IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Chisholm v. Antigonish Construction Ltd.,* 2008 NSSC 12

Date: 20080117
Docket: SH 163908
Registry: Halifax

Between:

John Chisholm

Plaintiff

v.

Antigonish Construction Limited, Chisholm Development Limited, and Duncan G. Chisholm

Defendants

(original proceeding)

And Between:

Antigonish Construction Limited, Chisholm Development Limited, and Duncan G. Chisholm

Plaintiffs

v.

John Chisholm and ACL Construction Limited

Defendants

Judge:	The Honourable Justice M. Heather Robertson
Heard:	June 20, 2007 and September 27, 2007, in Halifax, Nova Scotia
Written Decision:	January 17, 2008
Counsel:	Geoffrey Saunders and Marc Dunning, for the plaintiff Douglas A. Caldwell, Q.C., Adriana Meloni and Derek A. Simon, Articled Clerk, for the defendants

Robertson, J.:

[1] John Chisholm the plaintiff and the defendant by counterclaim is the applicant in this matter and seeks interlocutory relief pursuant to section 5 of Schedule 3 to the *Companies Act* (the "*Act*") for an order declaring that John Chisholm and his son Trevor Chisholm as directors of Antigonish Construction Limited ("Antigonish") and Chisholm Development Limited ("Chisholm") pursuant to a meeting of the companies held for that purpose on June 26, 2006 and such other relief as the Court may deem just. The respondent is Duncan Chisholm who seeks to have the meeting at which John and Trevor Chisholm were appointed directors declared invalid. For ease of reference, I shall refer to these gentlemen as John, Duncan, Ronald and Trevor.

[2] Section 5 of Schedule 3 to the *Act*, R.S.N.S. 1989, c. 81 states as follows:

> 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,
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> that it is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
>
> (3) In connection with an application under this Section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
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> (a) an order restraining the conduct complained of;
>
> (b) an order appointing a receiver or receiver-manager;

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

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

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

(f) an order directing a company, subject to subsection (5) of this Section, or any other person, to purchase securities of a security holder;

(g) an order directing a company, subject to subsection (5) of this Section, or any other person, to pay a security holder any part of the moneys paid by him for securities;

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

(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;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a company required under the Act;

(l) an order liquidating and dissolving the company;

(m) an order directing an investigation pursuant to Section 116 of the Act;

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

(4) If an order made under this Section directs amendment of the memorandum or articles of a company, no other amendment to the memorandum or articles shall be made without the consent of the court, until a court otherwise orders.

(5) A company shall not make a payment to a shareholder under clause (f) or (g) of subsection (3) of this Section if there are reasonable grounds for believing that

> (a) a company is or would after that payment be unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the company's assets would thereby be less than the aggregate of its liabilities.

BACKGROUND

[3] The Court has before it the affidavits of John, Duncan and Ronald, who also gave evidence at this proceeding. Their affidavits set out the history of their dispute. These three gentlemen are brothers and the sons of Ronald Chisholm Sr., who founded Antigonish Construction Limited in 1978. He also found Chisholm Development Limited. These were essentially family companies that included his sons. Although the share distribution was unequal, profits from these companies were always divided equally. The share distribution in these companies following Ronald Chisholm Sr.'s death in March 1994 was as follows:

Antigonish		Chisholm	
John	46 shares	John	40 shares
Duncan	37 shares	Duncan	40 shares
Ronald	17 shares	Ronald	20 shares

[4] After their father's death, the boys carried on with the companies, but differences arose between John and Duncan in the mid 1990's, resulting in John's departure as an employee in January 1997. John commenced operating ACL Construction Limited ("ACL"), a company he had incorporated in 1996. John resigned as a director from all of the family companies in February 1999. John's departure from these companies was a significant loss as he was the driving force behind them and largely responsible for their continued success. The distribution of profits in equal parts was not acceptable to him. He felt it did not reflect the contribution made by each of the members of the companies. That was the reason for his departure.

[5] In May 2000, John commenced a proceeding by way of originating notice (application inter parties). The relief then sought was an order requiring the winding up of Antigonish and Chisholm or, alternatively, an order pursuant to section 5 of Schedule 3 to the *Act* liquidating or dissolving Antigonish and

Chisholm or an order requiring that John's shares in the companies be purchased by the other shareholders.

[6] The initial application was converted to an action and the statement of claim was issued in July 2000. The defendants, Duncan and Ronald filed a defence and counterclaim against John and ACL in September 2000. In the counterclaim, Duncan and Ronald alleged John's breach of his fiduciary duty to the companies and his seizure of corporate opportunities that should have belonged to the companies.

[7] In November 2002, John settled the dispute with Ronald by entering into a share purchase agreement. Under the terms of this agreement John agreed to acquire Ronald's shares in the companies and agreed to discontinue his claim against Ronald in this action. Ronald agreed to discontinue his counterclaim against John and ACL and to resign as an officer and director of the companies. The anticipated results of this agreement would see shareholdings in each of the companies as follows:

Antigonish		Chisholm	
John	63 shares	John	60 shares
Duncan	37 shares	Duncan	40 shares

[8] However, Ronald had entered into an earlier shareholder's agreement with Duncan dated November 26, 1999, which purported to preclude the sale of shares between two existing shareholders without the consent of the third. The agreement also stated that all major decisions of the companies shall be made by a unanimous vote of the shareholders. John was not a party to this agreement. The amended statement of claim filed by John seeks an order setting aside this agreement and allowing the transfer of Ronald's shares to John.

[9] In 2004, fearing that the companies' assets were being depleted, John made an application pursuant to section 5 of Schedule 3 before then Associate Chief Justice MacDonald, seeking that Duncan's salary from the companies cease and a monitor be appointed by the Court to oversee the affairs of the companies. He also sought access to the companies' books and records. The order was dismissed with respect to the application to have the respondent Duncan cease taking a salary from the companies, but he was required to deliver a sworn affidavit every 60 days to

the applicant John setting out the sources of revenue, expenditures and details of any tenders given by the companies during the preceding 60 days. Until June 2006, Duncan complied with these provisions.

[10] During this rather lengthy litigation, the parties have made various attempts to settle the matter and have been unsuccessful.

[11] Duncan, the President of the companies, had not held shareholders' meetings pursuant to articles 72 and 76 of each of the company's articles, between 1997 and 2006, with the exception of a single meeting held in 1999 for the purpose of entering into an agreement with Ronald, that John was not a party to. Having asked that meetings be held on several occasions from 2000 onward, on April 10, 2006, John made the requisition for shareholders' meetings pursuant to section 84 of the *Nova Scotia Companies Act.* Notice was given to Duncan through his solicitor.

[12] The meetings took place on June 20, 2006, as scheduled and Duncan attended along with his then lawyer, Craig Garson, Q.C., who acted as secretary to the meeting. Also present at the meeting were John and his solicitor, Geoffrey Saunders. Tabled at each meeting were the proxies from Ronald allowing John to vote on his behalf at the meetings. The combined shareholdings of John and Ronald in Chisholm to be voted would to 60 shares of the 100 outstanding. In Antigonish, it would be 63 of the 100 outstanding shares. At the meeting, John demanded that the voting be conducted by way of poll and voted all of his shares and those over which he held a proxy in favour of himself and Trevor as directors, following their nomination. He similarly voted those shares against Duncan's nomination as a director of each of the companies. The election of directors was conducted at this meeting, notwithstanding that the earlier shareholders' agreements made between Duncan and Ronald required unanimous agreement before a change in directors or officers could be made.

EVIDENCE

[13] Ronald testified that he has a business degree from Saint Francis Xavier University. He worked in the family companies from 1984 to 2002. His evidence was he has not consulted with Duncan since November 10, 2002, the date he signed the share purchase agreement with John. He also ceased to be an employee of the companies on that date. Ronald agreed that an outstanding dispute existed

between the companies and John with respect to work completed on the Glenbourne subdivision in Antigonish by John in the company name and ACL, as well as the contract for grubbing in the Glen Arbor golf course site, two projects that the companies allege John had taken away with him when he left. Ronald testified that he had been paid $675,000 over a period of three years for the sale of his shares to John. He acknowledged signing the 1999 shareholders' agreement made between himself and Duncan. He testified that he had nothing to do with its drafting nor had he consulted a lawyer. He agreed that the purpose of the shareholders' agreement was to ensure that John could not be involved with the companies. He agreed that following the sale of his shares to John, he had been approached by Trevor to sign proxies to ensure that John could vote these shares at the June 20 meeting.

[14] Duncan, in his evidence agreed that he had not called any meetings of the companies from 1997 with the exception of the special meeting held in 1999 to give effect to the shareholders' agreement he had signed with Ronald. He testified that he had given John notice that meeting. With respect to John's requests that meetings be held in the year 2000 and 2006, Duncan testified that he simply ignored the requests. He disagreed with John's counsel, Geoffrey Saunders that he voted at the meeting against John and Trevor being appointed directors saying that he attempted to adjourn the meeting before the vote. He did agree that he had nominated himself as a director and said that he refused to resign as an officer and director of the companies. He agreed that the purpose of the 1999 shareholders' agreement was to prevent John from having any rights in the management of the companies. He also testified that he wanted to ensure that he and Ronald were not able to sell their shares without the other one knowing. He testified as far as he was concerned, Ronald was not in a legal position to sell his shares to John. With respect to Clause 1.3 of the 1999 Shareholders' Agreement wherein all major decisions of the companies were to be made by a unanimous vote of the shareholders, he agreed that after 2002 he did not seek Ronald's agreement or consent in the conduct of the business of the companies, once he learned of his sale of shares to John.

[15] With respect to the activities of the companies, he agreed that in the last three years the number of jobs that he tendered has steadily declined and that the work he did do was that of a subcontractor for Alva Construction, a company owned by the family of his son-in-law.

[16] John confirmed the contents of his affidavit and agreed in cross-examination that he had walked away from the family companies. He also agreed that he had done work on the Glenbourne subdivision in the name of ACL, as well as work on the Glen Arbor golf course. With respect to his use of the proxies at the meeting of June 20, he testified that he was not aware that he needed to deposit the proxies within 48 hours of meeting, but had taken legal advice in having the proxies signed by Ronald. He agreed that his combined shareholding in Chisholm would be 55% of the total shareholding of that companies after he acquired Ronald's shares.

[17] With respect to the reports from Duncan relating to the companies' activities since 2004, he agreed that the volume of work was decreasing. His explanation was that Duncan was simply not bidding on work, not trying to get work, and not actually working. Beside Duncan, Antigonish had only one other employee in 2006, down from two employees in 2005, and three employees in 2004. His affidavit evidence with respect to the financial position of the companies included unaudited statements of the companies prepared by Grant Thorton between the years March 31, 2000 and March 31, 2003. These statements confirm the declining activity in the companies. In his affidavit evidence, he asserts that there are a number of pieces of heavy equipment of considerable value including a Cat 235 excavator, a Cat D6 dozer, a Cat 930 loader, a John Deere 450 dozer and Ingersoll Rand rock drills, which are not being used to generate revenue for the companies and which are depreciating in value.

[18] It is clear to me from the evidence that John was the driving force behind the companies. With his departure, the companies have grown stagnant experiencing declining work and profitability. It is also clear that the assets of Antigonish, its equipment, is not being fully utilized. Chisholm is largely a holding company with retained earnings that supports Duncan's income. Antigonish carries on very little business except for some sewage installation work on behalf of Alva Construction. In reality, all that remains to be done is the winding up of these companies in settlement of the long-standing dispute between John and Duncan, now that John has purchased Ronald's interest in the companies. Settlement between John and Duncan has not yet been achieved.

LAW AND ARGUMENT

[19] The applicant seeks the Court's approval of the June 2006 meetings. It is submitted by John that the companies' Articles of Association are its governing

documents and are binding on the companies and its shareholders. He argues that the shareholders' agreement of March 1999 does not override the provisions of the articles of a company and actions taken in accordance with a company's articles are valid actions of the company notwithstanding contrary provisions in a shareholders' agreement.

[20] The articles of the companies provide the directors shall be elected at a properly called general meeting of the shareholders by a majority vote. The *Act* is clear that all shareholders in the company are bound by the terms of the company's Articles of Association and that the Articles of Association may only be amended by a special resolution of the shareholders. He submits that no meeting of the shareholders was held to pass a special resolution to amend the articles and that he did not sign a resolution in writing to amend the articles of the companies. John says that even if such a meeting was held by Ronald and Duncan, they did not hold the required number of shares to pass a special resolution to amend the articles of either company. Therefore, based on the articles of the companies and the provisions of the *Act*, he submits that the directors can be elected by a majority vote of the shareholders of the companies, as did occur on June 20, 2006.

[21] The respondent Duncan submits that the resolutions passed at the special general meeting of June 20, 2006, at the offices of John's solicitor and upon which he now relies are invalid and of no legal effect. He submits the following questions to the Court:

1. Was the June 20, 2006 meeting and any business transacted thereto, invalid?

    a) Lack of a Quorum

    b) Invalid Proxies

    c) Voting of Ron Chisholm's shares in contravention of the Shareholders' Agreement, in any event.

2. Will the Applicant's rights be oppressed by maintaining the status quo and keeping the Respondent, Duncan Chisholm on as a Director of the Companies pending a final resolution of the litigation?

[22] With respect to the issue of the proxies, Duncan claims the proxies were not filed with the company 48 hours prior to the meeting as required by Clause 98 of the Articles of Association of the companies. John submits that this is a mere procedural requirement that ought to be dispensed with as part of the remedy sought pursuant to section 5(3) of Schedule 3 and that in any event the Court could order the meetings be held again, achieving the same result.

[23] The relevant provisions of the Shareholders' Agreement of March 1999 are as follows:

> Clause 1.3: Requirement of Unanimity for Major Decisions
>
> The major decisions of the companies (" Major Decisions") shall be made by a unanimous vote of Shareholders. The Shareholders shall further define what constitutes a Major Decision, from time to time as the need arises. For the purposes of this Agreement, and notwithstanding any provisions of the Articles of the Companies, Major Decisions of the Companies shall include but shall not be limited to the following:
>
> ...
>
> > (i) changing the Directors and/or Officers of the Companies, and the appointment of new Officers or Directors
>
> Clause 6.11: Precedence Over Memorandum and Articles
>
> Notwithstanding the provisions contained in the Memorandum of Articles of the Companies, the rights and obligations between the Shareholders and the Companies and between the Shareholders inter se shall, insofar as they are inconsistent with the provisions contained in the said Memorandum or Articles, be determined by reference to this Agreement.

The relevant provisions of the articles of the companies are as follows:

> 82. Two members personally present and entitled to vote shall be a quorum for a general meeting for the choice of a chairman and the adjournment of the meeting. For all other purposes, a quorum for a special meeting shall be two members personally present and entitled to vote and holding or representing by proxy not less than one-tenth in number of such of the issued shares of the Company as confer upon the holders thereof the right to vote at such meeting.

85. At any general meeting a resolution puts the meeting shall be decided by a show of hands unless, either before or on the declaration of the result of the show of hands, a poll is demanded by (i) the chairman or (ii) at least five members present and entitled to vote at the meeting or (iii) a member or members holding or representing by proxy at least one-tenth in number of the issued shares of the Company that confer upon their holders the right to vote at the meeting.

88. When there is an equality of votes, either on a show of hands or on a pole, the chairman shall have a casting vote in addition to the vote or votes that he has as a member.

89. The chairman of a general meeting may, with the consent of a majority of the members present, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourn the meeting other than the business left unfinished at the meeting that was adjourned.

113. Subject to article 114, at the dissolution of every annual ordinary general meeting all the Directors shall retire from office and be succeeded by the Directors elected at such a meeting. Retiring Directors shall be eligible for reelection at such a meeting.

114. If at any ordinary general meeting at which an election of Directors ought to take place no such election takes place, or if no ordinary general meeting is held in any year or period of years, the retiring Directors shall continue in office until their successors are elected and a general meeting for that purpose may on notice be held at any time.

The relevant provisions of the *Act* are as follows:

Alteration of articles or regulations

23 (1) subject to this Act and to the conditions contained in its memorandum, a company may by special resolution, alter or add to its articles, and any alteration or additions so made shall be as valid as if originally contained in the articles and be subject in like manner to alteration by special resolution.

Binding effect of articles

24 (1) the memorandum and articles shall, when registered, buying the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each

> member, his heirs, executors and administrators, to observe all the provisions of the memorandum and of the articles, subject to this Act.
>
> Special resolution
>
> 87(1) a resolution passed by a company shall be deemed to be special whenever it has been passed by a majority of not less than three fourths of such members of the company entitled to vote as are present in person or by proxy, where proxies are allowed, at any general meeting of which notice specifying the intention to propose a resolution as a special resolution has been duly given, and such resolution has been confirmed by a majority of such members entitled to vote as are present in person or by proxy, where proxies are allowed, at a subsequent general meeting, of which notice has been duly given, and held had an interval of not less than 14 days, nor more than one month, from the date of the first meeting.
>
> Shareholder resolutions without meeting
>
> 92(1) a resolution, including a special resolution, in writing and signed by every shareholder who would be entitled to vote on the resolution at a meeting is as valid as if it were passed by such shareholders at a meeting and satisfies all of the requirements of this act respecting meetings of shareholders.
>
> (2) a copy of every resolution referred to in subsection (1) shall be kept within minutes of proceedings of shareholders

[24] The respondent submits that although he was physically present at the meeting on June 20, 2006, his shares ought not to have been counted for quorum purposes. The respondent's attendance at the meeting, he says was predicated on his belief that the meeting was invalid. He said in evidence that he made it clear at the beginning of the meeting that he would not resign and would remain on as a director of the companies. However, the initial business of the meeting was conducted. Duncan acted as chair and confirmed the companies' bankers for the following year were CIBC and that the companies' insurance would again be placed with Stanhope Co. Ltd. He submits however, that he attempted to adjourn the meeting before the voting started for the appointment of new directors and objected when the proxies were placed before him.

[25] It is clear to me from the evidence that Duncan did participate in the meeting. He nominated himself as a director of the companies and only objected to the vote when John passed the proxies across the table to him, nominating himself

and Trevor, as directors and officers. I do not consider this conduct to be "attendance at the meeting under protest." He opened the meeting, conducted business and placed his own nomination before the meeting. He only made a protest when he saw what the result would be, by John voting his own shares and those of Ronald by proxy succeeding in replacing the directors and officers of the companies. Section 89 of the articles did not allow Duncan to adjourn the meeting without consent.

[26] The respondent relies on *Lumbers v. Fretz,* [1929] 1 D.L.R. 51 (Ont. C.A.). The facts of this case cannot be compared with the present situation. In *Lumbers*, the court found that the action of the directors was not an honest exercise of the powers, but an attempt to divert the assets of the company to their own use as individuals and that proxies obtained from the shareholders had been acquired without acquainting a shareholder with knowledge of that which was proposed to be voted on. It was held that the use of the defendant of the proxies in support of a resolution to confirm the bylaws was an abuse of the powers given to him by proxy.

[27] The respondent also relies on *Leamy et al v. Sinaloa Exploration & Development Co. et al* (1925), 130 A. 282 (Court of Chancery of Delaware). Similarly, this case can be distinguished on its facts where the stockholder present at the meeting (and subsequently counted for quorum purposes) was actually physically ejected from the meeting before voting occurred, while his very purpose for attendance at the meeting was to assert its illegality.

[28] Alternatively, the respondent relies on article 98 of the company's memorandum and Articles of Association which provides as follows:

> 98. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power our authority shall be deposited at the office of the Company not less than forty-eight hours before the time for holding meeting or adjourned meeting at which the person named in such instrument proposes to vote. No instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

[29] I am in agreement with the applicant, that the failure to file the proxies within the required 48 hours is not fatal to this application. Duncan was aware of the sale of shares by Ronald to John. He came to the meeting with the belief that

because of the March 1999 agreement, Ronald's shares could not be voted at the meeting. His evidence on this point was interesting however in that he called Ronald before the meeting and asked if he could have Ronald's proxy and vote his shares at the meeting. He therefore had notice of what would transpire at the meeting and he attended it with his solicitor who acted as the secretary to the meeting. In any event, the lack of proper notice amounts to a technical failure that could be cured by ordering that the meetings be held again. And in the case of Antigonish, John was in a position to out-vote Duncan without need of Ronald's proxy.

[30] Lastly, in the alternative the respondent submits that voting Ronald's shares was contrary to the shareholders' agreement of February 16, 1999, Clause 1.3.

[31] With respect to John voting Ronald's shares, the respondent relies on *Drouillard v. Cogeco Cable Canada Inc.*, [2007] O.J. No. 1664 (Ont C.A.) and *Parks West Mall Ltd. v. Jennett*, [1995] A.J. No. 1150 (AB C.A.), suggesting that by transferring Ronald's shares to himself, the applicant had induced a breach of contract and cannot be allowed to profit from his wrongful act. Respectfully, I find that these cases have little application to the circumstances of this case. I cannot characterize the conduct of John in securing an agreement for the purchase of shares from his brother Ronald as an illegal act, in light of the fact that the shareholders' agreement of March 1999 was contrary to the articles of the company, having never been adopted by a special resolution of the company to amend the provisions of the memorandum and articles.

[32] *Hardman v. Alexander*, 2003 CarswellNS 97 (S.C.), is directly on point. In that case, which is quite similar to the circumstances of this case, all of the shareholders of the company had entered into a shareholders' agreement. The shareholders' agreement specified a certain individual be the president of the company. After the individual named as president resigned, the plaintiff claimed that the only way to change the president of the company was to amend the shareholders' agreement and therefore the subsequent election of a new president by the directors of the company was not valid.

[33] At para. 175, Justice Hood cited *Halsbury's Laws of England*, 4th ed., at vol. 7.1 para. 149, that states:

> Shareholders' agreements. Individual shareholders may deal with their own interests by contract in such way as they may think fit; but such contracts, whether made by all or some only of the shareholders, create personal obligations, or an *exceptio personalis* against themselves only, and do not become a regulation of the company or binding on the transferees of the parties to it or upon new or non-assenting shareholders.

[34] Justice Hood accepted that the shareholders' agreement did not constitute a special resolution that amended the company's articles of association and that unless the articles of association were specifically amended by a special resolution, they continued in full effect and the power granted to the directors to elect the company's president overruled the terms of the shareholders' agreement.

[35] She concluded at para. 179 that:

> In this case the articles were never altered and the power to elect the president all of HPDL [the company] remained vested in the directors.
>
> I therefore conclude that the resignation by William Hardman at a directors meeting and the election of Christopher Alexander at that meeting were valid.

[36] This decision was cited with approval by the British Columbia Supreme Court in *CIPC (Ocean View) Ltd. Partnership v. Churchill International Property Corp.* 2006 CarswellBC 1819 (S.C.). At para. 32, Justice L. Russell stated:

> However, the question to be answered here is, would a breach of the Shareholders' Agreement, if it applied, render the request and to Petition invalid? The answer is no. To hold otherwise, I would have to conclude that the Shareholders' Agreement rendered invalid the exercise of the directors' power permitted by the articles. However, a shareholders' agreement does not supersede the articles of a British Columbia company. If directors make a decision that is valid under the articles but contrary to a shareholders' agreement, they may be liable in their capacity as shareholders for breach of the agreement, but the act of the company will not be invalid.
>
> The notice of articles (formerly the memorandum) and the articles are the company's fundamental governing documents. The articles define the powers of the directors. ... Section 19 provides that the company and its shareholders are bound by the articles. The articles can be altered only in accordance with the rules set out in the *Business Corporations Act*.

> A basic rule that the powers of the company set out in the articles prevail unless they are properly altered has long been recognized. ...

[37] This is so in the circumstances of this case. The companies and shareholders are bound by the articles of the companies and those articles shall govern all actions of the companies unless and until they are amended by special resolution of the shareholders. The articles take precedence over any agreement between the shareholders where an inconsistency exists. In this case that is particularly so because John was not a party to the shareholders' agreement that Duncan seeks to rely upon.

[38] The applicant seeks an oppression remedy and relies on a recent decision of this Court in *Re Argo Protective Coatings Inc.* 2006 CarswellNS 436 at paras. 16 to 19, which sets out the various principles that were relevant to the contested aspects of that matter. Justice Warner advanced that the "reasonable expectations" test has come to the fore. He noted at para. 49:

> ¶ 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.

[39] There are quite obviously reasonable expectations to be accounted for in this case.

[40] John, claiming to be oppressed in this application, has the reasonable expectation that his shares could be voted at a meeting of the companies. Duncan, has the reasonable expectation that he might continue to be an employee of the companies and be compensated for his activities until his services are not longer required by the companies. Both John and Duncan have the reasonable expectation that in the winding up of the companies their respective interests should be considered.

[41] The remedy sought by the applicant is an oppression remedy. The Court has wide latitude to provide remedies pursuant to Section 5 of Schedule to the *Act.* The interests of all of the shareholders must be respected.

[42] In the circumstances of this case, it would not be appropriate for me to order a winding up of the companies at this juncture. That, I would see as a drastic step. However, in my view a confirmation that the meeting of June 20, 2006, was a valid meeting and that the election of the directors in accordance with the companies' articles, which are binding on the companies and their shareholders, does not constitute a drastic step. In this case, John's rights as a shareholder have been disregarded by Duncan for some time in his refusal to call meetings requested and in entering into a shareholder's agreement, in which John was not a party. John has established that he is oppressed and an appropriate remedy should follow.

[43] However, there are certain realities that flow from the appointment of John and Trevor as directors of these companies. John could now be left in the position of controlling the companies' course of litigation against himself and ACL. He could also control the sale of assets or the winding up of these companies to the detriment of Duncan's interests.

[44] I also recognize that counsel for the companies, Mr. Caldwell, could not take instructions from John with respect to the course of litigation. A person in the nature of a litigation guardian would have to be appointed, a person who is independent of John or Duncan, who could investigate the claim against John and ACL and instruct counsel.

[45] Further, with respect to the valuation of any of the companies' assets, i.e., its equipment, it would not be appropriate for John to conduct such a valuation. In that regard, a monitor, as an independent third party, could oversee the proper valuation of the assets of the companies and any subsequent sale of the assets of the companies would require approval by the Court. This would recognize John's legitimate interest that the remaining assets in these companies not be wasted and also protect both gentlemen with respect to the valuation and sale of assets. The choice of both the litigation guardian and the monitor, in the absence of agreement by counsel would be a decision made by the Court. These protections will in my view be fair to both John and Duncan and facilitate the resolution of this dispute that could otherwise linger in the courts for many more years, while the value in

the companies continue to be depleted. I will rely on counsel to agree to the form of the order that:

1. Confirms John and Trevor as directors of the companies and validates the meeting of June 20, 2006.

2. Provides that upon agreement of counsel, a *litigation guardian* will be appointed to evaluate the claims the companies have against John and ACL and instruct legal counsel accordingly and failing agreement the *litigation guardian* will be appointed by the Court.

3. Provides that upon agreement of counsel, a monitor will be appointed to oversee the affairs of the companies and the valuation of assets and failing agreement the monitor will be appointed by the Court.

[46] In the absence of the agreement by counsel as to the matter of costs, the Court will hear written submissions.

Justice M. Heather Robertson