NOVA SCOTIA COURT OF APPEAL
Citation: *D'Aubin v. MacDonald*, 2021 NSCA 55

Date: 20210709
Docket: CA 498845
Registry: Halifax

Between:

Ralph D'Aubin, Jennifer D'Aubin,
D'Aubin Family Meats Incorporated, a body corporate

Appellants

v.

Stephen MacDonald

Respondent

Judge:	The Honourable Justice David P. S. Farrar
Appeal Heard:	April 14, 2021, in Halifax, Nova Scotia
Subject:	Section 5, Third Schedule, of the *Companies Act*, R.S.N.S. 1989, c. 81, oppression and oppression remedies;
Summary:	The individual appellants and respondent are shareholders in D'Aubin Family Meats Incorporated. The shareholders' relationship was governed by the contents of three agreements. Pursuant to the agreements, Mr. MacDonald was to receive full access at all reasonable times to the accounting records of D'Aubin Meats. The motions judge found Mr. MacDonald had not been provided with accounting records in keeping with the agreements and this amounted to oppression of Mr. MacDonald's rights and interests in D'Aubin Meats. The motions judge ordered audited financial statements be prepared with Mr. MacDonald being responsible to pay fifty percent of the cost of preparation of the statements. He also ordered D'Aubin Meats, within 30 days of the completion of the audited financial statements, to retain the services of an arm's length business valuator, at its expense, to provide a report on the value of its shares for the purposes of buying out

Mr. MacDonald's shares in accordance with the agreements between the parties.

Issues:

(1) Did the application judge err in finding that the failure to provide proper financial records constituted oppression? (Appeal)

(2) If the conduct was oppressive did the application judge err in his determination of the appropriate remedy? (Appeal)

(3) Did the application judge err in requiring Mr. MacDonald to pay fifty percent of the costs of the audited financial statements? (Cross-appeal)

Result:

The appeal is allowed in part. The application judge did not err in finding the lack of financial information amounted to oppressive conduct. He also did not err in ordering that audited financial statements be prepared. However, he erred in ordering a business valuator be appointed to value the shares of D'Aubin Meats after the audited financial statements had been prepared. It was premature to determine that the parties would be unable to come to some agreement on the share value once appropriate financial records were obtained.

The cross-appeal was dismissed. In ordering Mr. MacDonald to pay fifty percent of costs of the audited financial statements the application judge was exercising his discretion in striking a balance between the parties. In so doing, he did not err.

As success was divided on the appeal, no costs were awarded to any party.

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D'Aubin Family Meats Incorporated, a body corporate

Appellants

v.

Stephen MacDonald

Respondent

Judges:	Wood, C.J.N.S., Farrar and Bourgeois, JJ.A.
Appeal Heard:	April 14, 2021, in Halifax, Nova Scotia
Held:	Appeal allowed in part, cross-appeal dismissed, with no costs, per reasons for judgment of Farrar, J.A.; Wood, C.J.N.S. and Bourgeois, J.A. concurring
Counsel:	John O'Neill, for the appellants Jonathan Cumming, for the respondent

Reasons for judgment:

Overview

[1] This appeal arises from the respondent Stephen MacDonald's application for an oppression remedy pursuant to s. 5, Third Schedule, of the *Companies Act*, R.S.N.S. 1989, c. 81 (the *Act*). He claimed the appellants, Ralph and Jennifer D'Aubin, and D'Aubin Family Meats Incorporated (D'Aubin Meats)[1], unfairly prejudiced and disregarded his rights and interests in D'Aubin Meats.

[2] In a decision dated December 20, 2019 (2019 NSSC 389), Justice Timothy Gabriel found Mr. MacDonald had been oppressed and ordered, as relief, audited financial statements be prepared for D'Aubin Meats. He required Mr. MacDonald to pay fifty-percent of the cost of preparing the statements. He also ordered D'Aubin Meats, within 30 days of the completion of the audited financial statements, to retain the services of an arm's length business valuator, at its expense, to provide a report on the value of its shares.

[3] The D'Aubins argue the application judge erred in granting Mr. MacDonald any relief or, alternatively, the relief which was granted went beyond what was necessary to address the oppressing conduct.

[4] Mr. MacDonald cross-appeals, arguing the application judge's requirement that he pay fifty-percent of the cost of the audited financial statements was an error.

[5] For the reasons that follow, I would allow the appeal in part and set aside the application judge's order that a business valuator be appointed to value the shares of D'Aubin Meats. I would not interfere with his conclusion that audited financial statements should be prepared to address the oppression.

[6] I would dismiss the cross-appeal.

[7] As success on the appeal and cross-appeal was divided, I would not award costs to any party.

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[1] I will sometimes refer to Ralph and Jennifer D'Aubin and D'Aubin Meats, collectively, as the D'Aubins.

Background

[8] D'Aubin Meats has been carrying on business in the Bridgetown area of the Annapolis Valley since 2014. Ralph D'Aubin and Jennifer D'Aubin are spouses and each own 35 shares of D'Aubin Meats. Stephen MacDonald owns 30 shares.

[9] D'Aubin Meats is a traditional butcher shop run by the D'Aubins on a day to day basis. It purchases whole animals from local farms, then processes and sells them. It also sells baked goods, farm, dairy and other items. The shareholders' relationship was to be governed by the contents of three agreements, all of which were dated September 12, 2013.[2]

[10] As the application judge did, I will refer to the three agreements as the Shareholders Agreement, the Supplementary Shareholders Agreement and the Loan Agreement.

[11] The Shareholders Agreement contained the following clause:

> 13. Notwithstanding any provisions in the Articles of Incorporation or bylaws to the contrary, each shareholder shall have full access at all reasonable times to the accounting records of the Company either personally or by an agent. (emphasis added)

[12] The Supplementary Shareholders Agreement provided:

> 5. Stephen agrees to sell his shares equally to Ralph and Jennifer five years from the date of this agreement (or such later date as may be required to meet the conditions set out in this paragraph) provided (1) Steven's loan to the Company is paid in full (2) all dividends contemplated by this agreement are paid.
>
> The price per share will be the amount agreed by the parties to be the market value of each share, or failing agreement, the amount determined by the Company's accountant to be the market value of each share. (emphasis added)
>
> 6. All parties shall have full access at all reasonable times to the accounting records of the Company themselves or by an agent.
>
> 7. Ralph and Jennifer agreed to meet with Stephen monthly to consider all aspects of the Company's business operations.
>
> 8. The parties agree to cause the company to maintain key person insurance on the life of Ralph in an amount at least equal to the total liabilities of the Company.

[2] Although it appears they were not executed until sometime after the end of October, 2013 nothing turns on this discrepancy.

[13] The Loan Agreement included the following:

> 3. D'Aubin further agrees that MacDonald shall have full access at all reasonable times [to] the accounting records of D'Aubin himself or by an agent.
>
> 4. D'Aubin agrees to make its officers, Ralph D'Aubin and Jennifer D'Aubin, available to meet with MacDonald monthly to consider all aspects of the Company's business operations.
>
> ...
>
> 7. D'Aubin agrees to consult MacDonald respecting any business opportunity that may affect the Company's future profitability and any intended capital purchases, borrowings and entering into obligations extending beyond sixty days.

[14] The application judge noted the relations between the parties started to deteriorate in or around late 2015 and identified Mr. MacDonald's two major concerns as: 1) the D'Aubins were not adhering to their contractual agreement to hold proper monthly shareholder meetings; and 2) his requests for disclosure of the company's records were ignored or the records provided were "wholly incomplete" to allow him to know the true financial position of the company (¶ 11 and 12).

[15] Mr. MacDonald also identified other matters of concern. The application judge addressed each of the other concerns raised by Mr. MacDonald and found they did not amount to oppression. Those concerns are not in issue on this appeal.

[16] The application judge also found the failure to hold monthly shareholder meetings in accordance with the agreements between the parties and the expectations of Mr. MacDonald did not result in him being subjected to unfair treatment, nor did he sustain any loss or harm by their absence (¶ 53). However, he was satisfied the failure to maintain adequate financial records amounted to unfair treatment, and granted the relief as previously set out.

Issues

[17] The appellants raise eight grounds of appeal in their factum. In the cross-appeal, Mr. MacDonald raises one issue. In my view, the matters to be determined can be summarized and restated as follows:

1) Did the application judge err in finding the failure to provide proper financial records constituted oppression? (Appeal)

2) If the conduct was oppressive, did the application judge err in his determination of the appropriate remedy? (Appeal)

3) If ordering the provision of audited financial statements was an appropriate remedy, did the application judge err in requiring Mr. MacDonald to pay fifty-percent of the cost of those statements? (Cross-appeal)

Standard of Review

Issue 1

[18] Both parties argue that the application judge's decision should be reviewed on a "palpable and overriding error standard".

[19] I disagree. Whether the D'Aubins' conduct amounted to oppression requires the identification of the correct legal test and its application to the facts. These are both questions of law to be reviewed on a correctness standard (*National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47, ¶ 151). In this case, neither party takes issue with the application judge's identification of the proper test for oppression, rather they say he improperly applied it. It is only if the application judge identified and applied the appropriate test correctly that his conclusions would be entitled to deference.

Issues 2 and 3

[20] The *Act* gives a court broad discretion to "make any interim or final order it thinks fit", making it subject to a deferential standard of review. However, that discretion is not limitless. It should go no further than necessary to correct the injustice or unfairness between the parties. In *Wilson v. Alharayeri*, 2017 SCC 39[3], the Court held:

> 26 Section 241(3) thus gives a trial court broad discretion to "make any interim or final order it thinks fit," before enumerating specific examples of permissible orders. But this discretion is not limitless. It must be exercised within legal bounds, and, as a starting point, it must be exercised within the bounds expressly delineated by the *CBCA*.

[3] Although the Court in *Wilson* was considering the *Canada Business Corporations Act*, R.S.C., 1985 c. C-44, the same principles apply to the *Act*.

> 27 Any order made under s. 241(3) exists solely to "rectify the matters complained of", as provided by s. 241(2). The purpose of the oppression remedy is therefore corrective: "... in seeking to redress inequities between private parties", the oppression remedy seeks to "apply a measure of corrective justice" (J. G. MacIntosh, "The Retrospectivity of the Oppression Remedy" (1987), 13 *Can. Bus. L.J.* 219, at p. 225; see also *Naneff v. Con-Crete Holdings Ltd*. (1995), 23 O.R. (3d) 481 (C.A.) ("*Naneff*"); *820099 Ontario Inc. v. Harold E. Ballard Ltd*. (1991), 3 B.L.R. (2d) 113 (Ont. C.J. (Gen. Div.)) ("*Ballard*"), at p. 197). In other words, an order made under s. 241(3) should go no further than necessary to correct the injustice or unfairness between the parties. (emphasis added)

[21] The question is whether the remedy crafted by the application judge was responsive to the oppressive conduct.

Analysis

Issue 1: Did the application judge err in finding the failure to provide proper financial records constituted oppression?

[22] The Third Schedule of the *Act* provides:

> 5 (1) A complainant may apply to the court for an order under this Section.
>
> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> > (a) any act or omission of the company or any of its affiliates effects a result;
> >
> > (b) the business or affairs of the company 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 company 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.

[23] The Third Schedule also sets out a non-exhaustive list of the remedies available under the oppression remedy:

> 5(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,
>
> …

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

[24] *Wilson, supra*, discussed the factors which can be considered by a trier of fact when considering an oppression remedy:

> [23] The nature of the oppression remedy is well recognized in our jurisprudence. Section 241 creates an equitable remedy that "seeks to ensure fairness — what is 'just and equitable'" (*BCE Inc.*, at para. 58). It gives "a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (*ibid*.). Courts considering claims for oppression are therefore instructed to engage in fact-specific, contextual inquiries looking at "business realities, not merely narrow legalities" (*ibid*.).
>
> [24] The two requirements of an oppression claim are equally well known. First, the complainant 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" (*BCE Inc.*, at para. 70). Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of "any security holder, creditor, director or officer," pursuant to s. 241(2). As stated above, the presence of these two elements is not at issue in this appeal.

[25] The application judge recognized the task before him:

> [23] What is required is a highly fact specific analysis. It is important to bear in mind that what may be "oppression" in one set of circumstances may not amount to such in another. The onus is upon the Applicant to show on a balance of probabilities that the conduct complained of was oppressive, and to justify the remedy(ies) sought.
>
> …
>
> [25] In addition, the oppression claimed must be sufficiently connected to the corporate affairs and not be merely the result of a personal dispute. Some harm to the claimant's interest as a corporate stakeholder must be evident.

[26] He then embarked on a detailed analysis of the evidence relating to all of Mr. MacDonald's allegations. When discussing the availability of financial records, it was clear to the application judge that Mr. MacDonald had been seeking accurate financial information for a number of years and it was an ongoing concern for him. He further reviewed the evidence which showed the financial information provided to Mr. MacDonald fell considerably short of the D'Aubins' obligations:

> [74] The availability of current and accurate financial records was and is an ongoing concern for the Applicant. The female Respondent provided *viva voce* testimony acknowledging that Mr. MacDonald has been seeking proper financial disclosure regularly since at least 2015. She had further interpreted his demands to include the dismissal of Mr. Wheaton, its current accountant. Ms. D'Aubin also seemed to acknowledge that the financial records of DFM have not really been up-to-date since at least early 2016. By necessary implication, the records with which the Applicant was provided in June 2016 by the Respondents fell considerably short of the audited financial statements which he was entitled (contractually at the very least) to review on an annual basis.
>
> [75] This evidence is compounded (first) by the fact that no financial records were made available to Mr. MacDonald at all from 2013 to June 2016. Second, by evidence that DFM's 2013 – 2015 corporate tax returns were not filed until 2017. One does not need to lean very heavily upon Mr. Burnell's evidence to conclude that this is not in accord with the generally accepted accounting principles which Mr. Wheaton ought to have observed in his dealings with DFM's books.
>
> [76] More germane to the present application, however, is the fact that, quite apart from everything else, in most situations, it is reasonable for a shareholder to expect that accurate and complete financial records will be made available to him in a timely manner. Case law is so replete with pronouncements to that effect that it is unnecessary to cite them individually. (emphasis added)

[27] The application judge also referred to the obligation in s. 120 of the *Act*, which creates a duty on all companies to maintain proper records:

> [77] On top of everything else, the duty is enshrined in s. 120 of the *Companies Act* as follows:
>
> > Every company shall cause to be kept at its registered office or at such other place as the directors may direct, proper books of account with respect to:
> >
> > (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;
> >
> > (b) all sales and purchases of goods by the company;
> >
> > (c) the assets and liabilities of the company. R.S., c. 81, s. 120.

[28] In addition to the *Act*, he also relied on the contractual requirements that Mr. MacDonald would have full access to the accounting records of D'Aubin Meats:

> [81] On top of this, the requirement that the Applicant shall have full access to the accounting records of DFM at all reasonable times is mentioned in both the Supplementary Shareholders Agreement and in the Loan Agreement. The latter

agreement places a specific onus upon the Respondents to ensure Mr. MacDonald's access to same:

> 3. D'Aubin further agrees that MacDonald shall have full access at all reasonable times to the accounting records of D'Aubin himself or by an agent.

[29] The application judge also considered that the proper financial records were necessary to value the shares for the purposes of the buyout of Mr. MacDonald's shares:

> [90] This amounts to unfair treatment. The harm which has resulted to the Applicant (and indeed to all Respondents, since it is ultimately for the best that the Applicant and the Respondents go their separate ways) is that it becomes virtually impossible to trigger the share "buy out" provisions, because without proper financial disclosure, the value of Mr. MacDonald's shares cannot be properly ascertained. Nor can the issue of whether his interests, and those of DFM, have been harmed by the female Respondent's role in Temple and if so, to what extent.

[30] On the issue of the financial statements, he concluded:

> [94] I consider the Applicant's right to expect regular financial reporting as reflected in the portions of the agreements that have been earlier referenced, and the female Respondent's acknowledgement in cross-examination of the deficiencies in that respect. I consider the impact which these inadequacies have had upon the parties' ability to fairly value the Applicants shares in their earlier aborted negotiations in that respect. I couple this observation with the fact that the shareholders loan is fully up-to-date and almost paid off, and that the time is approaching when the parties would, contractually, be otherwise entitled to invoke the buy out provisions.
>
> …
>
> [98] <u>When I consider these matters, I am satisfied that the Respondents' cumulative behaviour in relation to the Applicant, even in the absence of any indication of bad faith on their part, amounts to oppressive behaviour</u>. They should have taken steps necessary to have personnel in place which would implement their obligations to the Applicant and to DFM. Mr. Wheaton was clearly not discharging his duties as the company accountant in a proper fashion. (emphasis added)

[31] I can find no error in the application judge's thorough review of the evidence, his recitation of the law or his application of the law to the particular facts of this case.

[32] The application judge's conclusion that the failure to provide financial records amounted to oppressive conduct on the part of the D'Aubins is amply supported by the record and his reasons. I would dismiss this ground of appeal.

Issue 2: If the conduct was oppressive, did the application judge err in his determination of the appropriate remedy?

[33] The D'Aubins' complaints with respect to the remedy are two fold:

i) Under the agreements between the D'Aubins and Mr. MacDonald, he is not entitled to audited financial statements; and,

ii) The appointment of an arm's length business valuator to provide an independent valuation was not in the contemplation of the parties, not required in the agreements, and not responsive to the oppression which was found by the application judge.

[34] I will address each of these in turn:

Audited Financial Statements

[35] The appellants' argument is rooted in what they say is a fundamental error in the application judge's decision. They say the application judge mistakenly assumed that Mr. MacDonald was contractually entitled to audited financial statements. They point to the following in his decision:

> [74] The availability of current and accurate financial records was and is an ongoing concern for the Applicant. The female Respondent provided *viva voce* testimony acknowledging that Mr. MacDonald has been seeking proper financial disclosure regularly since at least 2015. She had further interpreted his demands to include the dismissal of Mr. Wheaton, its current accountant. Ms. D'Aubin also seemed to acknowledge that the financial records of DFM have not really been up-to-date since at least early 2016. By necessary implication, the records with which the Applicant was provided in June 2016 by the Respondents fell considerably short of the audited financial statements which he was entitled (contractually at the very least) to review on an annual basis. (emphasis added)

[36] The application judge obviously misspoke when he said Mr. MacDonald was contractually entitled to audited financial statements. There is no dispute that he was not so entitled. However, in my view, it had no impact on the result. The application judge clearly recognized he had a wide latitude to order whatever

remedy he considered to be appropriate (¶ 102). After reviewing the case law, he concluded:

> [105] I conclude that the remedy which is fashioned must be balanced by a principle of minimal interference: a Court should not interfere unnecessarily in the affairs of a corporate entity. Equally obvious is the fact that the remedy imposed must not be used by the Court to rewrite the agreement between the parties, and/or to leave the Applicant in a better position vis-à-vis the company and the other stakeholders than he was entitled to expect beforehand .
>
> [106] Communications between the parties have indeed broken down, and one despairs of the prospect that this may be remedied. The parties' problems have been exacerbated, somewhat, by the length of time that these proceedings have taken to come to a head. I observe that the Applicant's Notice of Application in Chambers was filed on May 2, 2017. Compounding this are those factors which have contributed to a portion of the angst experienced by Mr. MacDonald, and which have resulted from misunderstandings on his part.

[37] He then arrived at what he considered to be the appropriate remedy:

> [114] I am well aware that no solution is perfect. In an ideal world, directors would be able to manage a company's affairs in the best interest of themselves, and that of the company, without acrimony with the other stakeholders. As I consider the matter holistically, it appears that the following relief is necessary, and I so order:
>
> > 1. An independent auditor shall be appointed to complete audited financial statements for DFM from 2013 to present. It is not felt to be appropriate that the Court involve itself (at this stage) in the designation of who, specifically, shall fulfill the role of auditor. The Respondents must forthwith produce any information or documentation within their possession or control necessary to the auditor in order to discharge his/her duties, and shall promptly comply with all reasonable requests of the auditor made to them.
> >
> > 2. Mr. MacDonald, through his counsel, shall provide his choice for auditor to counsel for the Respondents within 10 days. If the person thus selected by the Applicant to be auditor is unacceptable to the Respondents, they shall provide their candidate (within five days thereafter) to counsel for the Applicant. Due to their previous involvement in this matter, neither Messrs. Wheaton or Burnell shall be eligible.
> >
> > 3. If the Respondents' candidate is not acceptable to the Applicant, the two candidates thus nominated shall agree on the name of a (third) individual who shall be appointed as auditor. If the two candidates cannot agree, either party may apply to Court to resolve the issue. Each party shall be responsible for the cost of his/their candidate, and the Applicant

> and Respondents shall each pay 50% of the auditor's fee, subject to the Court's overall discretion as to costs.
>
> 4. Within 30 days of the completion of the audited financial statements for DFM, the company shall retain the services of an arm's length business valuator to provide an independent valuation report as to the value of DFM's shares. The cost associated with the preparation of said report will be paid by DFM, again subject to the Court's overall discretion as to costs.
>
> 5. Upon completion of the valuation, the parties shall have 14 days (or such further time upon which they may agree or the Court may order) within which to come up with an agreed-upon purchase price for the Applicant's shares. Failing this, the parties may return to court for such further determinations and/or directions as are necessary.
>
> 6. The balance, if any, of the loan and interest owed to Mr. MacDonald at the time (if any) would also be paid out to him when his shares are purchased. In the meantime, DFM would maintain all required payments with respect to that loan in [accordance] with the Loan Agreement.
>
> 7. The court would retain jurisdiction, in addition to that required to make rulings in conjunction with numbers 3 and 5 above (if necessary) to provide any further directions should unforeseen matters arise while the parties implement these directions.
>
> 8. If costs cannot be agreed upon by the parties, they shall be determined by the Court (upon request) upon the completion of the Respondents' purchase of the Applicant's shares in accordance with the above procedure.
>
> (emphasis added)

[38] I am not prepared to interfere with the application judge's exercise of discretion in these circumstances. In my view, in light of the breakdown in the relationship and the mistrust between the parties, nothing short of audited financial statements would be appropriate.

[39] Returning to the appellants' argument that Mr. MacDonald was never entitled to audited financial statements contractually, another reason why this misstatement by the application judge had no practical effect on the result, is that he required Mr. MacDonald to pay fifty-percent of the cost of the audited financial statements. If Mr. MacDonald was contractually entitled to audited financial statements, there would be no reason why the application judge would require him to pay fifty-percent of the cost.

[40] This leads me to the conclusion that the application judge considered it necessary to have audited financial statements, but was striking a balance between the parties by requiring Mr. MacDonald to pay fifty-percent of the cost.

[41] I would not interfere with the application judge's conclusion that it was necessary to address the oppression by ordering audited financial statements.

Appointment of a Business Valuator

[42] I am satisfied it was not necessary to order D'Aubin Meats to retain the services of an arm's length business valuator.

[43] I will repeat the terms of the Supplementary Shareholders Agreement as it relates to the buy out of Mr. MacDonald's shares:

> 5. Stephen agrees to sell his shares equally to Ralph and Jennifer five years from the date of this agreement (or such later date as may be required to meet the conditions set out in this paragraph) provided (1) Steven's loan to the Company is paid in full (2) all dividends contemplated by this agreement are paid.
>
> The price per share will be the amount agreed by the parties to be the market value of each share, or failing agreement, the amount determined by the Company's accountant to be the market value of each share. (emphasis added)

[44] The application judge stressed the necessity of having accurate financial information in order to determine the value of the shares. It was premature to determine the parties would be unable to come to some agreement on the share value once appropriate financial records were obtained, or that any valuation by the company's accountant would not be the fair market value.

[45] In my view, the provisions of the application judge's order relating to the appointment of a business valuator are in error. They are not responsive to the oppressive conduct and are not a proper exercise of the application judge's discretion (*Wilson, supra*, ¶ 26 and 27).

[46] I would allow this ground of appeal, in part. So there is no uncertainty with respect to what I have found, the following provisions of the order should be struck:

> 4. Within 30 days of the completion of the audited financial statements for DFM, the company shall retain the services of an arm's length business valuator to provide an independent valuation report as to the value of DFM's shares. The

> cost associated with the preparation of said report will be paid by DFM, again subject to the Court's overall discretion as to costs.
>
> 5. Upon completion of the valuation, the parties shall have 14 days (or such further time upon which they may agree or the Court may order) within which to come up with an agreed-upon purchase price for the Applicant's shares. Failing this, the parties may return to court for such further determinations and/or directions as are necessary.
>
> 6. The balance, if any, of the loan and interest owed to Mr. MacDonald at the time (if any) would also be paid out to him when his shares are purchased. In the meantime, DFM would maintain all required payments with respect to that loan in accord with the Loan Agreement.

Issue 3: If ordering the provision of audited financial statements was an appropriate remedy, did the application judge err in requiring Mr. MacDonald to pay fifty-percent of the cost of those statements?

[47] I can address this issue summarily. I have already concluded above that the ordering of the audited financial statements was a proper exercise of the application judge's discretion and requiring Mr. MacDonald to pay fifty-percent of the cost was the means by which he struck a balance between the parties. He committed no error in doing so.

[48] I would dismiss the cross-claim.

Conclusion

[49] The appeal is allowed in part. The cross-appeal is dismissed. As success has been divided, no costs shall be awarded to any party.

Farrar, J.A.

Concurred in:

Wood, C.J.N.S.

Bourgeois, J.A.