transaction would also be subject to Mitec's updated due diligence review of Wi2Wi's financial condition, business and prospects and Mitec being satisfied therewith, as well as the satisfaction of any other approvals and conditions stated below.
>
> ...
>
> The purchase price per Common Share shall be payable $0.75 in cash and, at the discretion of Mitec, $0.75 in Mitec Common Shares, subject to regulatory and stock exchange approval.

It thus can be seen that it was a conditional offer, not a firm offer, and that the terms of payment, which were left to Mitec's discretion, enabled it to pay with its own common shares rather than with cash.

[81] The value of $0.53 is what Mitec offered on October 9, after it completed its due diligence of the impleaded party's situation. It is known that this situation was very precarious and that it had led to the approval of the private placement by the impleaded party's Board of Director several days earlier.

[82] In substance, the incidental appellant argues that the judge could not disregard the rate of US $1.50 because the offer of September 13, which came two weeks after the private placement, was the result of previous negotiations by mutual agreement before the massive dilution or devaluation that began on September 28. Certainly Mitec took a dim view of the private placement; indeed, it said as much to counsel for the impleaded party through its own counsel, in a letter dated September 30.

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[83] Even so, on October 9, after learning of the private placement, Mitec made its last proposal to the incidental appellant. The proposal was communicated simultaneously to the impleaded party's Board of Directors. The offer concerned "the 1,500,000 common shares in the capital stock of the Corporation held by the Vendor [the incidental appellant]". The price offered was US $0.50 "for a minimum of 8% or up to 100% of the vendors (*sic*) common shares". Daniel Piergentili, the President of Mitec called during the trial by the incidental appellant, testified about the outcome in the following terms:

> A. Afterwards, the next step was talking with the Wi2Wi board. We again tried to see if a deal could be worked out to purchase Ramzi's shares, this time at a price of fifty cents (.50). The Wi2Wi board initially put a stipulation on that we had to... if... if we were to strike a deal with Ramzi, we had to offer the same deal to all Wi2Wi shareholders.
>
> So, to try to explain that is...(inaudible) say he had a million (1,000,000) shares. We struck a deal with...at a certain price. All Wi2Wi shareholders had a...had the right to purchase those shares at fifty cents (.50), based on the number of shares they had.
>
> Q. Okay.
>
> A. So, on a pro rata basis, we could all buy a...a certain amount.
>
> Q. And after that?.
>
> A. So, after that, then there was a... along with that, there was an additional stipulation that Mitec could only buy eight percent (8%). So, if no one else... even if no one else participated, all we could ever buy was eight percent (8%).

After these discussions, on October 21, Daniel Piergentili communicated by e-mail with the respondent and announced to him tersely: "No I am done with these guys as far as I am concerned the deal is over."

[84] The incidental appellant attributes to the figure proposed on September 13 a scope that it does not have. This offer was conditional on Mitec's due diligence of the

impleaded party's situation. There can be no doubt that the results of this verification were very disappointing, justifying a 66% decrease in the offer, lowering it from US $1.50 to US $0.50. In addition, because of the situation, the private placement became an absolute necessity in order to inject cash into the impleaded party. If the private placement had truly been the decisive factor in the decrease, it would have been expected that Mitec, in its offer of October 9, would have proposed a price of US $0.05, or even US $0.02, for the incidental appellant's 1,500,000 common shares. And in fact the prejudice would have occurred because of the actions of the incidental respondents, because the sale price offered for the incidental appellant's common shares would have gone from US $750,000 to US $75,000, or even to US $30,000. But that is not what happened. The transaction failed for other reasons: the requirements (legitimate, as the judge noted) of the impleaded party's Board of Directors concerning control over the company, requirements that would have left Mitec in a very minority position within the impleaded party's shareholders, are the reason for what occurred.

[85] In these conditions, the trial judge could conclude as he did –at paragraph [138] of his reasons, for example – and assess the prejudice at $0.53 a share. The ground raised by the incidental appellant therefore has no basis in fact, which renders superfluous a review of the case law he cited.

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[86] For these reasons, I would dismiss the main appeal and the cross-appeal, with costs against the defaulting parties in both cases.

YVES-MARIE MORISSETTE, J.C.A.

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CITATION: Paul v. 1433295 Ontario Limited, 2013 ONSC 7002
COURT FILE NO.: CV-08-15586CM
DATE: 20131213

2013 ONSC 7002 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Doreen G. Downs Paul and Russell G. V. Paul Plaintiffs	William V. Sasso and Jacqueline A. Horvat, for the Plaintiffs
– and –	
1433295 Ontario Limited and Parmjit Singh Bahia Defendants	Dante D. Gatti, for the Defendants
	HEARD: February 19, 20, 21, 22, 25, 26, 27, 28, March 1, May 22, 23, 24 and 27, 2013

REASONS FOR JUDGMENT

NOLAN J.:

INTRODUCTION

[1] The plaintiffs, the minority shareholders of the defendant corporation, are seeking two main remedies against the corporation and the majority shareholder pursuant to the *Ontario Business Corporations Act*, R. S. O. 1990, c. B 16, as amended ("*OBCA*"); the first head of relief is found in s. 185, the dissent and appraisal provision; the second is found in s. 248, the oppression remedy. They are also seeking an order for pre-judgment interest.

[2] There is no issue between the plaintiffs and defendants that the plaintiffs are entitled to the first remedy. They disagree, however, on the value to be assigned to the property, a hotel, and thus the proper value to be assigned to the shares of the corporation.

[3] With respect to the second remedy, the majority shareholder denies that he engaged in any oppressive conduct towards the plaintiffs and, thus asserts that they are not entitled to any relief with respect to that claim.

BACKGROUND

[4] In about 1998, the defendant, Parmjit Singh Bahia ("Mr. Bahia"), a business man and a resident of the United Kingdom who now owns a number of hotels in England and the United States wanted to look at acquiring a hotel in Canada. This was his first venture into the hotel business. As part of his search, he explored a number of trade newspapers. In one of them, the Western Investor, he came across the name of one of the plaintiffs, Russell G.V. Paul ("Mr. Paul"), a real estate agent/broker who specializes in hotel sales and acquisitions. Mr. Bahia contacted Mr. Paul for the purpose of engaging his services to purchase at least one Canadian hotel. And thus began an unhappy relationship that culminated more than thirteen years later in the trial before me.

[5] After looking at numerous hotels across Canada in the company of Mr. Paul, Mr. Bahia decided to acquire the almost 100-year-old Prince Arthur Hotel ("the Hotel"), in Thunder Bay, Ontario, for $3,000,000 on February 23, 2001. Mr. Paul and Mr. Paul's wife, Doreen G. Downs Paul ("Mrs. Downs Paul"), the other plaintiff, proposed to Mr. Bahia that they would like to acquire an ownership interest in the Hotel. This could be accomplished by Mr. Paul foregoing his $100,000 commission on the sale of the Hotel with that amount being contributed to the purchase price. In return, Mr. Paul and Mrs. Downs Paul would each receive a 10 per cent interest in the shares of the defendant corporation, 1433295 Ontario Limited ("the Corporation"), which was incorporated in September 2000 for the sole purpose of acquiring, holding ownership of and managing the Hotel.

[6] The total $100,000 contribution of the plaintiffs was by way of a shareholder loan. The balance of the purchase price of the Hotel was by way of a shareholder loan to the Corporation from Mr. Bahia in the amount of $1,300,000 and a loan to the Corporation by the Business Development Bank of Canada ("BDC"), in the amount of $1,600,000. Mr. Bahia received 80 per cent of the shares of the Corporation. Mr. Bahia and Mrs. Downs Paul were the Directors of the Corporation.

[7] Although Mr. Bahia's financial contribution to the acquisition of the Hotel was 13 to 1 in relation to the contribution of the Pauls, he agreed to the 80/20 split of the shares because Mrs. Downs Paul was going to be involved in the management of the Hotel, allowing Mr. Bahia to focus on his other business ventures in the United Kingdom where he lived and elsewhere. Even though Mrs. Downs Paul's experience in managing the day to day operations of a hotel was little to non-existent and there was no agreement between the parties as to what her exact duties would be and whether she would be paid for those duties, that was the arrangement the parties put in place.

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[8] Not surprisingly, this management arrangement did not last long. Mrs. Downs Paul was ousted as the manager by Mr. Bahia and both the plaintiffs were banished from the Hotel by Mr. Bahia following a phone call to him from Mr. Paul who complained to him about the manner in which the Hotel was being managed by his wife.

[9] Although the lawyer who acted for all the parties on the incorporation of the Corporation prepared a draft Shareholder's Agreement which he provided to the Pauls and Mr. Bahia, the agreement was never signed. Mr. Bahia was not even sure he reviewed it. Thus, when there was a falling out between majority shareholder, Mr. Bahia, and the minority shareholders, the Pauls, there was little guidance for any of them or for the court years later, regarding any contemporaneous evidence of their reasonable expectations as between them when they entered into their fateful arrangement. This left the provisions of the *OBCA*, on which they each relied at trial to justify their respective complaints and actions and their mutual arrangements with BDC.

[10] The contributions by the Pauls and Mr. Bahia were secured by way of shareholder loans to the Corporation. The Pauls' loan was secured by a demand promissory note dated February 21, 2001, as well as by way of a charge in their favour registered against the Hotel. The conditions of the BDC loan, however, prevented the payment of any interest or repayment of the loan to any of the shareholders while any indebtedness to the BDC was outstanding. As of the time of the trial, the Corporation remained indebted to BDC.

[11] In spite of the falling out between the parties, annual shareholder meetings were held and there was an attempt on the part of Mr. Bahia to act in accordance with his legal obligations as a director of the Corporation. In June 2001, he removed Mrs. Doreen Paul as a director at a meeting of the shareholders. The Pauls continued to receive copies of the minutes of the annual shareholder meetings at which they attended or sent proxies and never made any formal complaints about the actions of the Corporation with a few exceptions. In addition, each year from 2003 up to and including 2012 with the exception of 2006 and 2007, the Pauls each received a cheque from the Corporation for interest on their shareholder loans. Although the agreement with BDC, which all the shareholders were required to enter into, specifically prohibited any payment of interest to the shareholders or any repayment of any shareholder loans while there was any indebtedness to BDC and the Pauls were well aware of this provisions, they accepted the interest payments without complaint.

[12] There was little direct communication between Mr. Bahia and the Pauls. There was some evidence that from time to time they had discussions about Mr. Bahia buying them out but nothing was finalized.

[13] From Mr. Bahia's standpoint, he found he was in an impossible situation with respect to the ongoing operation of the Hotel and the need for ongoing renovations of and repairs to the almost century old hotel. A stalemate between the plaintiffs and Mr. Bahia continued until December 2006 when Mr. Bahia sent a formal letter to the Pauls requesting they invest more funds in the Hotel for renovations. That request was refused. Prior to sending that letter, Mr. Bahia had learned from an accountant that the *OBCA* contained a

provision that would permit a corporation to take back shares of minority shareholders for fair value.

[14] On January 5, 2007, Mr. Bahia gave written notice to the Pauls of a special meeting of shareholders called for February 5, 2007. The notice of the meeting included a proposed memorandum which advised that the Corporation needed $700,000 for renovations to the Hotel. That memorandum further advised that Mr. Bahia, the sole director and majority shareholder, would not advance any further funds without the Pauls contributing a proportionate amount. The proposed resolution called for a reduction in the number of common shares on a 40-1 basis. The effect of this resolution when passed would have been that Mr. Bahia's shares would be reduced from 80 to 2 and the 10 common shares held by each of the Pauls would be reduced to one quarter of one common share. Scrip certificates would be issued for the fractional shares. That meeting did not proceed and the parties entered into negotiations to attempt to agree on a price the Pauls considered to be fair value for their shares. No agreement was reached.

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[15] On March 4, 2008, Mr. Bahia sent another notice of a shareholder meeting to be held on March 19, 2008, at which time the original resolution sought in February 2007 would be brought forward to exchange the Pauls' shares for scrip shares that would need to be exchanged for shares before year end. The Pauls disagreed with the resolution and exercised their rights to dissent and appraisal by way of written notice on April 24, 2008. This was followed on April 25, 2008, by correspondence from Mr. Bahia in which he offered to purchase their shares at what he determined was fair market value of the assets of the Corporation, that being $6,120 per share as of March 18, 2008.

[16] The Pauls complained at trial about the failure of Mr. Bahia as the sole director of the Corporation to include in either of the notices of the February 2007 or March 2008 shareholder meetings any notice to them of their dissent and appraisal rights pursuant to s. 185 of the *OBCA*. According to them, it was not until the special meeting of March 19, 2008 that the Corporation's counsel advised them of that right when they objected to the adoption of the resolution. While the inclusion of such a notice might be common practice, I was not referred to any part of s. 185 which required such notice.

[17] Following March 18, 2008, what I will refer to in this judgment as Valuation Day, there were a number of valuations of the Hotel prepared by various experts who testified at trial. Had a proper valuation been completed prior to Valuation Day, in preparation for Mr. Bahia's offer of $6,120 per share, this trial might well have been unnecessary.

[18] In any event, the parties agree that the relevant date for valuation of the Hotel is March 18, 2008. Other than that date, the parties agreed on little else. The Pauls commenced this action on August 14, 2008. They were granted leave on August 10, 2011, to amend their statement of claim which they did on September 1, 2011, to add allegations related to actions of Mr. Bahia that the Pauls allege both devalued their interest in the Hotel and provided inappropriate benefits to himself in violation of the agreement with BDC, oppressive conduct in violation of s. 248 of the *OBCA*.

ISSUES

[19] The main issues to be determined are:

1) What is the value to be assigned to the shares held by the Pauls on March 18, 2008, in accordance with s. 185 of the *OBCA*, based on the value of the Hotel as of that date and determining what, if any, amounts should be deducted from or added to that value to arrive at a proper share value;

2) Did the actions of Mr. Bahia, the majority shareholder, amount to oppressive conduct towards the minority shareholders, thus engaging s. 248 of the *OBCA*, the oppression remedy?

3) If that question is answered in the affirmative, what is the proper remedy?

4) Are the plaintiffs entitled to pre-judgment interest and, if so, in what amount and from what date?

[20] At the conclusion of his submissions at the end of trial, counsel for the defendants raised an additional issue. He sought leave to amend the pleadings by adding a final line to the statement of defence to include the defence of laches, claiming that the plaintiffs had delayed in bringing their action against the defendant. Thus, the claim is time-barred by reason of the equitable doctrine of laches, asserting that there was some evidence at trial to support that defence. Not surprisingly, counsel for the plaintiffs opposed the request for the amendment. I offered counsel seven days within which to make written submissions on the issue and should I receive submissions, I would arrange a further attendance. No further material was received from either counsel. I will deal with that issue in a summary way in the Analysis portion of this judgment.

THE EVIDENCE

[21] In all, there were twelve witnesses called by the parties and numerous volumes of documents entered as exhibits including numerous financial statements which were reviewed by almost all of the witnesses, both on direct and cross-examination. The first exhibit filed by the defendants on consent was a document produced by the Sauder School of Business, Real Estate Division of the University of British Columbia entitled Hotel Valuation CPD104 Professional Development Course. I mention it here only because this document was referred to throughout the trial by the defendants' counsel both in direct examination and cross-examination of almost all of the witnesses called by both sides and held up as "the Bible" of appraisers of hotels as the proper and only way of assigning value to a hotel. Indeed, one of the expert witnesses, Monique Rosszell, was credited as a contributor to the course materials. While some of the material was of assistance in understanding the sometimes complex procedures that make up the world of appraisals, particularly of specialized property such as hotels, the exhibit was not

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determinative of any conclusions I reached in coming to the ultimate share value. Given the prominent disclaimer on the first page of the document, I would have been in obvious error had I done so:

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[22] The plaintiffs called two witnesses. The first was Mr. Ben Lansink, a qualified real estate appraiser who testified as an expert as to the value of the Hotel. In addition to presenting his own report, he was later recalled on consent to present a further report he referred to as a technical review of the reports of the other experts called on behalf of the defendants. The other witness was the plaintiff, Russell Paul. In addition to testifying as to the circumstances under which he and his wife entered into this business venture with Mr. Bahia with respect to the Hotel, he prepared and presented his own report as to the value of the Prince Arthur Hotel. Not surprisingly, Mr. Paul's value was the highest of all the valuations presented at $8 million.

[23] The defendants called ten witnesses. The first was Monique Rosszell, a principal of HVS Global Hospitality Services, also a qualified appraiser, who prepared an appraisal of the Hotel.

[24] The next witness was Brian Keith Stanford of PKF Consulting, a company which provides appraisal services to a number of business sectors including hotels. Mr. Stanford, unlike Mr. Lansink and Ms. Rosszell, was not a qualified appraiser but he had prepared the report after an extensive review of the property itself and the financial records. The appraisal report was signed off by a certified appraiser, Stephen Raymer, also associated with PKF who also testified.

[25] The defendants also called as an expert Donna Marie Bain Smith, a chartered accountant and chartered business valuator as well as being qualified as an investigative and forensic

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accountant. She was retained by the defendants to provide a share valuation. She completed her first report on June 29, 2011. She prepared a second report January 29, 2013, after receiving the HVS report.

[26] David Kubinec, a public accountant with BDO in Thunder Bay, was called by the defendants to testify as the Corporation's accountant.

[27] The defendants also called Mrs. Downs Paul and Jeffrey Crowe of BDBC (formerly BDC), the manager of the Branch Centre in Windsor as witnesses. Although Mr. Crowe had no direct involvement with the BDC arrangement with the parties to this action, he testified as to the conditions under which BDC lent money to corporations, including the standard provisions in the contracts. He testified that BDC's standard loan documents do not prohibit the accrual of interest, just the payment of it.

[28] Mrs. Downs Paul's evidence confirmed other evidence that had been presented: she had been in a management/oversight role at the Hotel until she was discharged and she and Mr. Paul were removed from the Hotel by the police; she had paid herself a management fee of $10,000 by way of cheque written by herself; Mr. Bahia at first had reduced her portion of the shareholder loan by $10,000 as a result; she had complained and her portion of the shareholder loan was raised to $50,000; she was emotionally distraught and devastated when she was removed as a director by Mr. Bahia. While giving evidence, Mrs. Paul gave the court unsolicited information about alleged "bad behaviour" on the part of Mr. Bahia at the Hotel, no doubt in retaliation for allegations made against her and Mr. Paul, also for "bad behaviour". To be clear, none of the allegations made by either the plaintiffs or Mr. Bahia had much relevance to the issues to be determined by me.

[29] Mr. Bahia testified on his own behalf and as the Director of the Corporation.

ANALYSIS

Summary of the Nature of the Remedies Sought

[30] Pursuant to the dissent and appraisal remedy, s. 185 of the *OBCA* (see Schedule A attached), the plaintiffs have a statutory right to be paid fair value for their shares as of the day prior to the meeting of the corporation which would result in a fundamental change in the structure of the corporation that would create a fundamental change to their rights as shareholders.

[31] This right of dissent and appraisal is meant to result in a relatively quick process for the resolution of the value of the shares. Within seven days of the receipt of the notice of dissent from the dissenting shareholders and a request to be paid fair value for their shares, the corporation is to make an offer for the dissenting shareholder shares in an amount that directors of the corporation consider to be fair value. That offer is to be accompanied by a statement setting out how the fair value was determined.

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[32] If the corporation fails to make an offer or the dissenting shareholders fail to accept the offer, the corporation can apply to the court within a specified period of time for the court to fix a fair value for the shares. If the corporation fails to apply to the court, as in this case, then the dissenting shareholders have a right to apply to the court to have the value of the shares fixed. From the time the dissenting shareholders give notice of their desire to be paid out the fair value of their shares, they cease to have any rights as a shareholder.

[33] With respect to the oppression remedy provided for in s. 248 of the *OBCA* (see Schedule B attached), the court, should it find on the evidence that there has been oppressive behaviour on the part of the majority shareholders towards the minority shareholders, may provide a remedy that the court considers fair, just and equitable. When determining whether conduct complained of is oppressive, unfairly prejudicial or unfairly disregards the interests of any shareholder, the court must consider the acts complained of within the context of the reasonable expectations of the shareholders. The court can then allow for any equitable adjustments to be made to any amounts owing to the minority shareholders. It is clear in the relevant case law that both remedies can be sought together. Section 185(4) provides that the dissent and appraisal remedy can be sought "in addition to any other right a shareholder may have", in this case, the oppression remedy found in s. 248.

[34] With respect to the claim for pre-judgment interest, the plaintiffs are seeking interest on the amount determined to be fair market value for the shares as of Valuation Day in accordance with s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as well as s. 185(27) of the *OBCA*. With respect to pre-judgment interest in relation to the oppression claim, the plaintiffs are seeking it on any amount of damages back to the first act of oppression they assert, that is the day Mrs. Downs Paul was removed as a Director of the Corporation in June 2001.

Preliminary Issue: Amendment to the Statement of Defence

[35] As referred to earlier in this judgment, at the conclusion of his final submissions, counsel for the defendants sought leave to amend the defence to include the defence of laches. He argued that there would be no prejudice to the plaintiffs by allowing the amendment since laches is just "the equities version of the *Limitations Act*". He argued that the allegations of oppression by Mr. Bahia go back to 2001. Since the Pauls did not complain before this proceeding was commenced in 2008 and further amended in 2011 to set out in more detail the allegations of oppression, they are prohibited by the doctrine of laches from maintaining the oppression claim. Having raised this issue at the end of the trial, I will deal with it as a preliminary issue and begin by a brief review of the doctrine itself and the effect of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ("the Act"), on the doctrine.

[36] Halsbury's Laws of Canada - Limitation of Actions VI. EQUITABLE DOCTRINES, 2. Laches and Acquiescence contains a helpful summary.

> HLM-50 What constitutes laches. If a proceeding is not subject to a limitation period, or if the limitation period has not expired after a

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> lengthy period, the equitable doctrine of laches may apply as a defence to the claim. Laches permits a defendant to avoid an equitable (although not a legal) claim made against him or her if he or she can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either:
>
> 1. acquiesced in the defendant's conduct; or
> 2. caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.[1]
>
> A remedy is not normally available when the defendant is guilty of wrongdoing.[2]
>
> Acquiescence. In the context of laches, acquiescence is established if, after the deprivation of his or her rights and in the full knowledge of their existence, the plaintiff delays. It is not enough that the plaintiff knows of the facts that support a claim in equity; he or she must also know that the facts give rise to that claim.[3]
>
> Delay alone is not sufficient to invoke the doctrine. The issue of delay alone is dealt with by the appropriate statutory limitation period. Delay accompanied by what has occurred during the delay and the effects on the parties will determine whether the doctrine is to be applied.[4]

[37] While the defendants referred me to *Cutajar v. Fresca*, [2009] O.J. No. 5126 to support the claim that laches applies, there is far more support in the case law for the position that the *Limitations Act*, 2002 applies to oppression remedy claims. In *Cutajar*, Master Muir held at para. 73 that "there is no limitation period applicable to oppression remedy claims under section 248 of the *OBCA*." Master Muir came to this conclusion after a review of several cases: *Southerland v. Birks*, [2003] O.J. No. 2885 (C.A.), *Waxman v. Waxman* (2004), 186 O.A.C. 201, *Paragon Development Corp. v. Sonka Properties Inc.* (2009), 96 O.R. (3d) 574, and *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, [2006] O.J. No. 27 (C.A.).

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[1] *M. (K.) v. M. (H.)*, [1992] S.C.J. No. 85, [1992] 3 S.C.R. 6 (S.C.C.); *Wewaykum Indian Band v. Canada*, [2002] S.C.J. No. 79, [2002] 4 S.C.R. 245 (S.C.C.); *K. (K.) v. G. (K.W.)*, [2008] O.J. No. 2436, 56 C.C.L.T. (3d) 165 (Ont. C.A.); *McCallum v. Canada (Attorney General)*, [2010] S.J. No. 112, [2010] 2 C.N.L.R. 191 (Sask. Q.B.); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] M.J. No. 219, 2010 MBCA 71 (Man. C.A.).

[2] *Ambrozic v. Burcevski*, [2008] A.J. No. 552, 53 R.F.L. (6th) 242 (Alta. C.A.).

[3] *M. (K.) v. M. (H.)*, [1992] S.C.J. No. 85, [1992] 3 S.C.R. 6 (S.C.C.); *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] M.J. No. 219, 2010 MBCA 71 (Man. C.A.).

[4] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2010] M.J. No. 219, 2010 MBCA 71 (Man. C.A.).

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[38] This view of the law was expressly rejected in *Fracassi v. Cascioli*, 2011 ONSC 178, in which Justice Pepall held that *Paragon* and *Ford* do not apply under the new *Act*. At paras. 271 and 272, Justice Pepall noted that the new *Act* is meant to be comprehensive, and went on to find that it applies to oppression remedy claims:

> 271 The Court of Appeal addressed the new *Limitations Act, 2002* in *Joseph v. Paramount Canada's Wonderland, supra*. The Court stated that section 16 of the statute sets out a list of claims to which no limitation period applies. For other claims, the new Act establishes a basic two year limitation period and a maximum limitation period of fifteen years. The Court held that as section 4 of the new Act mandates a two year limitation period unless the Act provides otherwise, a court must look in the Act for the authority to depart from the application of the two year limitation period. As the Court noted, the wording of section 4 compels the conclusion that the new Act is intended to be comprehensive.
>
> 272 There is nothing in the *Limitations Act, 2002* that suggests that breach of a fiduciary duty or a claim for oppression escapes the statute's two year parameter. Reliance therefore cannot properly be placed on the limitation conclusion in *Paragon Development Corp. v. Sonka Properties Inc.* The *Ford Motor Co.* case was decided under the old limitation statute and in any event, it would appear that the oppression in that case continued until the commencement of the action. Accordingly, given the Court of Appeal's strict interpretation of the *Limitations Act, 2002* as reflected in *Joseph v. Paramount Canada's Wonderland*, I conclude that a two year limitation period applies to the remaining causes of action in this case....

[39] In *Reinhart v. VIXS Systems Inc.*, 2011 ONSC 5349, Justice Roberts also distinguished the older cases, and held at paras. 8-9 that the *Limitations Act*, 2002, applies to oppression remedy claims:

> 8 I prefer and adopt the analysis and conclusion of Madam Justice S. Pepall in the recent decision, *Fracassi v. Cascioli*, that the limitation period begins two years after the day on which the claim for oppression was discovered.
>
> 9 As a result, I conclude that a two-year limitation period applies to the plaintiff's oppression claim.

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[40] The *Act* itself, as found in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, is meant to have broad applicability. A reading of the applicability section of the *Act* itself supports this position:

> 2. (1) This Act applies to claims pursued in court proceedings other than,
>
> (a) proceedings to which the *Real Property Limitations Act* applies;
>
> (b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;
>
> (c) proceedings under the *Judicial Review Procedure Act*;
>
> (d) proceedings to which the *Provincial Offences Act* applies;
>
> (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
>
> (f) proceedings based on equitable claims by aboriginal peoples against the Crown. 2002, c. 24, Sched. B, s. 2 (1).

I am satisfied that the new *Act* applies to oppression remedy claims.

[41] In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, La Forest J. outlined the test for the doctrine of laches:

> 98 Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether [page78] the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[42] *M. (K.)* does not explicitly preclude laches from being used when a claim is subject to the *Limitations Act, 2002*, but does explain that the doctrine of laches was developed because, historically, limitations legislation did not apply to equitable claims:

> 96 Historically, statutes of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of these, but the more important development was the defence of laches. While laches must be considered here as in any delayed equitable claim, in my view it does not afford the respondent redress.

[43] This explanation provides support to the findings in the other cases cited above, that laches will not apply when an action is subject to and within a statutory limitation period.

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[44] Unlike legislation in other provinces, as well as the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, the *Limitations Act, 2002,* does not explicitly state that equitable remedies are still available despite the existence of the limitations legislation. This could be interpreted as an implication by the legislature that, where limitations legislation is applicable to claims in equity, equitable remedies are not to be used.

[45] The oppression remedy is subject to the *Limitations Act, 2002*. As such, a claim falling within the limitation period should not be subject to laches given the case law and legislative observations outlined above. While there is some case law to the contrary, this proposition does seem to follow the most recent case law as well as the purpose of the doctrine of laches as outlined by the Supreme Court of Canada. The defendants did not plead the *Limitation Act*. The request by the defendants to amend the statement of defence to include laches is refused.

ISSUE 1: SHARE VALUATION

Introduction

[46] The most vigorously contested aspect of the trial was the fair value to be assigned to the ten shares owned by each of the plaintiffs on Valuation Day pursuant to s. 185 of the *OBCA*.

[47] The *OBCA* and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 provide for a dissenting shareholder's right to receive fair value for shares:

> *Business Corporations Act* (Ontario):
>
> **185(4)** In addition to any other right the shareholder may have, but subject to subsection (30), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid by the corporation the fair value of the shares held by the shareholder in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted. R.S.O. 1990, c. B.16, s. 185 (4)
>
> *Canada Business Corporations Act*:
>
> **190(3)** In addition to any other right the shareholder may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents or an order made under subsection 192(4) becomes effective, to be paid by the corporation the fair value of the shares in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted or the order was made.

The sections are virtually identical. The only guidance that is offered with respect to the value of shares is that the shareholder must be paid "fair value". Accordingly, one must turn to the case law for guidance on how "fair value" is determined.

[48] The seminal case on "fair value" is *Brant Investments Ltd. et al. and KeepRite Inc. et al.* (1987), 60 O.R. (2d) 737 (H.C.), aff'd (1991), 3 O.R. (3d) 289 (C.A.). Anderson J. wrote about the meaning of "fair value" and the proper approach for the court in making such a determination in relation to the dissent and appraisal remedy at paras. 109-111 in the trial decision,

> For a phrase deceptively simple in terms, "fair value" has occasioned a great deal of judicial and editorial comment. I have concluded that there should be no premium for forcible taking. I have concluded that no element of value relative to synergistic benefits of the impugned transaction should be allowed. My reasons for these conclusions have been given. The conclusions, I hope, make it possible for me to approach the problems inherent in determining "fair value" by a route less tortuous than has been found necessary in some of the cases.
>
> I start from the premise that the appraisal remedy is a statutory right, granted to minority shareholders, to oblige the corporation to purchase the shares of those minority shareholders who dissent from some basic change imposed by the majority. The right as I view it is to recover the value of the investment so that the proceeds may be utilized elsewhere. In such circumstances I see no reason why market value is not "fair value". Market value (in some comment called "fair value", in some "intrinsic value") is defined as the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in terms of money or money's-worth. In my view, on the facts of this case, "market value" will constitute "fair value" within the meaning of that term as used in s. 184(3). It is on that basis that I propose to determine the award to the dissenting shareholders.
>
> In this context it is necessary to keep in mind the distinction between "market value" as thus defined and the "market value approach" to valuation referred to in the judgment of Greenberg J. in Domglas, supra. The latter has reference to use of the quoted price or prices on the stock market. Such prices reflect actual transactions of purchase and sale. "Market value" as defined above is a notional or hypothetical concept; an opinion arrived at by evidence, assumptions, calculations and judgment, in the absence of an actual transaction. The distinction is important for the disposition of this case.

[49] In *Brant*, three expert witnesses gave valuations on shares in KeepRite. There was a wide discrepancy between their valuations: Campbell: $9 per share; Louden: $22 per share;

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and Wise: $28 per share. Anderson J.'s analysis immediately favoured Campbell's valuation because Campbell had the benefit of speaking with management of KeepRite at the time that the dissent occurred. The other appraisers prepared their valuations much later and without the benefit of speaking with management regarding the state of affairs of the company.

[50] Anderson J. then went on to note the differences between the valuations to determine the basis of the discrepancies. The two major discrepancies that accounted for most of the differences were the probable debt level, probable rate of interest to be paid and the capitalization rate. He then discussed which analysis he preferred within those two areas of discrepancy. For example, there was a discrepancy in probable interest rates between Campbell and Louden by roughly 3 per cent. Campbell expected a 13-14 per cent interest rate and Louden expected 11 per cent. Anderson J. found that Campbell's analysis was more realistic because interest rates at the time had been fluctuating and Louden's estimate was based on the expectation that they would level off. Anderson J. believed that there was still significant uncertainty in interest rates and accepted Campbell's number.

[51] This analysis favours the following method of completing a valuation:

1. Assess the experts themselves. Do the circumstances lead to one being more credible?
2. Find out why there are discrepancies between the valuations. Which inputs led to the greatest discrepancies?
3. Analyze and select the preferred inputs.

Anderson J. found that redoing the valuation is impractical. Thus, it may be that the valuation reached is the one that is closer to the valuation of the expert who had the most favourable inputs.

[52] The challenges for the court in determining fair value on Valuation Day were also articulated by the court in *Nixon v. Trace*, 2012 BCCA 48, 315 B.C.A.C. 261, in which the court referred to an earlier Court of Appeal for British Columbia decision, *Re Cyprus Anvil Mining Corp and Dickson* (1987), 33 D.L.R. (4th) 641 (B.C.C.A.), which states:

> ... the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or to a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock.
>
> The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to

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> exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. No apology need be offered for that. Parliament has decreed that fair value be determined by the courts and not by a formula that can be stated in the legislation.
>
> ...
>
> In summary, it is my opinion that no method of determining value which might provide guidance should be rejected. Each formula that might prove useful should be worked out, using evidence, mathematics, assessment, judgment or whatever is required. But when all that has been done, the judge is still left only with a mixture of raw material and processed material on which he must exercise his judgment to determine fair value. [At 652.]

[53] Both of these cases confirm that valuation is not an exact science, and it will be up to the court to determine how to weigh competing valuations. In *Brant*, Anderson J. ultimately assigned a share value of $13. He did not engage in an in-depth analysis of why he arrived at this exact value, but that he generally favoured Campbell's reasoning over the others. His only criticism of Campbell, thus why he went to $13 instead of accepting $9, was because he found that Campbell put too much emphasis on a temporary crisis experienced by KeepRite, thus driving Campbell's valuation down.

[54] At paragraph 130, Anderson J. described the method he used to arrive at the $13 valuation:

> The third [possible method] is to arrive at my own valuation upon my view of the evidence as a whole and without resort to any sophisticated method. Fully conscious of its frailties and the criticisms to which they will give rise, I have selected it as the least of the available evils.

This is in line with the reasoning in *Nixon* where the court found that valuation is an imperfect science and it is ultimately up to the trial judge who has a wide degree of discretion in choosing the appropriate method in order to reach a valuation.

[55] The court was presented with three different opinions of value of the Hotel as of Valuation Day prepared by experts qualified to give such opinions. Every valuation used either an income approach or combined income and market comparison approach. As referred to earlier in this judgment, Mr. Paul prepared his own valuation of the Hotel even though he is not a qualified appraiser. In my view, it was presumptuous of him to take that approach to providing the court with evidence required to determine a proper share valuation. His report was not helpful and the presentation of his "opinions" resulted in a considerable waste of court time, both in terms of direct and cross-examinations. While Mr. Paul is an experienced real estate broker who has considerable knowledge about the buying and selling of hotels, his views as an interested party are of no value to

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the court. The fact that he assigned the highest value to the Hotel was not surprising, given his interest in the outcome.

[56] Mr. Paul's presentation of a report had another unfortunate result. His own expert, Mr. Lansink, made reference to various aspects of Mr. Paul's "findings" in his technical report prepared to respond to the defendants' experts' reports to rebut their opinions. In doing so, it brought Mr. Lansink's objectivity into serious question.

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[57] With respect to the expert reports themselves, I will review each of them briefly in turn.

Lansink Report

[58] Mr. Lansink was asked by Mrs. Downs Paul on December 12, 2011 to provide a report regarding the value of the Hotel for the purposes of this litigation. Mr. Lansink has been a real estate appraiser and a member of the Appraisal Institute of Canada ("AAIC") since 1972, a designation which allows a person so qualified to appraise any kind of property. In that capacity, he has appraised all manner of property including airports, golf courses, hotels, motels, care facilities for seniors, cemeteries and numerous other kinds of properties in Ontario. His report concluded that the market value estimate of Valuation Day was $6,140,000 and a per room value of $51,167. Mr. Lansink attended at the property on December 20, 2011 for the purpose of inspecting it, the neighbourhood and the surrounding community. He also reviewed the Financial Statements for the period ending February 14, 2008, as well as the Statement of Income and Expense for the periods ending March 11, 2010 and April 8, 2010.

[59] Mr. Lansink's valuation took into account the desirable waterfront location of the historic hotel built by the Canadian National Railroad in 1911, the number of rooms, the amenities, as well as comparison with other competitors in the community.

[60] Mr. Lansink described the various methods that can be used to estimate the value of property as compared to other properties: the direct comparison approach; the income approach; and the cost approach. He did not use the cost approach as that approach is more appropriate for new construction. Thus, Mr. Lansink used the first two methods to come to his final valuation.

[61] When Mr. Lansink was cross-examined on the factors he considered in coming to his ultimate value, he disagreed that a hotel had to be valued in the manner recommended by the Sauder School of Business and insisted that hotels were valued in the same way as any property. Mr. Lansink's report did not make reference to many of the aspects of hotel operation that were considered by the other appraisers such as demand generators, travel forecasts, competition, market performance, supply and demand analysis, and occupancy projections. Mr. Lansink's valuation also did not utilize the Uniform System of Accounts used by the other experts to convert reported financial data into a system that could permit comparison among various hotel properties. While this does not mean that one could conclude that Mr. Lansink's approach to valuation was wrong, his approach made

it more difficult to compare and contrast the values assigned to the Hotel by the various appraisers.

[62] In arriving at his opinion that the Net Operating Income of the Hotel was $460,860, Mr. Lansink, unlike all the other experts, did not include a 3 per cent management fee nor a 4 per cent reserve for replacement of assets. It was his view that the amount set aside for repairs and replacement included replacement of assets. As well, the arrangement that the Pauls and Mr. Bahia entered into with BDC included the payment of a monthly amount in excess of $11,000 to be held by BDC and drawn against for the purpose of repairs and replacements created a reserve. Since this arrangement was already in place, Mr. Lansink determined that a further 4 per cent reserve was unnecessary.

[63] The other significant difference between the value placed on the Hotel by Mr. Lansink and the other experts was the capitalization rate of 7.5 per cent he applied. He arrived at this amount by comparing the capitalization rates for six hotels sold around the time of Valuation Day, that is from January to March 2008. In fact, the Canadian Hotel Transaction Report that was made an exhibit at trial reported 21 hotel transactions during the same period selected by Mr. Lansink for comparison with the Hotel. The average capitalization rate of all the 21 transactions was 10.20 per cent and the median rate 10.9 per cent.

[64] Even accepting that a number of the 21 transactions were not comparable to the Hotel, there were a number which had been properly used as comparables by the other appraisers and which I find Mr. Lansink should have included. Had he done so, the average or median capitalization rate would have been in the 10.2 per cent to 10.9 per cent range, in line with that of the other appraisers. Also, if he added a reserve for replacement of 1 per cent of gross sales as suggested by counsel for the defendants, Mr. Lansink's final value would have been between $4,225,000 and $3,953,700, also in line with the value of the Hotel set by the other appraisers.

[65] Before leaving the issue of Mr. Lansink's opinion that the amounts recorded in the Corporation's financial statements for repairs and maintenance was sufficient to cover the cost of asset replacement, this opinion is not supported by a review of the financial statements of the Hotel including the balance statements. In addition to the amounts expended for repairs and maintenance, there was an additional $617,845 spent from the time of the purchase of the Hotel to February 28, 2008 which is close to the 4 per cent reserve for Asset Replacement included by the other appraisers in their opinions of the value of the Hotel.

[66] Support for the inclusion of the 4 per cent reserve for asset replacement in an analysis of the ongoing annual expenses of a hotel is found in the Capex 2007 study of capital expenditures in the hotel industry. This is a document prepared for hoteliers by the International Society of Hospitality Consultants for the purpose of providing information regarding hotel expenditures for capital needs. In the introduction it is pointed out that what the data collection revealed in the study was that capital expenditures for a hotel generally increase with the age of the hotel. The Hotel was built in 1911 and I heard a

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significant amount of evidence from most of the witnesses about the condition of the Hotel and its physical plant needs.

[67] Counsel for the plaintiffs urged me to find that the monthly payment by the Hotel to BDC provided for in agreements to be held by BDC until drawn down by the Hotel on presentation of satisfactory invoices or estimates had the effect of creating such a reserve. With respect, I disagree. I find that the BDC account could be used for a much wider purpose including repairs and maintenance and was not set aside for asset replacement. I find, therefore, that a 4 per cent reserve for asset replacement should be included in determining the net operating income of the Hotel.

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HVS Report

[68] Monique Rosszell, a principal of HVS Consulting and Valuation in Toronto prepared a valuation at the request of Mr. Bahia. Unlike the other valuations, Ms. Rosszell was not made aware of the purpose for which the report was requested. By way of experience, Ms. Rosszell has impressive credentials. Besides having the AACI designation as did Mr. Lansink and Mr. Raymer, she is a member of the Royal Institute of Chartered Surveyors ("MRICS"), and has both a degree in hotel management from Ecole Hoteliere de Lausame, Switzerland, and practical experience in working in the hotel industry itself with three large hotel chains.

[69] Unlike Mr. Lansink, Ms. Rosszell did not inspect the Hotel during the preparation of her report. It was inspected by an associate, not an AACI accredited appraiser. Ms. Rosszell testified, however, that she had inspected the Hotel in 2011. Her report delivered on October 26, 2012, expressed the opinion that the retrospective market value of the Hotel as of March 19, 2008, based on the income capitalization approach was $4,200,000, equating to a $35,000 per room value, considerably below that of Mr. Lansink's appraisal which set a per room value of $51,167.

[70] She also expressed the view that based on a sales comparison approach, the value of the Hotel would be $3,200,000 to $6,400,000. Ms. Rosszell did not find that given the unique nature of the Hotel, subjective rather than objective adjustments would need to be made between the subject property and other properties, thus diminishing the reliability of the sale comparison approach. In any event, it was her opinion that the typical hotel investor does not approach a purchase from a sales comparison approach except to establish broad value parameters.

[71] Ms. Rosszell confirmed that her approach to hotel valuation was in accordance with the principles taught at the University of British Columbia Sauder School of Business, Real Estate Division where she studied and received her AACI designation. Accordingly, she converted the financial documentation she received into the uniform system of accounts used by hotels in which certain expenses are allocated to certain categories to be better able to evaluate the performance of a hotel in comparison to other hotels. As well, Ms.

Rosszell included a 3 per cent management fee and a 4 per cent reserve for asset replacement. To not include such a reserve would result in a loss of market share if the appearance of the rooms and other guest areas were neglected.

[72] Some of the factors which influenced Ms. Rosszell's valuation included a comparison of the Hotel's performance in relation to the competition in Thunder Bay, including the revenue per available room or RevPAR as it is referred to in the hotel industry. This is the average room rate multiplied by the occupancy of the available rooms on an annual basis. Using this calculation, the Hotel had the lowest RevPAR in 2006 and 2007 of comparable hotels. Other hotels in Thunder Bay had increased their number of rooms which ate into the Hotel's market share. While the Hotel entered into a contract for $300,000 at the end of 2007 with Canadian Pacific for rooms which would increase their projected room nights, it would reduce the average per room cost to $77.61 from $82.24 because the contract was for 300 rooms at $52.00 each night.

[73] Ms. Rosszell also commented on the dated nature of the Hotel including older beds and furniture which she found accounted for the fact that the Hotel was not doing as well as its competitors. She also reviewed the internal financial documents of the Hotel and compared them with the audited financial statements as opposed to the financial statements of the Corporation as the internal Hotel documents were more detailed. She was unaware, however, that Mr. Bahia had been receiving approximately $100,000 per year as management fees and reported that there were no management fees being paid.

[74] Ms. Rosszell was challenged at length on cross-examination, particularly in relation to her financial conclusions based on the financial statements and other documents. I find that some of the disparity in her financial analysis, particularly in relation to her insistence that a 4 per cent asset replacement reserve was required along with a 3 per cent management fee was based on a rate application of principles without factoring in the particular circumstances of the Hotel. Even though the Hotel was depositing over $11,000 per month with BDC for revenue for repairs, maintenance and replacement of items, and Mr. Bahia was receiving a management fee of almost $100,000 per year, these undisputed facts were not reflected in her report.

PKF Report

[75] Brian Stanford, a principal of PKF Consulting, and Stephen Raymer, also associated with PKF, testified with respect to the valuation of the Hotel completed by that firm on February 26, 2010, effective March 19, 2008, as well as a second valuation submitted the same day which valued the Hotel as of March 1, 2010. For reasons that were never made clear, the existence of these valuations were not made known until after the plaintiffs had brought a motion in 2011 to ask the court to appoint an appraiser pursuant to s. 85 (25) of the *OBCA*. I will have more to say about that provision of the *OBCA* later in this judgment.

[76] Mr. Stanford is not qualified as an appraiser by the AAIC but has been involved with many hotel valuations since 1983 when he joined PKF as an intern with a degree in

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tourism and hospitality from Ryerson. He attended at the Hotel, to assess the Hotel, some of its competitors as well as the community and factors that impact on the value of the Hotel.

[77] It was Mr. Stanford who also reviewed the financial statements of the Hotel and pointed out that the Hotel has 121 rooms, not 120 as one room is used for administrative purposes. Nevertheless, he said it should be described as a 121 room hotel as the additional room adds to the value of the property. Although in need of significant updating in terms of the room furnishing, bathrooms and elevators, it has the advantage of good space for meetings and a waterfront location near the casino.

[78] Like Ms. Rosszell, Mr. Stanford pointed out that the RevPAR of the Hotel was the lowest among the competition and had been for a number of years. Also, like Ms. Rosszell, he converted the financial information he reviewed into the uniform system of accounts for hotels. Unlike Ms. Rosszell, Mr. Stanford reduced the operating expense for administration by $99,000, the amount received by Mr. Bahia annually, but added a 3 per cent management fee as well as a 4 per cent reserve for asset replacement. Taking into account a number of factors including a review of economic factors impacting on the Thunder Bay economy, tourism statistics and projections, the age of the Hotel and the updating required, he determined that an 11 per cent capitalization was appropriate. Based on his calculations, this resulted in a value of the Hotel on Valuation Day of $4,100,000. A report of the same day but effective March 1, 2010, put the value of the Hotel at $3,600,000, a significant decrease in value in just under two years. From Mr. Bahia's perspective, the lower value in 2010 impacted negatively on his ability to get financing, the purpose for which that report was completed. In contrast, the higher value in 2008 impacted on what the Corporation would have to pay the Pauls for their 20 per cent minority interest. Counsel for the defendants pointed out that this was supportive of the neutrality of the PKF approach.

[79] Stephen Raymer who is qualified by AAIC signed the PKF appraisal after spending seven to eight hours reviewing the report. He agreed with the $4,100,000 value. He acknowledged that he had not inspected the Hotel as part of the appraisal and that he had relied on the observations and opinions of Mr. Stanford in relation to the physical plant. He did say, however, that because of family connections in Thunder Bay, he was very familiar with the Hotel.

[80] Mr. David Kubinec is a public accountant with BDO Canada, the accountants for the Hotel, and in that capacity his firm had audited the Hotel since 2006. Much of his evidence was related to reviewing the financial statements in Exhibit 17 and explaining the limited nature of the BDO report that accompanied Mr. Bahia's offer to purchase the Pauls' shares explaining the difference between repairs and maintenance expenses as opposed to capital expenditures, pointing out that repairs are not considered capital expenditures. The latter are capitalized and identified under plant and equipment on the balance sheet. There are also different tax consequences for repairs and maintenance as opposed to capital expenditures. Repairs and maintenance expenditures are operating

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expenditures and are direct deductions from revenue. Capital expenditures, on the other hand, are accrued and deducted (depreciated) over time.

[81] According to a review of the audited statement, the total capital investment in the Hotel since its acquisition, has been $795,000. Mr. Kubinec was confident that there were no capital expenditures reported as repairs and maintenance.

[82] On cross-examination, Mr. Kubinec acknowledged that the BDC reserve account was used over the years for both repairs and maintenance and capital expenditures. In addition, he acknowledged that he did not examine each and every invoice but rather reviewed a sample of expenditures in various categories, additions to or replacement of furniture and equipment to assess the appropriate category. In 2006, $43,943 was spent on furniture and equipment, $17,802 was spent in 2007 and in 2004 capital expenditures were $13,000.

[83] Mr. Kubinec was questioned at length about the entries in the financial statements regarding the accrual of interest by Mr. Bahia and the fact that the different treatment of the interest in regard to the Pauls was never confirmed with the Pauls. Mr. Kubinec relied on information he received from Mr. Bahia and the management staff at the Hotel.

Analysis of the Different Approaches to Valuation

[84] The key differences in the case before me between valuations are: the capitalization rate, the inclusion of a management fee, the inclusion of a reserve for asset replacement, the treatment of the accrued interest and the time at which the valuations were carried out.

[85] The Lansink valuation uses a capitalization rate of 7.5 per cent. Counsel for the defendants argued that the median capitalization rate used by Lansink was incorrect and that it should have been 9.6 per cent based on counsel's statistical calculations. A capitalization rate of 7.5 per cent results in a final value of $6,144,804 while a capitalization rate of 9.6 per cent results in a final value of $4,800,625, with all other factors being equal, using Lansink's numbers.

[86] Counsel for the defendants went on to assert that the report used by Lansink actually shows a median capitalization rate of 10.9 per cent, which is in the 10-11 per cent range used by PKF. This would result in a final value of $4,228,073 as opposed to the $6,144,804. This appears to be the largest source of discrepancy between the valuations and brings Lansink's valuation closer to that of PKF and HVS. Any further discrepancy can be explained by the inclusion of the management fee and reserve. Of further note, PKF's valuation was done much closer to the date in question, giving it additional weight following the reasoning in *Brant*.

[87] Overall, the greatest discrepancy in the various values of the Hotel on an income basis is in the capitalization rate used. Mr. Lansink applied a rate that I find was not supported in his report, as he did not consider a number of hotels in the comparison that should have been included. Using the correct median capitalization rate, the value of the Hotel comes

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within the range of the other valuations. Incorporating a management fee and reserve would bring the valuation between $4,100,000 and $4,200,000 as suggested by the PKF report and the HVS report. I find that $4,100,000 is the value of the hotel to be used in assigning a share value. While I am aware that the second PKF valuation as of March 2010 reduced the value by approximately $500,000, the law is clear that I must use the Valuation Day value for calculating the fair value of the shares.

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[88] The defendants called as an expert Donna Marie Bain Smith, a chartered business valuator, to provide a report and an opinion as to the *en bloc* share value of the Corporation which she found to be between $1,226,000 and $1,256,000 using the PKF value of the Hotel of $4,100,000. In her first report she used that value to create an asset valuation and arrived at this value by taking the fair market value of the hotel and subtracting the net book value, tax shield forgone, and future income taxes.

[89] Ms. Bain Smith provided a second report on January 29, 2013, based on the HVS valuation of $4,200,000. Using the same approach as in her first report, she found the *en bloc* share value to be between $1,326,000 and $1,356,000. It was Ms. Bain Smith's evidence on cross-examination that while she had done an asset based evaluation, she agreed that she could have approached her evaluation from an earnings based approach which would not take into account the tax shield foregone.

[90] The "asset-based approach" is an accepted approach to determining fair market value (*Faulkner v. Faulkner*, [1997] A.J. No. 730; *Calmont Leasing Ltd. v. Kredle* (1996), 38 Alta. L.R. (3d) 296). However, the method suggested by the plaintiff, the income/investment method, has more support in the case law (*Domglas Inc. v. Jarislowsky* (1980), 13 B.L.R. 135 at paras. 373-374). In *Manning v. Harris Steel Group Inc.* (1986), 7 B.C.L.R. (2d) 69 (Sup. Ct.), Justice Proudfoot found:

> This value (the income/investment method) seems the method most often used. I refer again to the cases of Cyprus Anvil Mining Corporation v. Dickson et al. (1983), 40 B.C.L.R. 180, Diligenti v. RWMD Operations Kelowna Ltd. (1978), 4 B.C.L.R. 134 as well as Les Investissements Mont-Soleil Inc. v. National Drug Limited (1983), 22 B.L.R. 139. The reason for this method most often being used no doubt being that one is in business to earn income, it must follow that the value of a business must depend upon the capacity to generate income. Greenberg, J., in Domglas stated: "The basic concept currently accepted by valuation theorists is that as business is worth only what it can earn except where it is worthless on an earning basis than the amount that would be realized if it were liquidated". It then seems to become necessary to look at the situation on the basis of the value of a going concern.

[91] Proudfoot J. went on to state that the capitalization of earnings approach is most appropriate to determine the fair market value of shares. Generally, the income based approach is used where a business is of "going concern", and the asset based approach is

used for businesses that are being liquidated. However, the Alberta Court of Appeal rejected the notion that a trial judge is bound by one valuation method in *Pocklington Foods Inc. v. Alberta (Provincial Treasurer),* 2000 ABCA 8, 75 Alta. L.R. (3d) 263:

> Because share valuation involves primarily the judgment and discretion of a trial judge based on the facts of the case, a lower court's valuation approach should not be interfered with on appeal unless that technique displays a "manifest error": see Domglas Inc. v. Jarislowsky, Fraser & Co. Ltd. et al. (1982), 138 D.L.R. (3d) 521 at 523 (Que. C.A.); see also Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114 at 121.
>
> At trial, the learned trial judge heard expert evidence from both parties on the compelling approaches available in the valuation of the shares. Each party advocated that a particular method be employed by the trial judge. However, after considering the evidence and determining that there were difficulties in the approaches advanced by each party, the trial judge selected a combination approach as the most appropriate method of valuation in the circumstances.

[92] The average *en bloc* share value using the asset-based approach at a hotel value of $4,100,000 is $1,240,500. Using the investment approach, the value is higher depending on which Hotel valuation is selected. As indicated above, a value of $4,100,000 to $4,200,000 is supported by the evidence. Since the investment approach is recommended in the case law, I find that this is the approach I should use.

Minority Discount

[93] Generally, a minority discount is applied to shares that are being sold because a willing buyer would be willing to pay less for a minority share than for a majority share due to the lack of control that comes with that share. While the application of a minority discount is an accepted practice at the discretion of the court and has been applied in some cases, I find that the circumstances of this case do not lend themselves to assigning a minority discount, in accordance with the reasoning in *Diligenti v. RWMD Operations Kelowna Ltd.* (1977), 4 B.C.L.R. 134, at para. 81:

> In the first place, while it is true that in the process of the initial step--determination of the *value of the business* as a going concern--one must look at what a willing purchaser would be prepared to pay a willing vendor for that business on the open market, in the second step --determination of the actual *price for the shares*, the situation here is quite different from that of a minority shareholder offering his shares on the open market. In such a situation, which is the approach taken in the revenue cases, including *Levitt*, supra, the purchaser would end up as a new minority shareholder, subject to all the disadvantages of the position of the original shareholder: obviously a minority discount

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> would be applicable. But here, where the purchase will be by virtue of an order that existing shareholders, or the company, make the purchase, the result will be that existing shareholders will simply consolidate their positions. They do not become minority shareholders as a result of the purchase --they are already, as individuals, minority shareholders; in this case they become holders of one-third of the shares instead of one-quarter. Their position in relation to each other is not changed. On the basis of the facts I consider that the arguments as to the application of a minority discount do not apply to these circumstances.

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Value of the Shares

[94] Accepting the approach articulated by Anderson J. in *Brant* set out earlier in this judgment, that is to arrive upon my own valuation based on my view of the evidence as a whole and without resort to any sophisticated method, I fix the *en bloc* value of the shares at $1,700,000 or $17,000 per share. I came to this value by accepting the value of the Hotel at $4,100,000, deducting the mortgage, allowing the accrued interest of Mr. Bahia and the management fees that were paid to him and approved by the shareholders and also acknowledging the $700,000 required for much needed upgrades to the hotel identified by both the PKF and the HVS reports. Each of the Pauls will receive $170,000 plus $50,000 as repayment of their shareholder loan. The shareholder loans are to be paid out forthwith with the value of the shares to be paid out within 90 days in three equal payments, along with the interest provided for later in this decision. I remain seized of any issues arising from this schedule.

Section 185(25) Court Appointed Appraisers

[95] Counsel for the plaintiffs submitted that more use should be made of this section by courts. I agree, particularly because the role of experts in relation to the court is being clarified to emphasise their obligation to be of assistance to the court rather than to the party who hired them. The appropriate time, however, to make such a request is early in a proceeding before one or more of the parties has obtained an appraisal of their own. Sorting through a number of different appraisals prepared by various experts is much less efficient and more costly for the parties involved than having one appraiser who would work under the direction of the court.

ISSUE 2: OPPRESSION REMEDY

Introduction

[96] It is clear that an action in oppression can be brought concurrently with an action involving dissenting shareholder rights, as Anderson J. held in *Brant* at paras. 40-41:

> Notwithstanding the anomaly to which I have referred I think it would be wrong to hold that a remedy under s. 234 was closed when the

> right to dissent under s. 184 was exercised. The variety of circumstances which might give rise to a remedy under s. 234, and the wide range of such remedies, would render such a decision unwise, even if the Act could be construed to give alternative remedies only. It may be that in a proper case, and upon interlocutory motion at some stage of the proceedings, a court might find it just and convenient to order a stay of one proceeding or the other, but that is a problem for another day and another case.
>
> It was open to the dissenting shareholders to bring the oppression action, which has failed on the merits.

[97] Like shareholder dissent rights, the oppression remedy is codified in the *OBCA* and the *Canada Business Corporations Act*.

> *Business Corporations Act* (Ontario)
>
> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).
>
> (2) Where, upon 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 or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be 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 of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248 (2).
>
> *Canada Business Corporations Act*
>
> 241. (1) A complainant may apply to a 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

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> (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.

As with the dissent and appraisal rights, the federal and provincial legislation are almost identical.

[98] In *Bank Leu AG v. Gaming Lottery Corp.* (2003), 231 D.L.R. (4th) 251 (Ont. C.A.), Weiler J.A. explained the oppression remedy as follows:

> The oppression remedy is designed to afford a remedy when a corporation acts in an oppressive, unfair or prejudicial manner towards a minority shareholder or creditor or in a manner that unfairly disregards their interests. Important underpinnings of the oppression remedy are the expectations, intentions and understandings of the minority shareholder and creditor. Against these are to be balanced the extent to which the acts complained of were unforeseeable or the extent to which the creditor and minority shareholder could reasonably have protected itself from the acts about which complaint is now made: *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div. [Commercial List]) aff'd (1998), 162 D.L.R. (4th) 367 (Ont. C.A.).

[99] In *Abraham and Inter Wide Investments Ltd. et al* (1985), 51 O.R. (2d) 460 (H.C.), Griffiths J. held that for conduct to amount to oppression, it "must have been 'burdensome, harsh and wrongful' under which the shareholder is in effect coerced to submit to something unfair" (para. 28).

[100] In *Toole v. Acres Inc.* (2007), 30 B.L.R. (4th) 133, Cummings J. explained how the reasonable expectations of the parties works into the oppression analysis, and how courts are to assess the oppressive conduct within the context of the business-judgment rule:

> The statutory oppression remedy provided by s. 241 of the *CBCA* serves to protect the reasonable expectations of the parties created as "part of the compact of the shareholders." *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.).

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> The existence of reasonable expectations is a question of fact, to be determined on an objective basis The questioned conduct of the corporation is to be assessed within the context of the so-called business-judgment rule', which recognizes the proper role of the board of directors in guiding the corporate entity as its directing mind. The court is not to second-guess the management of the corporation and must defer to the decision-making of the directors so long as such decision-making falls within the ambit of normative corporate decision-making in furtherance of the best interests of the corporation.

[101] The Supreme Court of Canada provided guidance on applying the oppression remedy under the *CBCA* in *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69, [2008] 3 S.C.R. 560:

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

[102] The court went on to discuss "unfair prejudice", which has application in this case:

> **93** The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "[U]nfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include **squeezing out a minority shareholder**, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83. **[Emphasis added.]**

[103] Markus Koehnen in *Oppression and Related Remedies* (Toronto: Carswell, 2004), which is frequently cited by the courts, provides some guidance on what constitutes oppression at 79-84:

> **Oppression** is conduct that is coercive or abusive. It has also been described as conduct that is burdensome, harsh and wrongful, or an abuse of power that results in an impairment of confidence in the probity with which the company's affairs are being conducted

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Unfair prejudice has been found to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Examples of unfair prejudice from corporate cases include

- squeezing out a minority shareholder because of a personal desire to exclude her;
- failing to disclose related party transactions in financial statements;
- amalgamating two corporations and thereby transferring the minority's interest from a corporation with a very low debt equity ratio to a very high debt equity ratio;
- paying management fees to certain shareholders to the exclusion of others;
- paying dividends without formal declaration.

Unfair disregard means to ignore or treat the interests of the complainant as being of no importance. Examples include

- failing to prosecute the claims of a corporation diligently where one of the directors benefited from the improper prosecution;
- educing a shareholder's dividend by setting off the value of other benefits against it when this had not been done in the past;
- failing to deliver property that belonged to the complainant.

[104] Finally, Greer J. offered *indicia* of oppression in *Millar v. McNally,* [1991] 3 B.L.R. (2d) 102 (Ont. Gen. Div.):

(i) lack of a valid corporate purpose for the transaction;

(ii) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm's length transaction;

(iii) lack of good faith on the part of the directors of the corporation;

(iv) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or to the detriment of the minority shareholder;

(v) lack of adequate and appropriate disclosure of material information to the minority shareholders; and

(vi) a plan or design to eliminate the minority shareholder.

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The first of the *indicia* highlighted by Greer J. are the lack of a solid business rationale for the action taken by the majority shareholder and the fact that bad faith is not required to find oppression.

[105] Counsel for the plaintiffs asserted that Mr. Bahia had acted in an oppressive manner towards the Pauls:

1. Mrs. Downs Paul was removed as director of the Corporation;
2. Crediting interest on his shareholders' loan in spite of the agreement all the shareholders entered into with BDC;
3. Paying himself excessive management fees; and
4. The company adopted a resolution involving the issuance of scrip shares, which was oppressive to the plaintiffs and was not done for a valid business purpose.

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1. The Plaintiff Mrs. Downs Paul Was Removed as a Director

[106] The plaintiffs assert that the removal of Mrs. Downs Paul as a director in June 2001 amounted to oppressive conduct. The defendants assert the purpose of the removal was so that Mr. Bahia could "move the company forward". The plaintiffs argued that the election of more directors would have resolved these concerns.

[107] I find that this was a business judgment rather than oppressive conduct. Mrs. Paul had been removed as a "manager" for reasons that I accept from the evidence of Mr. Bahia. The evidence of the Pauls did not convince me otherwise. It is trite law that the courts should not interfere with business decisions in these types of cases. With the lack of evidence to the contrary, I find this was not oppression conduct. The fact that Mrs. Downs Paul was emotionally distraught because of her removal does not make it oppressive conduct. The suggestion by the plaintiffs that the election of more directors would have resolved these concerns simply adds weight to the argument that this was a business decision, as the ideal size of the board of directors is a debateable issue.

2. The Paying/Accruing of Interest

[108] The BDC Corporation agreements entered into with the Corporation and the shareholders does not permit payments to be made to any shareholders while the Corporation remains indebted to BDC. This position was made clear in the BDC Letter Agreement that provided that interest shall not be paid on the loans:

> SECURITY
>
> 5. Assignment of shareholder loan totalling $1,400,000. Interest may not be paid.

The plaintiffs argued that Mr. Bahia fixed interest on the loan at 10 per cent or 12 per cent accruing his interest as a liability, thereby artificially reducing the equity/share value of the Corporation by $130,000 or more annually in violation of the agreement.

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[109] The defendants argued that the plan to pay interest to the Pauls and to accrue Mr. Bahia's interest was approved at a Shareholders Meeting on July 29, 2002, by unanimous resolution which provided:

> INTEREST PAYMENTS
>
> By unanimous resolution, retroactive interest payments for the respective investment of each shareholder will be paid to each shareholder once the requirements of the Business Development Bank of Canada are satisfied.

[110] In addition, the plaintiffs accepted the interest payments every year it was paid including 2012 and never complained. All shareholders were paid or entitled to an identical rate of interest, that interest rate fluctuated depending on the Hotel profitability, with interest not being paid in a number of years.

[111] Considering the test for oppression, including the reasonable expectations of the parties, it is difficult to find that there was oppression with respect to the treatment of interest on the shareholder loans. The problem with the plaintiffs' position is that they accepted interest payments without complaint, suggesting that their reasonable expectation was met. Furthermore, there is no indication that the payment of interest was "unfair, oppressive, or prejudicial" to the minority shareholders. The interest rate was the same for all shareholders, and there was a benefit to the shareholders to receive these payments, with the corresponding cost of share value dilution.

[112] I find that since the plaintiffs accepted their interest payments and did not complain about these payments or refuse them, the accrual of interest by Mr. Bahia does not equate to oppressive conduct. If the plaintiffs had taken exception to the payments and refused them, they might have been able to argue that these payments did not meet their reasonable expectations with regards to the corresponding share value dilution.

3. The Majority Shareholder Paid Himself Management Fees

[113] The plaintiffs alleged that the defendant paid himself high management fees, including during periods when he was not on the property. They allege that his position was one of oversight, not management and that he was thus not entitled to these fees.

[114] The defendants argued that, again, there was no compelling evidence as to the expectations of the Pauls with respect to the need for oversight of the Hotel. Mr. Bahia testified that he was actively involved in the management of the Hotel. There was no evidentiary basis for the views of the Pauls that Mr. Bahia was not involved in active management and that Mr. Bahia was overpaid. He put in $90,000 for emergency repairs. Although it was paid back, without his involvement the value of the Hotel would not have increased. The defendants also pointed out that if the plaintiffs had objected to this practice, they could have complained about it earlier and resolved the issue. As it was, the

payments were approved at shareholder meetings. Mrs. Downs Paul also wrote herself a cheque for $10,000 to compensate herself for her management duties for the brief period during which she was in an oversight management role. Thus, the plaintiffs cannot reasonably dispute the management fees that Mr. Bahia paid to himself on the basis that the payment of such a fee did not accord with their reasonable expectations.

[115] In *Runnalls v. Regent Holdings Ltd.*, 2010 BCSC 1106, 72 B.L.R. (4th) 297, Smith J. was faced with a similar claim:

> **63** In giving examples of unfairly prejudicial conduct, the Supreme Court of Canada in BCE Inc. included "preferring some shareholders with management fees and paying directors' fees higher than the industry norm". In this case, there is no doubt that Mr. Ewachniuk has performed a management role and the minority shareholders have not. As for the value of those services, I am not persuaded that the fees charged by a commercial property manager, who has no equity in the business and may be working for a number of clients, is a valid comparison or that it constitutes evidence of an "industry norm".
>
> **64** A proper comparison would be to the income derived by the owner/operator of a business with similar asset value, income, and cash flow. No such evidence is before me and I suspect it is an area in which it would be very difficult to identify any kind of "industry norm". In the circumstances, I am unable to say that the management and directors' fees, other than the single payment conceded to be improper, are so unreasonable as to be oppressive. The petitioners are therefore entitled to an increase in Regent's value in the amount of $540,000.

[116] The circumstances here are similar. I find that Mr. Bahia did take an active part in management. The plaintiffs cannot complain that this was oppressive conduct. There was little evidence to support the plaintiffs' position that his pay was excessive for the work that he did. I find Mr. Bahia did, in fact, carry on the duties outlined he described. I find the evidence does not establish that his taking of management fees constituted oppression.

4. The Corporation adopted a resolution involving the issuance of scrip shares

[117] Section 57(1) of the *OBCA* provides the following:

> Under section 57(1) of the OBCA, a corporation may issue a certificate for a fractional share or scrip certificate that entitle the holder to receive a certificate for a full share by exchanging scrip certificates aggregating a full share. Subsection 57(2) permits the directors of the corporation to attach conditions to the scrip certificates, including a condition that the certificates become void if

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> not exchanged for a full share before a specified date. A holder of a scrip certificate is not entitled to exercise voting rights or to receive dividend.

The Pauls alleged that the resolution regarding the issuance of scrip certificates was done to squeeze them out as minority shareholders without any compensation and was not done for any legitimate business purpose. As well, they alleged that the plan to squeeze them out began by letter dated December 8, 2006, wherein the Mr. Bahia demanded that they provide further funds to renovate the Hotel. The plaintiffs were asked to provide $417,600 while Mr. Bahia would provide $282,400. The difference in the amounts, according to Mr. Bahia, was to attempt to bring the amount of the plaintiffs' investment more in line with the number of shares they had in relation to the number of shares held by Mr. Bahia in relation to his proportionately greater investment.

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[118] The Pauls refused the request. Mr. Bahia then called a special meeting of shareholders at which there would be a resolution, the result of which would be that articles of incorporation would be amended to reduce common shares on a 40 to 1 basis. This would leave Mr. Bahia with two common shares and the plaintiffs with ¼ of one common share each.

[119] The plaintiffs were to be issued scrip certificates for their fractional shares. The scrip certificates entitled them to a certificate for a full common share by exchanging scrip certificates aggregating a full common share by December 31, 2007; thereafter, the scrip certificates would be void. Since the scrip certificates aggregated ½ of 1 common share, the plaintiffs' interest in the Corporation would be lost entirely without any compensation.

[120] The defendants' position rested on essentially two points:

1. The minority shareholders owned 20% of the shares of the Corporation but had invested only 7.4% of the total amount loaned to the company;
2. The hotel badly needed renovations, and there was no other reasonable source of funding;

and thus, there was a valid business reason for the proposed resolution.

[121] It is clear that the parties had never turned their minds to what would happen if additional funding was required. Both Mr. Bahia and Mr. Paul agreed that costly renovations were necessary to allow the Hotel to compete in the market. Mr. Bahia also said that the demand for additional funding was to increase the plaintiffs' investment so as to be more proportionate with their ownership and with the amount that Mr. Bahia had invested.

[122] Counsel for the defendants argued that Mr. Bahia's intention at all times was to employ a lawful procedure to have the minority shareholders' interest bought out at fair market value. Although the parties were discussing the purchase of shares for fair market value,

they could not agree on a price. As a result, Mr. Bahia then began proceedings under the *OBCA* to amend the articles of incorporation and issue the scrip certificates.

[123] The scheme has been explained under the identical *CBCA* section in *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 710,

> 35 Clearly, there is nothing unlawful about the acquisition by a corporation of fractional shares. In fact, s. 49 reinforces the discretion that directors are given in dealing with fractional share interests, and supports the proposition that fractional shares may be acquired without a shareholder's consent. That section permits a corporation to issue scrip certificates representing fractional shares, which can be exchanged for a full share (s. 49(15)). The directors may attach conditions that "the scrip certificates become void if not exchanged for a share certificate representing a full share before a specified date" (s. 49(16)). While this specific mechanism was not used in LSI Canada's going private transaction, it is nevertheless instructive. If a corporation is permitted to issue scrip certificates with conditions that will terminate a shareholder's interest, how can it be unlawful for a corporation to acquire fractional shares without the consent of the shareholder. LSI Canada's cancellation of fractional share interests does in one step what s. 49 expressly permits a corporation to do in two.

[124] It is clear that as between the shareholders there was a stalemate that was negatively affecting the viability of the business of the Corporation. Additional funds were needed. The issue becomes the process that the defendants undertook to break the stalemate. Mr. Bahia employed a lawful procedure available under the *OBCA*. At the same time, the manner in which he exercised it rendered the shares of the Pauls worthless. They could not exchange the fractional share scrip certificates for a full share.

[125] While a lawful process was followed, it is not clear how such proposed resolution was in the best interests of the Corporation or that Mr. Bahia acted appropriately when he offered to purchase the Pauls' shares at a price he acknowledged he would not have accepted for his shares. The BDO "valuation" which was attached to the offer was replete with disclaimers that made the opinion of value meaningless. I find that the real purpose of the resolution was to squeeze out the Pauls, the minority shareholders, an action that was considered by the Supreme Court of Canada in *B.C.E. Inc.* to be oppressive conduct.

[126] Having found this act was oppressive, I have to consider what, if any, remedy is appropriate. On the facts of this case, it is my view that damages are minimal as the Pauls exercised their rights pursuant to s. 185 of the *OBCA* and are being paid out a court-determined value of their shares. The proposed resolution ultimately brought about an end that both parties sought, even though the parties could not agree on the value of the shares resulting in this lawsuit.

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[127] Having found it to be oppressive conduct, I must consider an appropriate remedy. In all the circumstances of this case, I find that the damages for the oppression will be $45,000 which the Pauls have already received in interest.

ISSUE 3: PRE-JUDGMENT INTEREST

[128] The Pauls are entitled to pre-judgment interest on the value of their shares from Valuation Day, March 18, 2008, until that amount is paid in accordance with this judgment with the appropriate rate of interest being calculated in accordance with the Bank of Canada rate as of March 18, 2008, and being adjusted annually on March 18 in each successive year until paid. Since the remedy for oppression was a reduction in a cost award that has been outstanding since 2011, there is no pre-judgment interest payable on that amount.

COSTS

[129] If the parties are unable to agree on costs, I will receive written submissions no longer than 10 pages in length on costs pursuant to s. 185 (15) and/or costs pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, within 30 days sent to my attention through the trial coordinator.

SUMMARY OF CONCLUSION

[130] The following order shall issue:

1) The shareholder loans of the plaintiffs shall be paid out forthwith less $10,000 owing to the defendants in costs;

2) The value of the plaintiffs' shares is fixed at $17,000 each for a total of $340,000, plus pre-judgment interest calculated as set out in this judgment;

3) The damages for oppression is fixed in the amount of $45,000 which the Pauls have already received in interest;

4) Costs to be determined in accordance with paragraph 129 of this decision;

5) I remain seized in the event that there are issues arising from this decision.

Original signed by "*Mary Jo M. Nolan*"
Mary Jo M. Nolan
Justice

Released: December 13, 2013

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CITATION: Paul v. 1433295 Ontario Limited, 2013 ONSC 7002
COURT FILE NO.: CV-08-15586CM
DATE: 20131213

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Doreen G. Downs Paul and Russell G. V. Paul

Plaintiffs

– and –

1433295 Ontario Limited and Parmjit Singh Bahia

Defendants

REASONS FOR JUDGMENT

Nolan J.

Released: December 13, 2013