IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Argo Protective Coatings Inc., Re, 2006 NSSC 283

Date: 20061002
Docket: S.H. No. 263538
Registry: Halifax

IN THE MATTER OF:	The Companies Act, being Chapter 81 of the Revised Statutes of Nova Scotia, 1989 and amendments thereto
	- and -
IN THE MATTER OF:	The application of 3026709 Nova Scotia Ltd. ("Numberco") for an Order appointing an inspector to investigate the affairs of Argo Protective Coatings Inc. And to report thereon, pursuant to Section 5(3) of the Third Schedule, and Section 116 of the Companies Act.

Judge:	The Honourable Justice Gregory M. Warner.
Heard:	June 15, 2006, in Halifax, Nova Scotia
Final Written Submissions:	September 21, 2006
Counsel:	A. Douglas Tupper, Q.C., and Sarah Kirby, counsel for the Applicant
	David P.S. Farrar, Q.C., and Sheree Conlon, counsel for the Respondent

By the Court:

A. BACKGROUND

[1] A minority shareholder claims to have been oppressed, unfairly prejudiced and/or unfairly disregarded by a company and seeks interim relief pursuant to the oppression sections in the Third Schedule of the **Companies Act of Nova Scotia**.

[2] The company, Argo Protective Coatings Inc. (“Argo”), is a Nova Scotia body corporate. Until December, 2005, when it sold its operating assets, its primary business was galvanizing, blasting and painting steel.

[3] The applicant, 3026709 Nova Scotia Limited (“Cherubini”), owns one-third of the issued common shares of Argo. The applicant is a member of the Cherubini Group of companies whose businesses include fabrication and installation of structural steel and rebar. The Cherubini Group is Argo’s largest customer.

[4] Annapolis Group Inc. (“AGI”) owns one-sixth of Argo. Parker Brothers Contracting Limited (“Parker”) owns one-half of Argo. Nick Betts (Betts), President of AGI and Vice-President of Parker; Malcolm Giffin, President of

Parker; and Renato Gasparetto, Vice-President of the Cherubini Group of companies, are the directors of Argo. Nick Betts is Chairman of the Board and President; Malcolm Giffin is Vice-Chairman of the Board.

[5] The applicant, through the affidavits of Michael Bate, its controller, states that AGI and Parker are part of the Joudrey Group of companies; that is, they are related as defined in a Shareholders' Agreement, and that Betts frequently commented that he had "majority control". This evidence was not denied or contradicted by the respondent. I find that AGI and Parker, were "related parties" or "affiliates" as defined in the Shareholders' Agreement.

[6] The Shareholders' Agreement, dated April 14th, 1997, contained two provisions relevant to this application (that is, the reasonable expectations of shareholders of Argo):

> (i) Notwithstanding Argo's Memorandum and Articles of Association, and regardless of any action at a meeting of the directors or shareholders (unless expressly agreed to in writing by all shareholders), no obligation would be incurred, nor any action taken, by the Company without the prior consent of seventy-five percent of the shareholders respecting:(a) loans to shareholders or repayment of shareholder loans; and (b) payment of salaries, bonuses or other payments to shareholders or

their affiliates, except in the ordinary course of business; and

(ii) All transactions between the Company, and shareholders or related parties, would occur at fair market rates.

[7] In December, 2005, Argo sold its business assets to a company ("APC") which is fifty percent owned by the Cherubini Group. Argo has been inactive since that time.

[8] Bate had limited access to Argo's books and records as part of the due diligence inquiry make by the purchaser of Argo's operating assets. From this inquiry and other observations, the applicant became concerned as to whether Argo had acted unfairly towards the Cherubini Group and in favour of the AGI - Parker majority. Exchanges ensued between Betts and various officials of Cherubini. The applicant requested that Argo authorize an investigation of its books and records by an independent auditor to confirm that all activities were conducted in an equitable manner as between shareholders. It appears that the applicant's intention was that the "independent auditor" would be Levy Casey, a firm of chartered accountants, who at one time had been Argo's external auditor (until replaced seven years ago by Grant Thornton), and who was the external auditor for the Cherubini Group. The applicant offered to pay the cost of this "independent investigation".

[9] In response, Betts stated that he would refer the issues raised by Cherubini to Argo's "independent auditors", Grant Thornton, for review as part of its finalizing of the December 2005 year-end statements.

[10] The applicant now requests the Court to appoint "their" external auditor to investigate their allegations. They refer the Court to the authority contained in subsection 5(3)(m) of the Third Schedule of the **Companies Act** which authorizes an order directing an investigation pursuant to s. 116 of the **Companies Act**.

[11] The areas of alleged oppression or unfairness relate to Argo's unfair preferential treatment of Joudrey group companies in related party transactions and in particular:

> (I) a summary of Argo's jobs over five years shows gross profits on jobs to the Cherubini group of 34.5 percent and of jobs for Parker of only 10.7 percent, despite Cherubini constituting $8.4 million and Parker $1.1 million respectively of Argo's total sales of $15.7 million (for which gross profits total 32.3 percent).

(ii) Argo acquired assets and assumed liabilities from Joudrey related companies for other than fair market value, benefiting the Joudrey Group at the expense of Argo and Cherubini, specifically in relation to the purchase of used forklifts from Maritime Paper, used painting equipment from Parker, and a container load of obsolescent cans of paint from Parker.

(iii) Argo treated trade receivables from the Joudrey Group more favourably than from the Cherubini Group, in particular, Argo offset, against shareholder payments owed to Cherubini, trade receivables from Cherubini, and refused at least one delivery of Cherubini work product; at the same time, it allowed Parker trade receivables to be outstanding for a longer period, and, in particular, a 2000 $26,600.00 trade receivable, which remains outstanding, without offsetting it against shareholder payments to Parker, and without charging interest on it.

(iv) Argo's 2005 financial statements show it paid management fees to Parker and had an account payable to

AGI for management fees, but only showed the management fees owing to Cherubini as an accrued liability. Similarly, loan interest is shown as having been paid to Parker, and as being an account payable to AGI; no amount was shown as owing to Cherubini, until after Cherubini's complaint on March 8, 2006. Furthermore, salaries, bonuses, and administrative fees were paid to employees of Parker and AGI, without Cherubini's consent.

(v) Argo did not charge Parker for storing equipment on Argo property.

[12] Particulars of the basis of the breached reasonable shareholder expectations are that:

(a) all transactions between Argo and its shareholders and the shareholders' related parties would be conducted in an equitable manner in so far as this was in the best interests of Argo;

Basis: section 4.3 of the Shareholders' Agreement and general commercial practice

(b) the shareholders would not treat Argo as their own property;

Basis: general commercial practice

(c) the directors would act honestly and in good faith in the best interests of Argo and exercise the diligence expected of a reasonably prudent person;

Basis: general commercial practice and fiduciary duties owed by directors to Argo

(d) no action would be taken by Argo concerning the loaning of any amount to any shareholder, officer or director of the Company without the prior consent of shareholders holding an aggregate 75% of the votes attached to the outstanding issues shares which carry a right to vote;

Basis: section 4.2(1) of the Shareholders' Agreement

(e) no action would be taken by Argo concerning the payment of any salary, onuses, and other payments to the shareholders of Argo or their affiliates, except in the ordinary course of business, without the prior consent of shareholders holding an aggregate 75% of the votes attached to the outstanding issued shares which carry a right to vote;

Basis: section 4.2(m) of the Shareholders' Agreement

(f) the shareholders would share in the profits of the enterprise according to their ownership interests, and that no shareholder should appropriate a disproportionate share of the remuneration, management fees, administration fees, bonuses and other like payments; and

Basis: general commercial practice

(g) the purchase of any assets from non-arm's length parties would be considered a matter requiring decision at a meeting of the Board of Directors and be determined by a majority of votes cast at the meeting.

Basis: section 4.1(d) of the Shareholders' Agreement and general commercial practice

June 7, 2006 Affidavit of Renato Gasparetto, para. 3

B. THE LAW

Oppression Generally

[13] The Oppression Remedy, a text by David Morritt, Sonya Bjorkquist and Allan Coleman, (Aurora: Canada Law Book: Looseleaf (May, 2006)) is a comprehensive guide to the history, principles, and the application of principles, which flow from the statutory provisions in Canadian jurisdictions respecting oppression and unfair treatment; they apply to s. 5 of the Third Schedule of the Nova Scotia **Companies Act**.

[14] Many articulate and important decisions have outlined and defined the principles and parameters of the remedy. They include: **Ebrahimi v. Westbourne Galleries Ltd** [1973] A.C. 360 (H.L.); **Sparling v. Javelin International Ltdee** [1986] R.J.Q. 1073; **Mason v. Intercity Properties Ltd**. (1987) 37 B.L.R. 6 (OCA); **820099 Ontario Inc. v Harold E. Ballard Ltd.**, 1991 CarswellOnt 142 (OSCJ); **Westfair Foods Ltd v. Watt**, 1991 CarswellAlta 63 (ACA); **Pente Investment**

Management Ltd v. Schneider Corp., 1998 CarswellOnt 4035 (OCA); and **Pelley v. Pelley**, 2003 NLCA 6. Gomery J. in **Sparling**, and Farley J. in **Ballard** are particularly thorough.

[15] A succinct synopsis is given by Smith, A.C.J., in **Harbert Distressed Investment Master Fund Ltd. v. Calpine Canada Energy Finance II ULC,** 2005 NSSC 211.

[16] A summary of only those principles relevant to the contested aspects of this application follows.

[17] Stanley Beck wrote that the remedy is perhaps "the broadest, most comprehensive, most open-ended shareholder remedy in the common law world . . . unprecedented in its scope . . . [and] applied in a wide variety of situations." The remedy does not deal with questions of legal rights or entitlement of the interested parties to a corporation, but rather with the questions of equity - abuse, oppression or unfairness. Bad faith or intention by the oppressor is not a prerequisite to the remedy. It is the act or conduct and the manner in which the corporate powers are exercised that are relevant. There is no limit to the individual fact situations that can

give rise to the remedy, nor any limit on the particulars of any remedy that may be ordered.

[18] On the other hand, limitations do exist, both as to entitlement to the oppression remedy and the nature of the remedy that a court should order.

[19] Directors and officers of a corporation are not the agents of the shareholders. They are required to manage the corporate affairs according to their best judgment. They are impressed with both statutory and common law duties of loyalty and care; however, what is in the best interests of the corporation may not be in the best interests of particular shareholders. The concept of the "business judgment rule" restricts the review or second guessing by Courts when examining the affairs of the officers and directors (that is, those in control). Courts are limited to a more general review of the reasonableness of the corporate decision as opposed to a detailed examination, with the benefit of hindsight, for a perfect decision.

[20] Courts should refrain from permitting an application for an oppression remedy to become a tactical weapon to tip the scales in favour of the applicant and subjugate the majority to the machinations of the minority; rather, relief is limited to balancing

the scales. The goal is to relieve the minority from oppression and unfairness. It is not to impose oppressive and unfair conduct on the corporation, and for that reason a careful analysis of the true nature of the complaint and of the acts complained of is essential.

[21] It is not disputed, in the case at bar, that the applicant, as a minority shareholder, is a party entitled to seek the oppression remedy. It appears that the overwhelmingly most significant consideration, and limitation, both in respect to finding entitlement, and the appropriate remedy, is the assessment of whether the act or conduct complained of is consistent with the reasonable expectations of the complainant.

[22] Reasonable expectations can be formed in many ways. Acts which are lawful exercises of corporate power may be outside of what is fairly regarded as in the contemplation of the parties when they became shareholders or members of a corporation - this understanding was described by Farley J., in **Ballard** as “the compact of the shareholders”; only reasonable expectations are protected through the oppression remedy.

[23] Determining what constitutes the reasonable expectation is a question of fact requiring a detailed examination of the acts or conduct complained of. What is oppressive or unfair in one case may not necessarily be so in a case with slightly different facts (see **Ferguson v. Imax Systems Corp**, 1983 CarswellOnt 926 (O.D.C.)). The expectations may be derived from shareholder agreements, and from any and all of the words and deeds of the parties. Reasonable expectations are dynamic and not static.

[24] In his text, **Morritt** observes at chapter 3:20.50 that some basic expectations can be assumed. I assume that these would include accepted standards of ethical corporate behaviour such as those described in **Aquino v. First Choice Capital Fund Ltd,** 1995 CarswellSask 54 and 1996 CarswellSask 224 (SQB), and **SCI Systems Inc v. Gornitzki Thompson & Little Co**, 1997 CarswellOnt 1769 (OSCJ).

[25] The remedy does not protect the complainant's "wish list", nor offer a remedy for any more than that which is necessary to remedy a reasonable and legitimate expectation. The remedy is limited to relief from a reasonable expectation and no more [see **Naneff v. Con-Crete Holdings**, 1995 CarswellOnt 1207 (OCA)].

[26] While being careful to reiterate the open-endedness of the circumstances to which the oppression remedy applies, many decisions have enumerated factors for consideration in evaluating oppressive conduct. Some of these lists are referred to in **Morritt**'s text at chapter 5:30. The lists are similar. The factors and analysis described by the Alberta Court of Appeal in **Westfair,** include:

> (a) general commercial practice;
>
> (b) protection of the underlying expectations of the shareholders;
>
> (c) the extent to which the acts complained of were unenforceable;
>
> (d) the extent to which the shareholder could have reasonably protected itself; and
>
> (e) the detriment to the shareholder.

[27] A further limitation is the timing of the application. Since a remedy is meant to rectify oppressive conduct, Gomery, J's statement in **Sparling** is relevant:

> The jurisdiction of the Court is limited to the making of orders to rectify the matters complained of. The Court does not have jurisdiction to intervene in the management of a

> company's affairs otherwise. Presumably if it is not possible to rectify oppression and unfairness no order should be made.

[28] The Manitoba Court of Appeal noted in **Jaska v. Jaska**, 1996 CarswellMan 570 at Paragraph 29:

> If the minority shareholders or creditors do not need to be protected, then there is no reason to invoke the remedies under the statute since other remedies are still available, most notably the commencement of an ordinary lawsuit for damages . . .

[29] With respect to future conduct, Gomery, J., also noted that the courts should not remedy injustices that have not yet occurred and which may never occur; however, as Morritt notes, where there are reasonable grounds to believe that damage will occur if an order is not granted, the broad statutory authority to grant oppression relief exists.

Interim Relief

[30] Very relevant to this case is the fact that it is an application for interim relief. The parties differ with respect to the onus on the applicant in an interim application.

[31] The **Companies Act** does not differentiate between an interim and final order, in respect of the criteria for establishing oppression or the options for relief. It

provides simply that if the Court is "satisfied" as to oppressive or unfair acts or conduct, it may make an order to rectify "the matters complained of".

[32] The applicant seeks an interim order in the form of an investigation pursuant to s. 116 of the **Companies Act**. Such would authorize a Court-appointed inspector to access any corporate books and records, examine any officers or agents under oath, and report his/her opinion on any matter investigated to the Court.

[33] The applicant's position, with regards to an interim application for an investigation, appears to be that the standard of proof of satisfaction is a strong *prima facie* case or alternatively, the first of the three injunction threshold tests (per **American Cyanamid/RJR MacDonald)** of a case serious enough to be heard but, in any event, not proof of actual oppression.

[34] In support of its position, it cites:

> (a) paragraphs 42 - 44 in **HSBC Capital Canada Inc v. First Mortgage Alberta Fund (V) Inc**, 1999 ABQB 406, which in turn cites Blair, J., in **Deluce Holdings Inc. V. Air Canada** (1992) 12 O.R. (3d)131 as stating:

I do not accept the submission . . . that the court must be in a position to make an actual finding of 'oppression' before it can make an interim order under s. 241 [the oppression section] . . . Such a consequence, it seems to me, would render the power to make an interim order meaningless in most cases. The very reason d'être of an interim order is that the court is not in a position to make such a finding because the parties have not been able to prepare the case fully at that stage . . .;

(b) **Re Royal Trustco Ltd. (No 3)**, (1981) 14 B.L.R. 307 at paragraph 18:

. . . a court need not be satisfied that the conduct complained of took place, or that such conduct has been proved to have taken place. If such a standard of proof were required, it would make any investigation unnecessary. Having regard to the fact that the relief provided for in the section is an investigation, it seems to me that a court is entitled to make an order for an investigation <u>if it appears on the face of the material submitted to the court that there is good reason to think that the conduct complained of may have taken place.</u>, (Emphasis added)

(c) **Bentley Boudreau v. Red Knight Enterprises (1987) Ltd.**, March 8, 2001 S.H. 165510 (Unreported) wherein Justice Moir, at page 1 wrote:

Respecting an interim remedy of the kind sought [an investigation], I believe a court should determine the question of fitness by first having reference to a threshold similar to the American Cyanamid test on interim injunctions; that is to say, whether the affidavit evidence suggests a case which is not frivolous, but which presents a case serious enough to be heard.

[35] The respondent's position is that the applicant must show a strong *prima facie* case of oppression or unfairness on the evidence before this Chambers Court. A summary of its position is as follows.

[36] First, the Court should not order an investigation to help the applicant make its case. It cites **Woodford v. Johnston Equipment (1998) Ltd** (2001) 17 B.L.R.(3d) 42 (NBQB) at paragraph 33:

> The court should not make the order sought unless there is sufficient evidence to make a finding of oppressive conduct. In this case allegations of oppressive conduct have been answered, and, in the face of these answers the court cannot particularly in a motions setting, make findings of such conduct. It is also clear that an investigation should not be ordered to assist the court in making a finding of oppressive conduct.

[37] Second, Argo disclosed annual audited financial statements, and have through Thomas Fitzpatrick denied the complaints of the applicant, or withholding information to which the applicant is entitled as a shareholder.

[38] Third, the facts in the cases relied upon by the applicant differ from the case at bar. In **HSBC**, the Court's finding of a *prima facie* case of unfair disregard was premised on the respondent's confirming, and not denying, that it withheld information. In **Royal Trustco**, the impugned conduct was admitted; in this case,

Argo does not admit the alleged oppression. The reasoning in **Re First Investors Corp** [1988] A.J. No. 244 (ABQB), is not applicable as the statutory provision in Alberta, permitting an ex parte application, differs from the Nova Scotia legislation. In addition, Justice Berger restricted the investigation to "facts which otherwise may be inaccessible", whereas in the case at bar, the applicant had full financial disclosure through Argo's annual audited financial statements. **Red Knight** is distinguishable because the applicant's concerns were linked to the failure to continue producing monthly financial statements, a fact admitted by the respondent; even in those circumstances, the investigation authorized was limited. In **Consolidated Enfield Corp. v. Blair** [1995] O.J. 2593 (OSCJ), an investigation was ordered into related party transactions, is distinguishable. The finding of oppression was premised on insufficient financial reporting and non-disclosure; in addition, the Court considered the fact that other ongoing litigation had failed to disclose the related party transactions. Finally, **Catalyst Fund General Partner I Inc. v. Hollinger Inc.** [2004] O.J. 3644 (OSCJ), is distinguishable because the Court ordered an investigation into related party transactions only where the respondent failed to explain the purpose, extent or details of a number of those transactions.

[39] The respondent's position appears to be that:

> (a) unlike the cases relied on by the applicant, in this case, the respondent, through Thomas Fitzpatrick's affidavit, has denied the allegations of oppression; and
>
> (b) in the cases relied upon by the applicant, findings or admissions were made to the effect that the respondent had failed to disclose relevant financial information; in this case, the applicant received the annual audited financial statements (that is, disclosure) to which it was entitled.

[40] In response, the applicant argues that the interim application need not rectify the oppression. While the remedy must respond to the circumstances, the interim application seeks an investigation to access facts which are in the control of the respondent. It refers to **Re Royal Trustco Ltd**, at paragraph 4:

> . . .it is clear that an investigation is only an investigation, and is not a proceeding for the determination of rights. Resort must be had to other sections of the Act for that.

[41] "A strong *prima facie* case" is not defined in the cases cited by counsel.

[42] In **HSBC**, it was said to be less than an actual finding of oppression. In **Royal Trustco** the Court said that if the acts or conduct were actually proven, there was no need for an investigation.

[43] I have difficulty understanding what is intended by the decisions which place a burden on the applicant in an interim application of a "strong prima facie" case, as opposed to " proof " on a final application or trial. These proceedings are civil in nature. The normal legal burden in civil matters is proof on a balance of probabilities. There is no reason why the burden to obtain the interim relief of an investigation should be any greater. If the term is intended to apply to the evidential burden only, then it still should not impose a greater onus than the legal or ultimate burden at trial or on a final application, which burden is described in c. 5.43 in The Law of Evidence in Canada by John Sopinka, Sidney Lederman and Alan Bryant, 2nd Edition, (Butterworths, 1999).

[44] The Court notes that none of the multitude of burdens described in chapters 3 and 5 in this text (Sopinka et al) describes or defines, in the civil law context, a "strong *prima facie* case". Furthermore, in Chapter 3.31 to 3.38, the authors describe the inconsistent use of the term "*prima facie"* by the Supreme Court of

Canada, and the danger of indiscriminately using a “mixed Latin-English idiom”, the meaning of which is unclear .

[45] Driedger’s formulation of the modern approach to statutory interpretation is repeatedly cited by the Supreme Court of Canada (see, for example, **Bell ExpressVu Ltd. Partnership v. Rex,** 2002 SCC 42) as the preferred approach for statutory interpretation; it recognizes the role of context in construing the words of statutes; it applies to the proper interpretation of the word “satisfied” in the context of this case.

[46] As noted, the oppression remedy is a broad, comprehensive, open-ended shareholder remedy, intended to apply in a wide variety of situations, and with a wide variety of remedies.

[47] In this case, the applicant alleges, based on the partial information available to it, that the respondent acted in an oppressive or unfair manner with respect to related party transactions. It has asked for detailed information to confirm or disprove its specific allegations, and the evidence that it has of those alleged oppressive acts. The respondent, through its deponent, Fitzpatrick, has denied the alleged oppressive acts, and has stated that the applicant has received the audited financial statements to

which it, as a minority shareholder, is legally entitled. It is clear from the affidavits, and cross-examination of affiants, that the applicant does not accept Fitzpatrick's blanket denial, unsubstantiated by corporate records.

[48] The requested interim relief is for an investigation to get the complete factual information with respect to the specific allegations of oppression or unfair conduct.

[49] In my view, the evidence that will satisfy the burden for interim relief depends upon the specific circumstances, and remedies sought, in the context of the specific case. It should be a contextual analysis. In the context of a request for an investigation - to access the information that may confirm or disprove the specific allegations of oppression, the burden should not be as high as requests for some of the other remedies enumerated in s. 5 (3) of the Third Schedule to the **Companies Act**, which are more intrusive and should only be ordered on proof of oppression, such as requests to permanently restrain (enjoin) conduct, to appoint a receiver, to amend the memorandum or articles, to direct purchase, issuance or exchange of shares, or the payment of money, to set aside transactions, or to liquidate the corporation.

[50] An interim order should not authorize a fishing expedition. On the other hand, imposing a burden of proof of the kind normally assigned to a plaintiff in a civil trial (sometimes called the legal, ultimate or persuasive burden) as a precondition to an interim order, in particular an interim order to investigate, would make the interim procedure meaningless for any practical purpose.

[51] In ordering an investigation, a contextual consideration is whether the information is available to the applicant. If the evidence before the court demonstrates that the applicant does not have access to the specific records and information that would confirm or disprove the factual background of its complaints, then the onus on the applicant is more easily discharged than if such information is otherwise available to it.

[52] I accept Justice Blair's statement in **Deluce,** cited in **HSBC** at paragraph 43, to the effect that the very reason for an interim order is that the court is not in a position to make such a finding because the parties have not been able to prepare their case fully. In this case the applicant claims that it has not had access to the specific records and evidence that might establish or disprove the acts about which it has some knowledge and complains.

[53] I note the approach of Justice Moir, in **Red Knight**, of applying the first of three injunction threshold tests (a case serious enough to be heard), in the circumstances of that case to order an independent investigation by an independent chartered accounting firm. For the purposes and in the context of this case, I do not adopt this burden.

[54] The term “strong *prima facie* case” has a nebulous meaning, especially in the civil context, and is not helpful in this circumstance. When a complainant has no legal entitlement to the specific factual information to confirm or disprove its complaint and seeks the means to obtain that evidence, the complainant’s threshold burden of proof of oppression is met when the evidence presented by the complainant, on its face, and in the absence of better evidence (in the context of the case at bar being the kind of evidence that the respondent had access to and the applicant did not) leads the court to a reasonable inference that the act or conduct complained about likely occurred. An examination of the corporate books, records, officers and directors, may not confirm what is apparent, but that possibility should not constitute a barrier to an interim order for disclosure of the best evidence.

[55] I disagree with the analysis of the respondent that in all of the cases cited by the applicant, orders for investigations only followed an admission by the respondent that it had failed to provide the disclosure to prove or disprove oppression or unfairness, or, alternatively, did not deny oppression. In determining whether the burden is met, on an interim application for an investigation, it should not be enough for the respondent to simply deny the truth of the allegation, and fail to provide the records and evidence that was available to it.

[56] The applicant must establish, and the Court must find, before making an interim order for an investigation, that the evidence tendered by the applicant, supports a reasonable inference that the acts or conduct complained of are, on their face, likely true. Said differently, that the evidence has the appearance of proving the facts though it may not constitute certain proof. The fact that the allegation is denied is not, per se, sufficient to defeat the inference. There has always existed an evidential burden on the party in exclusive control of evidence, to produce that evidence or face a possible inference that the evidence may not be favourable to that party. On the other hand, evidence of a respondent, that tends to show that the factual premise of the applicant's complaint is not likely true, may defeat what some describe as a "strong *prima facie* case".

C. ANALYSIS OF APPLICANTS COMPLAINTS

First Complaint

[57] The first complaint is that on total sales of $15.7 million in the last five years, Argo's gross profit margin on jobs of $8.4 million for Cherubini was 34.5 percent, but on sales of $1.1 million for Parker was only 10.7 percent. This undisclosed preferential treatment of a Joudrey-related company is unexplained, and constitutes unfair disregard of the applicant's reasonable expectations.

[58] The applicant's evidence is contained in Michael Bate's first and third affidavits, and, in particular, Argo's five year "Job Summary Report" (called "Report"), Exhibit B to Bate's first affidavit.

[59] Argo's response, through Fitzpatrick's affidavit at paragraphs 8 - 23, outlines Argo's general pricing policy and states that Cherubini got pricing and scheduling preferences as Argo's biggest customer. He acknowledges that, on a 2003 Parker job (South Venture), projected profit levels were not reached. This was discussed in management meetings attended by Bate on December 9, 2004 and January 27, 2005;

copies of the minutes were attached to his affidavit. He also described a 2001/2002 Cherubini job (Pontoon), on which Argo's gross profit margin was much better than the expected thirty percent. The management meeting minutes reflect a discussion of poor quoting in the year 2004 and the need to increase margins. On their face, the minutes do not relate to the South Venture job in 2003, nor disclose what information was available to Bate at the meetings.

[60] On cross-examination, Bate acknowledged attending the management committee meetings where gross margins were discussed, but denied that the financial information provided at these meetings disclosed the kind of information contained in the "Report" obtained in February, 2006. He acknowledged that he examined records of one Parker job where Argo made a $75,000.00 price adjustment, which adjustment, he testified, would not explain the gross margin on all jobs for Parker of 10.7 percent.

[61] On cross-examination, Fitzpatrick was directed to gross margin figures shown in the "Report", ranging from 3.4 percent to 27 percent for several other Argo customers, including direct competitors of Cherubini. He acknowledged that Cherubini was not only the largest customer of Argo but provided the biggest profit

margin. He noted that some of the gross margin figures for Cherubini's competitors were not for galvanizing but for painting, and that margins were generally lower on painting jobs. He was not able to answer questions about the $75,000.00 price adjustment on the South Venture job referenced by Bate, nor the $50,000.00 in special expenses that Bate claimed were charged to that job. In preparation for this application he had not searched for, or reviewed, the records related to the jobs identified in the "Report", which were physically stored with APC, and which might have clarified or explained the gross margin differential.

[62] The applicant seeks, in reference to the jobs listed on the "Report" as being with Cherubini and Parker, the following documents and information:

> (a) The original bid estimate documents together with all change order estimates that detail the estimated revenues, expenses and gross profits for each job listed;
>
> (b) The Contract Documents or Purchase Orders received from the customer for each job listed;
>
> (c) A Detailed Cost Ledger listing all revenues and expense items for each job listed;

(d) Where the Detailed Cost ledger references purchases from shareholders or their affiliates, the supplier's purchase invoices, Argo's purchase orders and Argo's receiving documents;

(e) Access to Argo's management personnel to discuss any unusual aspects of each job listed.

Analysis

[63] On its face, the "Report" shows a significant and unexplained gross margin differential between jobs performed by Argo for Cherubini versus Parker. Bate's knowledge of a $75,000.00 price adjustment on one Parker job does not explain the difference in the total gross margins on all jobs for those two parties, and no other explanation was given. Fitzpatrick's evidence of Cherubini being given scheduling preference - presumably a good business practice by any business with its biggest customer (over fifty percent of sales), does not explain away what is, on its face, a significant gross margin differential between jobs performed for the majority shareholder versus the minority shareholder.

[64] The statement in paragraph 19 of Fitzpatrick's affidavit about a discount of a "half cent per pound" on orders over 2,000 pounds, was stated to reflect a preference in favour of Cherubini. This statement was not explained; there was no evidence that the half cent per pound was not available on orders over 2,000 pounds for all customers; nor was the supposed preference quantified as to amount, to show how it related to the significant gross margin differential referenced in the "Report".

[65] The management committee meetings of December 9, 2004 and January 27, 2005, about profit margins in the year 2004, do not show that Bate (and through him, Cherubini) had the kind of information that might justify the gross margin differential, which information it now seeks.

[66] Cherubini has satisfied the Court, on the basis of the "Report", and in the absence of Argo's books and records or other material evidence, that significant preferential treatment was given to Parker, contrary to section 4.3 of the Shareholder's Agreement.

[67] If Cherubini received preferential treatment in some aspect of its business dealings with Argo, it is not evident in the "Report", and was not explained,

quantified, or proven (even on a *prima facie* or apparent basis) by Fitzpatrick's affidavit. Furthermore, it is unlikely that the applicant could have received a preference, without the prior consent of the majority shareholders (represented by Argo's President, Nick Betts), which preference would then be in accordance with the Agreement and reasonable expectations of the parties. In contrast, Cherubini appears to have had no knowledge, before February, 2006, of the significant gross margin differential between jobs for it, and jobs for Parker and Cherubini's other direct competitors.

[68] I will deal with the issue of the appropriate remedy later.

Second complaint

[69] This complaint deals with the acquisition of used forklifts, used painting equipment, and cans of obsolescent paint from Joudrey Group companies by Argo for other than fair market rates, contrary to the Shareholders Agreement.

[70] Forklifts - The applicant's evidence is contained in the affidavit of Michael Lynch and Renato Gasparetto. Michael Lynch was the safety officer at Argo (now

at APC). He was not cross-examined on his affidavit, which affidavit states that he examined at AGI's facility seven used forklifts for possible purchase. A mechanic for AGI provided a list of repairs needed to make the forklifts workable. The list was extensive. While he felt the forklifts had little value to Argo, they were purchased by Argo. On delivery, repairs that he estimated at $8,000.00 to $10,000.00 were done to make two of the seven forklifts workable. The quote to get the other five forklifts workable was $8,000.00 to $10,000.00 each. They were not fixed but stored for a couple of years and eventually sold as scrap for $1,200.00. Renato Gasparetto in his March 9, 2006, affidavit says that he saw approximately twelve used forklifts on Argo's Burnside facility and asked Fitzpatrick why they were purchased. Fitzpatrick replied they were purchased from AGI at a cheap price. Two years later they were scrapped.

[71] The respondent's reply, through Fitzpatrick's affidavit, was that seven forklifts were purchased from Maritime Paper (a Joudrey company) in 2004 for $15,000.00. Two of these were used and included in the sale to APC. The others were used for spare parts and eventually sold for scrap as the cost of repair was excessive. He opined that good used forklifts cost $15,000.00 each. Since Argo's cost for the two used forklifts and five used for spares was $15,000.00 and $8,000.00

to $10,000.00 was spent on repairs, he felt Argo got good value for the seven forklifts.

[72] Painting Equipment - The applicant's evidence is the affidavit evidence of Michael Lynch, Frank Kaulback, Michael Ivanko and Renato Gasparetto. The respondent did not cross-examine on any of this evidence. Lynch said that shortly before Parker moved from its Windsor Junction facility, he attended that facility with Fitzpatrick, and Frank Kaulback, to see if there was anything they could use. He and Kaulback transported paint spray pots, blasting pots and two portable furnaces to Argo's facilities. Kaulback, a maintenance worker at Argo, confirmed the trip to Parker's plant, with Fitzpatrick and Lynch, made in three trucks. He returned with a truck load of paint spray pots, sandblasting pots, hoses and an old furnace. Michael Ivanko, shop foreman at Argo, noticed, when hired in the fall of 2002, paint spray pots on the roof of the maintenance office, which Kaulback said came from Parker. The pots were disposed of in 2006 as they needed repairs. He also indicated sandblasting pots were later purchased from Parker for an unknown price. Gasparetto swore that he was unaware of any of this until told by Ivanko in late December, 2005 and when he asked he did not get a satisfactory explanation of these purchases.

[73] In reply, Fitzpatrick (paragraphs 34 - 37) swore that he was advised that Parker had surplus equipment in 2001; he went to examine it, and purchased this used painting equipment for $9,000.00. The equipment was used by Argo. He felt Argo paid fair market value for this equipment.

[74] Used Cans of Paint - The applicant's evidence is contained in the affidavits of Harold Boutilier, Michael Lynch and Renato Gasparetto. This evidence was not subjected to cross-examination. Boutilier, the shipper/receiver at Argo's Woodside plant, swore that four or five years ago, Fitzpatrick advised that he was going to Parker's Windsor Junction facility to look at equipment and to pick up paint. He returned the same day with two half-ton pick up loads of paint cans that were used, old and open. The cans of paint were placed in a large shipping container and stored until they were disposed of in January 2006. Lynch swore that as Safety Officer one of his responsibilities was to ensure compliance with environment regulations. In respect of the shipping container full of cans and buckets of old paint at Argo's Woodside plant, he asked Fitzpatrick why the paint was there and wanted to arrange for its disposal. Fitzpatrick told him to back off and leave it alone. Lynch said all the paint was ultimately disposed of at a cost of $810.00 per 45 gallon drum.

Gasparetto swore that he first became aware from Harold Boutilier in late December, 2005, of the obsolete cans of paint and their disposal as hazardous waste. He questioned the storing of Parker's paint and never received a satisfactory answer.

[75] Fitzpatrick denied that Argo had stored paint for Parker. His affidavit suggests that Boutilier was referring to cans of paint that had accumulated since 1987, and were delivered from Argo's Burnside plant to the Woodside paint shop and put in the shipping container. He says Argo accumulated twenty to thirty pallets of left-over paint over the years; after the sale of Argo's assets to APC, Argo paid APC $30,000.00 for disposal of accumulated waste, none of which waste was paint from Parker. In 2001 Argo acquired about twenty gallons of thinner from Parker at no cost; it was "used on trailer-like jobs".

Analysis

[76] The applicant's evidence shows that the respondent acquired seven forklifts and used painting equipment from Parker. It does not establish any terms of the transactions. The respondent, through Fitzpatrick, has given specific and plausible

answers that would negate that these related party transactions were for other than fair market value.

[77] The applicant's problem is that it does not trust the respondent and wants to see the invoices and repair records. The applicant's suspicion is not enough to establish, on its face, that the forklifts and used painting equipment were purchased for other than fair market value. While the applicant may have some grounds, based on the refusal of the respondent to show them the invoices and repair records, to question and mistrust the respondent, this does not meet the threshold burden of showing oppression or unfairness.

[78] The limitations to the oppression remedy described by Morritt, relating to the "business judgment" rule, and the numerous decisions warning courts against "fishing expeditions" based on suspicions, leads me to the conclusion that Fitzpatrick's specific, if undocumented, reply, adequately answers the applicant's evidence in this interim proceeding. The applicant has not discharged its burden of showing, on its face, that the transactions were likely oppressive or unfair.

[79] The answer, with regards to the cans of obsolete paint, is not so clear. The applicant's evidence was not subjected to cross-examination. Fitzpatrick's affidavit simply says the only paint acquired from Parker was thinner that was used and not included in the waste disposed of, at a cost to Argo, on the sale of its assets to APC.

[80] A careful reading of Boutilier's affidavit shows that Fitzpatrick returned to the Woodside facility, with two half-ton pick-up loads of paint, later the same day that he went to Parker's Windsor Junction facility. Boutilier does not say the paint came from the Parker plant, although that might be a reasonable inference to draw. The attendance at the Windsor Junction plant appears to have taken place in or about 2001. The Lynch and Kaulback affidavits do not show that either of them returned with used paint from the Windsor Junction plant; they returned with used painting equipment. Lynch also swears that the shipping container was on the Woodside facility since the year 2000 (before the Windsor Junction trip), and full of paint cans at that time.

[81] Fitzpatrick's affidavit evidence is not inconsistent with the affidavit evidence of Boutilier, Lynch and Kaulback. It does contain an explanation, logical on its face,

that, since the 1980's, Argo had accumulated paint which was moved by him from the Burnside plant to the Woodside paint shop for storage in the shipping container.

[82] I am satisfied that Fitzpatrick's specific affidavit evidence, on its face, answers the suspicions of the applicant, and negates the apparent complaint of oppression or unfairness on this issue.

Third complaint

[83] The third complaint references unfair treatment respecting trade receivables. The applicant says that generally its trade payables to Argo were paid earlier than Parker's trade payables, and, on at least one occasion, Argo refused to release goods required by Cherubini for the Voisey Bay project until Cherubini had made special arrangements for payment of its account to Argo. In addition, the applicant's trade payables to Argo were offset against distributions payable to it by Argo, but the same treatment was not applied to Parker.

[84] Because the business assets have now been sold and the Company appears to be in the position of winding up its affairs, some of these complaints are matters

about which, as a matter of timing, no appropriate remedy could be given - even if the acts were oppressive or unfair.

[85] There is one exception. It appears that, in or about 2000, Parker incurred a trade payable to Argo in connection with the MacDonald Bridge project in the amount of approximately $26,600.00. This payable is still outstanding. In addition, Argo apparently did not charge interest on this long outstanding account. Argo has not, even in winding up its affairs, offset this trade receivable from Parker against distributions made to shareholders (including Parker); in this respect, Argo has treated Parker differently than Cherubini.

[86] The applicant complains that this is both an unfair preference to a majority shareholder, and contrary to the Shareholders' Agreement, since it constitutes a long term interest-free loan by Argo to Parker, to which the applicant has not consented.

[87] The applicant's evidence is contained in Bate's March 9, 2006 affidavit (paragraphs 26 - 29) and Gasparetto's June 7th affidavit (paragraphs 7 - 10). Cherubini says that it worked on the MacDonald Bridge project, as part of a joint venture that included Parker; like Parker, it was not fully paid for its work, but was

required to pay, and did pay, its trade account with Argo. It says Parker should have paid its trade account with Argo in a timely manner, or the account should have been offset against monies paid by Argo to Parker -in the same way that Argo offset Cherubini's trade account.

[88] Argo's response is contained in paragraphs 45 - 59 of Fitzpatrick's affidavit, and in cross-examination of Gasparetto and Bate. In 2004, an industry slowdown caused cash flow problems for Argo. Argo sought payment of its largest receivables including those of Parker and Cherubini. In reply to requests for payment of their accounts, Gasparetto asked Fitzpatrick in September, 2004, to confirm that Parker's $26,600.00 (long outstanding) receivable would be paid. The court did not see Argo's reply, but attached to Fitzpatrick's affidavit (as Exhibit F) is an e-mail from Steve Ross, a Cherubini employee authorized to deal with the matter, in which Cherubini agreed to pay outstanding trade payables, and that Cherubini "will not deduct or link the $26,000.00 owed by Parker Brothers to accounts payable from [Cherubini] . . .".

[89] From cross-examination of Gasparetto and Bate, it is apparent that Ross's e-mail was only intended to be a response to the situation at that time - not a blanket or

long term waiver of Argo's obligation to collect this trade receivable from Parker. Bate testified that Cherubini was concerned at that time with Parker paying the remaining $250,000.00 it owed Argo; that is, it was focussed on the larger amount owed by Parker, and not just the outstanding MacDonald Bridge account.

[90] In its prehearing memorandum, counsel for the respondent suggests that (a) Cherubini had consented to the non-collection of the $26,000.00 overdue receivable, and (b) Parker voluntarily injected cash into Argo to alleviate cash flow problems (which Cherubini appears not to have done), and that this injection of cash exempted Argo from trying to collect the Parker receivable. In its post-hearing memorandum, Argo submits that (a) the $26,000.00 receivable is not a material transaction in relation to Argo's gross annual profits, (b) this complaint (the appropriateness of Argo's conduct on this complaint) is a matter for another (separate) action against Argo, and (c), even if this Court finds the evidence on this point gives rise to a strong *prima facie* case, there is no relief the Court can give that would rectify this oppression.

Anaylsis

[91] The applicant's evidence, on its face, clearly shows that Parker has still not paid, and apparently has not been charged interest on, a 2000 trade receivable owing to Argo. Argo appears to have treated this trade receivable differently from those owed by Cherubini.

[92] It is an unreasonable interpretation of the Ross e-mail of September 29, 2004 (Exhibit F on the Fitzpatrick affidavit) to suggest that it was a blanket waiver of Argo's obligation to collect this receivable, as opposed to the explanation given by Bate - that the applicant was more focussed on receipt by Argo, at the same time that Cherubini paid its outstanding account, of the other $250,000.00 owing by Parker.

[93] The applicant has discharged the onus of demonstrating that Argo appears to have acted oppressively or unfairly to Cherubini by treating this receivable differently than receivables owing by Cherubini. It is a breach of Cherubini's reasonable expectations as a shareholder that it would be treated differently in this regard. This is particularly relevant at this time, when Argo's assets have been sold and it is in the process of winding up its affairs. In March 2006, when making to shareholders a distribution of funds, this trade receivable was not offset against amounts payable to Parker.

[94] The applicant asks the court to obtain Argo's original invoice to Parker regarding the $26,600., and all documents from Parker to Argo respecting assurances, guarantees and debt acknowledgement re payment of the debt and related interest within a reasonable time. In its post-hearing memorandum, the respondent says there is no further information that is required in regards to the determination of this issue, and it is inappropriate to order an investigation into this issue. The respondent's submission appears to be an admission that, unlike other trade receivables owed to Argo by shareholders, Argo has no intention to collect, or charge interest on, this receivable, and a submission that such conduct, on its face, does not constitute oppressive or unfair prejudice or disregard of the applicant's interests, and that the complaint is properly dealt with in another action. As a result, an investigation should be limited to obtaining the documents requested by the applicant, so that if the apparent oppression is confirmed on a trial or final hearing, the quantum of any remedy can be calculated.

[95] With regards to Argo's representation that the issue of this oppression should be left for another action, and that there is no appropriate relief that should be granted in these proceedings, the court disagrees. On its face, the conduct constituted

an preference to Parker, and a prejudice to the applicant minority shareholder, contrary to reasonable shareholder expectations, and was an act of oppression. The fact that it may not be "a material transaction in relation to Argo's gross annual profits" (a quote from the respondent's post-hearing memorandum), makes it no less oppressive and unfair to the applicant.

[96] This oppression is ongoing and therefore the application is timely; Argo is in the process of being wound up and its equity distributed, without an accounting for this apparently unfair benefit to Parker at the expense of Cherubini.

[97] It is appropriate to give a remedy. In post-hearing memorandums, counsel submitted that the court is not limited to the remedy sought in the application; the cases filed confirm that I can impose whatever remedy is fair in the circumstances to rectify the oppression complained of.

[98] This application is an interim application. The appropriate remedy would be to obtain the factual particulars of the uncollected receivable, and of the practice of Argo in charging interest on similar accounts. In addition, because Argo is in the process of winding up its affairs, in the absence of an undertaking by Argo not to

make any further distribution to Parker without offsetting the trade account, it would be appropriate to enjoin Argo from making any further payment to Parker without first offsetting an amount equal to the $26,600.00, together with interest at the rate charged by Argo for trade receivables owing from other shareholders, including Cherubini, until a final determination of oppression.

Fourth Complaint

[99] The applicant complains that Argo's 2005 balance sheet shows it paid management fees and some loan interest to Parker, and had an account payable to AGI, for management fees and loan interest; in contrast, management fees to the applicant were shown only as accrued liabilities, and the applicant was not paid interest on its 2001 $100,000.00 loan to Argo until March, 2006. In addition, the applicant complains that, without Cherubini's prior consent, salaries, bonuses and administrative charges were paid in 2005 to Parker's Controller (Jeff Burroughs) and AGI's Vice- President Finance (Robert Gillis), contrary to s. 4.2(m) of the Shareholders' Agreement. The applicant says this raises questions respecting unfair preferential timing of payments and unexplained bonus/salary payments contrary to the Shareholders' Agreement. Argo's reply is contained in paragraphs 38 - 44 of the

Fitzpatrick affidavit. With respect to management fees, Fitzpatrick swore that management fees were calculated at the beginning of each year to be paid as agreed on budgeted business between Argo and the shareholders, and that they were adjusted at year end based on actual business. Parker and AGI invoiced for these management fees and for interest on their shareholder loans on a monthly basis and were paid. The applicant did not do so, even when it was sometimes reminded to submit invoices, so that it could be paid, but the applicant's entitlement was always accrued on the books until an invoice was received.

[100] With respect to salaries/bonuses/administration fees, when Argo's Controller left in 2005 (when the business was in the process of being sold), Mr. Burroughs and Mr. Gillis provided part-time services to permit Argo to complete its sale. The applicant, as a member of the Management Committee, knew this, and did not object at the time. These salaries, bonuses, and administrative fees were incurred in the ordinary course of business.

[101] Argo's reply is specific and reasonable, and fully answers the applicant's complaints. In addition, since the payments to Burroughs and Gillis were in the ordinary course of business, in order to permit Argo to complete its business

activities, they were not in beach of the Shareholders' Agreement; in any event, based on the evidence before the Court, the applicant knew of their employment by and services for Argo.

Fifth Complaint

[102] This complaint was to the effect that Argo stored Parker equipment on Argo property in 2005 without charging rent for this storage, until the applicant complained. This was said to be in contrast to the general treatment of the applicant who, on at least one occasion, was denied access to its work product without arrangements for payment of its accounts.

[103] At the hearing in June, it was evident that the applicant itself stored equipment on Argo's property in a similar manner to Parker.

[104] The complaint is not supported by any evidence. The evidence did not establish unfair preference to Parker, or disregard for Cherubini, or oppression.

Summary of Oppression Findings

[105] The applicant has established, on the face of the evidence in this interim application, that the gross profit margin on Argo's jobs for the applicant was significantly higher, over the last five years of its activities, than for Parker jobs; Argo's explanation does not answer what is an apparent unfair preference to Parker. The failure to offset Parker's long outstanding trade receivable in respect of the MacDonald Bridge job of approximately $26,600.00, which treatment differed from Argo's treatment of the applicant's trade receivables, was unfair and not explained or justified in the context of the reasonable expectations of a minority shareholder such as the applicant.

[106] All the other complaints, which appear to have arisen out of a breakdown in the relationship between the shareholders, were acts that might have been aggravating as between the parties, but were not, on their face, oppressive or unfair. I come to this conclusion recognizing that management of Argo was required to act in the best interests of Argo as a whole, which was not necessarily synonymous with the best interests of individual shareholders.

REMEDY

[107] In response to the complaints and requests for access by its "independent auditor" at its expense, made by Cherubini in February, 2006, Betts (for Argo) responded that he had forwarded the concerns to Argo's "independent auditors" to be looked into at the applicant's expense, and stated that if the auditor felt it was necessary, the auditor would contact Cherubini. There was no evidence about Betts advice to Argo's auditor (Grant Thornton); the auditor apparently did not contact Cherubini. Interestingly, however, the Notes to the financial statement respecting related party transactions changed for the December 31st, 2005, annual statement of Argo. From 2001 to 2003, the Notes simply identified transactions with related parties. The 2004 year end Notes listed transactions and added:

> The company, in the normal course of business, pays and charges management fees and interest, and sells and purchases services to certain related companies. All transactions are at fair market value.

The 2005 year end Notes (dated February 24, 2006) include at the end of a list of transactions the following:

> The Company, in the normal course of business, pays and charges management fees and interest, and sells and purchases services to certain related companies. <u>All transactions are recorded at the exchange amount agreed to by the parties</u>.

[108] The court has no knowledge what Betts advised the auditors to cause them to change their “Notes” without contact with the applicant. No evidence from Argo’s auditor was tendered. A direction that Argo’s existing auditor, Grant Thornton, obtain and provide the court with the factual information relevant to the two outstanding complaints might be speedier, less costly, and possibly result in a more complete answer. However, their unexplained change to the Notes about related party transactions, apparently made without contact with the applicant, and the atmosphere of distrust that pervades these parties, would distract from any factual finding they might make.

[109] Similarly, while it may be convenient, and possibly result in a more complete recovery of relevant documents, to order APC’s bookkeeping staff to search for and recover relevant documents, they do not appear to be independent of the applicant.

[110] With the obvious mistrust between the parties, it is more appropriate to appoint an accounting firm, independent of all parties, to search for, recover, maintain custody of, and report to the parties and the court on the relevant factual information, so as to enable this court, at the next stage in this proceeding (in the

absence of a resolution between the parties in the meantime), to determine, on all the relevant facts, what oppression or unfairness, if any, occurred, and what final remedy is appropriate. This should not preclude the independent accounting firm, appointed as an inspector by the court, from accessing the bookkeeping staff, formerly of Argo, now of APC, to assist in locating and recovering under the inspector's supervision, relevant information.

[111] On August 29, 2006, the Court requested that the parties name two chartered accounting firms, independent of, but acceptable to, the parties. They agreed on two names. The first name was Ernst & Young Inc.

[112] The appropriate remedy, in respect of this interim application, is to appoint Ernst and Young Inc. to conduct an investigation, pursuant to s. 5(3)(m) of the Third Schedule and s. 116 of the **Companies Act**. The inspection will be limited to an investigation of all information that the inspector determines is relevant to the two complaints that, on their face, constitute oppressive or unfair conduct by Argo.

[113] When the inspector has searched for, examined and recovered all factual documents, records and information, it shall report to the Court and the parties its factual findings with copies of the relevant documents and information.

[114] In the interim, Argo is enjoined from making any payment to Parker, until a final determination has been made as to whether Parker's unpaid trade receivable to Argo, was oppressive or unfair conduct.

[115] Before its application, the applicant had requested that Argo give it access to corporate records respecting its complaints. When refused, it requested that its "independent auditor" be given access at the applicant's expense. It maintained this latter position during this application.

[116] I do not agree that its "independent auditor" is any more appropriate an inspector than the respondent's independent auditor. However, I direct that the applicant shall pay the inspector's costs, subject to an eventual order on costs that may permit it to include those costs as a disbursement, after the final determination of the allegations of oppression and unfair conduct is made. Recovery of these costs

by the applicant would be, in any event, subject to the discretion of the court on final determination of the issue of oppression and unfairness.

J.