SUPREME COURT OF NOVA SCOTIA

Citation: Richards v. Richards, 2013 NSSC 163

Date: (2013-06-10)
Docket: Hfx. No. 390959
Registry: Halifax

Between:

SANDRA LYNN RICHARDS

Applicant

v.

ROBERT JAMES RICHARDS, JAYLYNN ENTERPRISES LIMITED, HOLM REALTY LIMITED, DUANE ROBERT RICHARDS, JAY ROBERT RICHARDS and **RICHARDS FAMILY TRUST (2002)**

Respondents

Judge:	The Honourable Justice Pierre L. Muise
Heard:	December 3, 4 and 5, 2012, and January 31 and February 1, 2013,
Final Written Submissions:	March 7, 2013
Counsel:	Sandra Richards represented by Rubin Dexter, Robert Richards represented by William Ryan, Q.C., Jaylynn Enterprises Limited and Holm Realty Limited represented by Joseph Burke

Duane Richards self-represented during this hearing (his Counsel, Lesley Mercer and David Byers were not in attendance)

Jay Richards represented by Colin Bryson
Richards Family Trust (2002) not represented

A. INTRODUCTION

[1] The Applicant, Sandra Lynn Richards ("Sandra") and the Respondent, Robert James Richards ("Robert"), were married in 1976. They have three sons, one of which is the Respondent, Jay Robert Richards ("Jay"). The Respondent, Duane Robert Richards is Robert's son from his previous marriage.

[2] The Respondent, Jaylynn Enterprises Limited ("Jaylynn"), was incorporated in 1976, about two months before Sandra and Robert were married, while they were living common law. Initially, Sandra and Robert were the only two shareholders. By 2002, the shareholders had increased to include: Sandra, Robert, Jay, their other two sons, Jordan David Richards ("Jordan") and Ross Thomson Richards ("Ross"), and, the Respondent, the Richards Family Trust (2002) (the "Family Trust"). They continue to be the shareholders today. The beneficiaries of the Family Trust were, and continue to be, Sandra, Robert and their three sons.

[3] The Respondent, Holm Realty Limited ("Holm"), was incorporated in 1989. The only shareholders were, and continue to be, Sandra and Robert.

[4] Until 2010, Sandra and Robert were the only directors and officers of Jaylynn and Holm. Sandra was Secretary and Robert was President. They also both

worked in the day-to-day operations of the businesses conducted by both companies. The business of both companies was run out of the same office. They operated under the umbrella of what was known as the Home Centre Group of Companies (the "Home Centre"), owned and managed by family members.

[5] Sandra and Robert separated on March 13, 2010, partly because their working relationship, which had been deteriorating, became significantly worse in January of 2010, when Robert proceeded with renovations on a building known as the Bowater Unit, contrary to Sandra's wishes. They both continued to work in the businesses. However, the working relationship continued to deteriorate.

[6] Between April 8 and 10, 2010, she formally asked the Bank of Montreal ("BMO") to reduce Jaylynn's operating line of credit from $900,000 to $150,000. She did this purportedly to control the amount Jaylynn could spend, because BMO could not put in place a mechanism to ensure that both her and Robert's signature had to be on Jaylynn cheques. Robert convinced BMO to maintain the line of credit where it was.

[7] On April 13, 2010, Sandra sent an e-mail to the employees of the Home Centre indicating she would no longer be working there. It was taken and accepted by Robert as confirming her resignation. However, he did not formally dismiss her as an employee until September 17, 2010.

[8] She also wrote herself a cheque from Holm's account, dated May 31, 2010, in the amount of $29,000, which represented about half of the money in the account. Robert arranged for it to be stopped from clearing.

[9] In or about May of 2010, Robert stopped income payments to Sandra and himself, in the form of dividends and draws, from both Jaylynn and Holm.

[10] Nevertheless, Sandra and Robert were still attempting to salvage their marriage, until it became clear, on or about August 7, 2010, that there was no possibility of reconciliation.

[11] At a Shareholders' and Directors' meeting of Holm, on September 16, 2010, Robert used his casting vote to block Sandra's re-election as a director and officer.

[12] A General Meeting of Jaylynn was held August 12, 2011. Sandra did not attend. Sandra, Robert and Jay were elected directors. At a board meeting held the same day, Robert and Sandra were re-elected as President and Secretary. Duane was appointed as a director for the following year.

[13] A further general meeting was held October 7, 2011. Sandra was not in attendance. Robert, Jay and Duane were elected directors. At a board meeting held

the same day: Robert was elected President; Jay was elected Secretary; and, Duane was elected Vice-President. Sandra remained a director.

[14] Sandra commenced an Application in Court seeking oppression remedies, including injunctive relief, under s. 5 of the Third Schedule to the **Companies Act**, R.S.N.S. 1989, c. 81, based on these and other actions by Robert and the other Respondents.

[15] She also filed the within motion seeking an interim injunction.

[16] The interim injunction being sought is one prohibiting Richard, Duane and Jay from contravening the Directors' Resolution and Shareholders' Special Resolution, of Jaylynn, dated July 13, 1983, and Section 4.01 of the Shareholders' Agreement , in relation to Jaylynn, dated June 15, 1994. Those provide, among other things, that: transactions exceeding $50,000 require the signatures of both Sandra and Robert; and, sales, leases or mortgages of Jaylynn assets, as well as transactions over $50,000, require the unanimous consent of all shareholders.

[17] The Respondents, except for the Family Trust, which is not represented in this motion, contest this request for interim injunctive relief.

[18] Sandra has provided the requisite undertaking regarding indemnification of losses, moving for interlocutory relief and pursuing her claim without delay.

[19] In the within motion, Sandra also requested production of, and access to, corporate and financial records of Jaylynn and Holm. The Respondents have produced much of the requested information. They agree to what they consider reasonable ongoing production of, or access to, information, including from the accountant for Jaylynn, through her accountant, in accordance with a reasonable arrangement. Sandra seeks more detailed and extensive production, and more complete access to information.

B. ISSUES

1. The main issue, broadly described, is whether the Applicant is entitled to the interim injunctive relief requested pursuant to s. 5 of the Third Schedule, the "oppression remedy" provision, of the **Companies Act**, R.S.N.S. 1989, c. 81.

2. The second issue is the extent to which Sandra and/or her accountant, on an interim basis, ought to have access to, and receive copies of, the corporate and financial records for Jaylynn and Holm.

C. LAW AND ANALYSIS

1. AUTHORITY TO GRANT INTERIM INJUNCTIVE REMEDY REQUESTED

[20] S. 5 of the Third Schedule to the **Companies Act** provides:

> "5 (1) A complainant may apply to the court for an order under this Section.

> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that 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,
>
> (a) an order restraining the conduct complained of;
>
> ….
>
> (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;
>
> ….
>
> (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;
>
> … . "

[21] It is agreed that Ms. Richards, as a shareholder, fits within the definition of "complainant" in s. 7(5)(b) of the Third Schedule. That agreement conforms with the Ontario Court of Appeal decisions in **Naneff v. Con-Crete Holdings Limited et al.**, [1995] O.J. No. 1377 and **UPM-Kymmene Corp. v. Miramichi Inc.**, [2004] O.J. No. 636.

[22] Some of the principles relating to interim oppression remedies were outlined in **Merks Poultry Farms Ltd. v. Wittenburg**, 2010 NSSC 278. At paragraph [44], the Court stated:

> "An interim order will only be given where it is necessary to preserve rights pending the hearing of an action on the merits .... Evidence to satisfy the burden for interim relief depends upon the specific circumstances and remedies sought."

[23] Then, at paragraph [297] the Court stated:

> "The purpose of an interim order is to attempt, if possible, to preserve balance, and to encourage the parties to resolve the issues themselves without damaging the business. When parties are so focussed on their own interests, and fail to see their common interest in the success of their joint enterprise, the responsibility of the Court is to take only measures that are absolutely necessary to preserve the status quo until trial."

[24] The Court in **Deluce Holdings Inc. v. Air Canada**, [1992] O.J. No. 2382 (G.D.). at paragraph 68, stated:

> "The court has a very broad discretionary power under the oppression remedy legislation to select a remedy appropriate to the situation at hand. Its mandate is to 'make any interim or final order it thinks fit'. This discretion must be exercised in accordance with judicial principles, of course, and within the overall parameters of corporate law. None the less, the remedy has been described by one early commentator as 'beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world . . . unprecedented in its scope': see Stanley M. Beck, "Minority Shareholders' Rights in the 1980's", Special Lectures of the Law Society of Upper Canada, 1982 Corporate Law in the 80's , at p. 312. Courts are prepared to be creative and flexible in fashioning remedies to fit the case when called upon to apply this broad remedy."

[25] An oppression remedy is even available to a shareholder with majority voting control, and to one who has another available remedy: **UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.**, [2004] O.J. No. 636 (C.A.).

[26] Where an injunctive interim oppression remedy is sought, the test for interlocutory injunctions set out in **RJR-MacDonald Inc. v. Canada (Attorney General),** [1994] S.C.J. No. 17 generally applies. At paragraph 43 of the Quicklaw Version, the Court summarized the test as follows:

> "First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

[27] The onus is on Sandra to satisfy the Court that all three branches of the test should be decided in her favour.

2. STANDARD TO ESTABLISH FIRST BRANCH OF RJR-MACDONALD TEST FOR INTERIM INJUNCTIVE OPPRESSION REMEDY

[28] The Respondent, Robert Richards, referred to a number of cases from Ontario as authority that a party seeking an interlocutory injunction as an interim oppression remedy must establish a strong prima facie case "showing that the corporation or its affairs have been conducted in a manner that is oppressive or

unfairly prejudicial to, or that unfairly disregards the interests of, the complainant shareholder." This particular quote emanated from paragraph 32 of **Stern v. Imasco Ltd.**, 1999 CarswellOnt 3546 (O.S.C.J.).

[29] He also referred to **Amaranth LLC v. Counsel Corp.**, 2005 CarswellOnt 4944 (O.S.C.J.), where the Court, at paragraph 11 indicated that, in the circumstances of that case, it was satisfied that it was appropriate to replace the requirement of a "serious issue to be tried", in the first branch of the RJR-MacDonald Test, with the higher test of "strong prima facie case".

[30] Another of the cases he referred to is **Le Maitre Ltd. v. Segeren**, [2007] O.J. No. 2047 (S.C.J.). That case dealt with an interim injunction as an oppression remedy and the parties agreed that the "strong prima facie case" standard applied. The Court conducted no analysis to determine the proper standard.

[31] I will discuss other cases provided in the remainder of my reasons regarding the proper standard to apply to the first branch of the RJR-Macdonald Test.

[32] No Nova Scotia cases were provided in which the "strong prima facie case" standard was said to apply automatically to interlocutory injunctive oppression remedy motions.

[33] In **JLL Patheon Holdings v. Patheon Inc**., [2009] O.J. No. 2202, at paragraph 42, the Court stated:

> "[W]here injunctive relief is sought in the context of an oppression action, the applicant must, in most circumstances …, demonstrate a strong prima facie case because the Court is effectively being asked for a final determination on the basis of a relatively complete record." [Emphasis by underlining added.]

[34] This later Ontario case moves away from an automatic application of the more stringent test in interlocutory injunctive oppression remedy cases.

[35] In a further Ontario case, decided later the same year, **Tullio Developments Inc. v. 2177314 Ontario Ltd.**, 2009 CarswellOnt 7643 (O.S.C.J.), at paragraph 15, the Court, dealing with an application for an interlocutory injunction as an oppression remedy, noted that the requirement to show a strong prima facie case no longer applies. Nevertheless, the Court went on to note that it must be wary of imposing an interim remedy which would have the practical effect being the final relief, such as by putting the corporation at risk of insolvency or importing a shotgun provision not agreed to.

[36] The judgment in Tullio was rendered about two months after the decision in **Mealla v. Salba Corp. N.A.**, [2009] O.J. No. 4057 (S.C.J.), in which the Court, dealing with a motion for an interim injunctive oppression remedy to maintain the status quo, at paragraph 45, stated that "the Applicants must establish that there is a serious issue or question to be tried", without referring to any change in the test.

[37] In my view, these later Ontario cases recognize, at least, that there is no automatic application of the strong prima facie case standard in interlocutory oppression remedy cases.

[38] Like the Courts in **Tullio** and **Mealla**, as well as in **Boffo Family Holdings Ltd.** v. **Mountainview Developments Ltd**., 2010 BCSC 560, for the reasons outlined below, I am of the view that the higher strong prima facie case does not automatically apply simply because the interlocutory injunction is sought in the oppression remedy context. I am also of the view that it does not apply in the circumstances of the case at hand.

[39] I agree with the reasoning in **Boffo**, where the Court, at paragraphs 26, and 28 to 32, stated:

> "26 In *Amaranth LLC v. Counsel Corp*., **[2005] O.J. No. 4329** (Ont. S.C.J.), a shareholder alleged that the respondent corporation had disposed of virtually all of its assets in breach of the notification requirements set out in the Ontario Business Corporations Act. He brought an application for an order that the remaining assets be placed in trust or that the corporation be required to inform shareholders of any transaction of any magnitude. Campbell J. considered the issue of whether the first branch of the test for interlocutory relief required simply the formulation of a 'serious issue to be tried' or whether it required a 'strong prima facie case.' He concluded that a strong prima facie case was the appropriate test. However, he also noted that it made practical sense when the relief in effect provided execution before judgment.
>
> ….
>
> 28 It is useful to go back to basic principles. In *RJR-MacDonald*, the Supreme Court of Canada adopted the approach outlined by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd. [[1975] 1 All E.R. 504* (U.K. H.L.)] (at 335):
>
> > Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396*, an applicant for interlocutory relief was required to

> demonstrate a 'strong prima facie case' on the merits in order to satisfy the first test. In *American Cyanamid Co.*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that 'the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried'. The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.
>
> [emphasis added]

29 Sopinka and Cory JJ., writing for the Court, described the meaning of 'a serious question to be tried' at 337-338:

> What then are the indicators of 'a serious question to be tried'? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. ...
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

30 The Court noted two exceptions where the higher threshold of a strong prima facie case would apply: when the result of the interlocutory motion will amount to a final determination of the action, and when the case rests on a pure question of law. In this case, neither exception would apply.

31 In the following B.C. cases, injunctions were sought pending proceedings under s. 227 of the *BCA: N'Quatqua Logging Co. v. Thevarge*, 2006 BCSC 1122 (B.C. S.C.); *Koopman v. Rathwell*, 2006 BCSC 366 (B.C. S.C.); *Evergreen Security Ltd. (Trustee of) v. Crystal Graphite Corp.*, 2004 BCSC 713 (B.C. S.C.). Each of those cases applied the 'serious question to be tried' test without reference to the strong *prima facie* case approach.

32 I conclude that the petitioners must establish a 'serious question to be tried' rather than a 'strong *prima facie* case'."

[40] The Court in **RJR-MacDonald**, at paragraph 56 of the Quicklaw Version, left open the possibility that, outside of Charter cases, a third exception may be where there is no substantial dispute in relation to the facts.

[41] A further exception is where the interlocutory interim injunction being sought is mandatory, as opposed to prohibitory. In such a situation, a more stringent test applies in Nova Scotia. The standard for this test has been described, in various decisions of the Nova Scotia Supreme Court, as requiring the moving party to show a "strong *prima facie* case" or that he or she is "clearly in the right". (See: **Gallant v. Casino Taxi Ltd.**, [1996] N.S.J. No. 567 (S.C.), at paragraphs 5 to 7; **Burnside Industrial Packaging Limited v. Canada Post Corporation**, [1994] N.S.J. No. 204 (S.C.), at paragraphs 10 and 11; **Canada (Attorney General) v. Marineserve.MG Inc.**, 2001 NSSC 127, at paragraphs 30 to 33; **Hardman Group Ltd. v. Alexander**, [1998] N.S.J. No. 562 (S.C.), at paragraphs 4 to 7; and, **Movie Gallery Canada, Inc. v. 9070-7720 Quebec Inc.**, [2005] N.S.J. No. 111 (S.C.), at paragraph 16.)

[42] Our Court of Appeal, in **D.E. & Son Fisheries Ltd. v. Goreham**, 2004 NSCA 53, at paragraphs 10 and 11, confirmed that it is "generally accepted that the test [for a mandatory interim injunction] is more rigorous than that applied where a prohibitory injunction is sought". However, the Court did not say what the proper standard was. It merely indicated it was less onerous than that required for summary judgment.

[43] The "strong *prima facie* case" standard has also been applied for such mandatory orders in other provinces. (See, for example, **Connelly v. Connelly-McKinley Ltd.**, 2010 ABQB 515, at paragraphs 5 to 7, and **Natpao Holding Inc. v. Evanov Communications Inc.**, [2008] O.J. No. 2181 (S.C.J), at paragraph 38.)

[44] The Saskatchewan Court of Appeal, in **Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership**, 2011 SKCA 120, has signaled that the continued use of a more stringent test for mandatory interlocutory injunctions may be ripe for revisiting, stating, at paragraphs 42, 45 and 46, the following:

> "42 It is readily apparent, of course, that the decisions from this Court on this issue were rendered well before the Supreme Court's rulings in *Metropolitan Stores* and *RJR-MacDonald* and without direct reference to the concerns of principle underpinning those two decisions. Accordingly, they are now of questionable authority and must be reassessed. In my view, we must take our cue from the Supreme Court and hold that, going forward, use of the serious issue to be tried approach should be the general rule in relation to all applications for interlocutory injunctive relief, including applications for mandatory relief.
>
> ….
>
> 45 This said, I hasten to add that a change of approach in favour of the use of the serious issue to be tried standard should not shift the legal landscape. This is because the meaningful difference between prohibitory and mandatory injunctions in the present context is that mandatory-type injunctions, generally speaking, go beyond maintaining the *status quo*, are more intrusive and have a larger potential to create losses that will be left uncompensated after trial if the plaintiff's claim be unsuccessful. Thus, the real question at play in this regard should be one of how best to account for these realities when deciding whether to grant an interlocutory injunction. My point here is that the business of accounting for the effects of mandatory-type injunctions on defendants does not have to involve the use of a demanding standard in relation to the strength of the plaintiff's case. Indeed, that approach involves the classic 'blunt instrument.' A more effective and more nuanced way to proceed is to consider

> the likely effect of a proposed mandatory order on a case-by-case basis and in the context of the balance of convenience analysis.
>
> 46 In other words, taking the position that the serious issue to be tried approach should be used in connection with applications for mandatory-type injunctions does not mean such injunctions will be easier to obtain than they have been historically. It means only that the analysis of the relevant risks and equities should not end, and the matter be resolved against the plaintiff, if the plaintiff can do no more than make out a serious issue to be tried. The potential burdens of the mandatory injunction on the defendant will, and must be, carefully weighed in the course of the balance of convenience analysis."

[45] I agree with this reasoning. However, the same shift has not been signaled in Nova Scotia, where the exception remains, and requires a standard of proof that is more onerous than a "serious question to be tried".

[46] Nevertheless, in the circumstances of the case at hand, I find that none of the exceptions obtain and the Applicant must only establish a "serious question to be tried", not a more onerous standard.

[47] This is not a case where "the result of the interlocutory motion will amount to a final determination of the action".

[48] Unlike in **Gazit (1997) Inc. v. Centrefund Realty Corp**., 2000 CarswellOnt 2876 (O.S.C.J.), another case presented by Robert, the interim remedy sought is not one tying up the corporation's assets, resulting in it being unable to satisfy third party contractual obligations, while allowing the applicant to continue with a takeover bid. The remedy sought in the case at hand does not amount to a "security-before-judgment type of order". In addition, unlike in **Gazit**,

there is substantial dispute in relation to the facts of the case at hand. Further, this is not a case which rests on a pure question of law. [See paragraph 78 of **Gazit**.]

[49] This is not a case as in **Amaranth,** where the relief requested was one freezing sufficient assets of the corporation, that it would necessarily force a settlement, and, in effect, amount to "execution before judgment". [See paragraph 11.]

[50] In **Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc**., [2007] O.J. No. 89 (S.C.J.), (affirmed in 2008 ONCA 531), the Court, at paragraph 62, stated:

> "At the least, in seeking an interim and interlocutory injunction through the oppression remedy in anticipation of perceived harm in the future, a plaintiff should have to meet the higher threshold test of a 'strong prima facie case'." [Emphasis by underlining added.]

[51] The "perceived harm" anticipated was depletion of the capital of Air Canada and Ace following the transfer of "Jazz" from Air Canada to Ace, as part of a restructuring under the Companies' Creditors Arrangement Act. The Pilots Association sought an interlocutory and interim injunction preventing Ace from making further distributions in excess of a specified amount. The Court found, at paragraph 63, that the Pilots Association had "not even established there [was] a serious issue to be tried" as its motion was "premised upon speculative threatened

or future harm", and before there was "even a real and credible possibility on an objective test that the event may occur".

[52] In the case at hand, the allegedly oppressive acts have already occurred. This motion is not brought in anticipation of future harmful oppressive acts.

[53] Further, **Air Canada Pilots Assn.** was decided prior to the 2009 Ontario cases I referenced above, in which the more stringent test did not apply in the interlocutory oppression remedy context.

[54] Robert submitted that Karakatsanis J., as she then was, in **Vincent Corp. v. Provis Inc.**, 2010 ONSC 750, "applied" the "strong *prima facie* case" test on a motion for an interim oppression remedy. However, she did not state that was the test. She concluded that: under two heads of alleged oppression, there was "strong *prima facie* evidence"; under a third head, there was "*prima facie* evidence"; and, the fourth head was "oppressive and unfairly prejudicial conduct. She then went on to conclude there was "strong *prima facie* evidence … to establish that the reasonable expectations" of the persons alleging oppression had not been met because of those four heads of alleged oppression. She did not unequivocally "apply" the "strong *prima facie* case" standard. Rather, it appears that she articulated the various standards of proof she concluded had been met, not what standard of proof was ultimately required. In addition, the interim remedy sought

was not for injunctive relief. Further, the motion was for, among other things, the appointment of a receiver, which may be considered akin to execution before judgment, a recognized exception. Therefore, even if it had been an interim motion for an interlocutory injunction, the "strong *prima facie* case" standard would have been appropriate.

[55] The Court in **Stern** dealt with an interim application, under oppression remedy provisions (and rules of court) for disclosure, prior to close of pleadings. At paragraph 32, the Court stated that "a strong *prima facie* case must be established showing that the corporation or its affairs have been conducted in a manner that is oppressive or unfairly prejudicial". It cited authorities in support of that statement. However, it conducted no analysis of how the circumstances of those cases compared with the circumstances before it. In addition, it is noteworthy that, in **Stern** the Court, at paragraph 46, found that there was "no evidence of any failure to meet statutory and regulatory disclosure obligations". Therefore, in that case there was not even a serious question to be tried. In addition, the case was not dealing with an interim motion for an interlocutory injunction. If it could be characterized as being akin to a request for an injunction, it would be a request for a mandatory injunction because it sought to compel the responding party to take the steps required to provide the disclosure requested. In

such a case, a higher standard is currently required. Further, Stern was decided a decade before **Tullio** and **Mealla**.

[56] Justice Robert Sharpe, in "Injunctions and Specific Performance" (Toronto: Canada Law Book, 2012), at page 5-23, indicated, in the context of a corporate restructuring dispute, that an interlocutory injunctive oppression remedy ought only be granted if "it is patently clear the conduct in issue has been illegal or abusive". However, he stated the following in relation to such cases:

> "The result of refusing an injunction will be to permit the corporate restructuring to occur without any chance of injunctive relief later. The effect of granting the injunction will almost always be either to end any real prospect of the reorganization occurring, quite possibly to the detriment of the majority shareholders who may be in the right, or to force the majority to buy out the minority at whatever price the minority can bargain for."

[57] Thus he was addressing circumstances in which he viewed the relief sought as being a final determination of the matter, one of the recognized exceptions.

[58] It is prohibitory injunctive relief that is at issue in this motion, not mandatory injunctive relief. Sandra is asking for an order prohibiting Robert, Duane and Jay from contravening the Directors' Special Resolution and Shareholders' Special Resolution, of Jaylynn, dated July 13, 1983, and section 4.01 of the Jaylynn Shareholders' Agreement dated June 15, 1994. Essentially such an injunction would prevent the Respondents from effecting any Jaylynn transaction exceeding $50,000 and entering into any sale, lease or mortgage of Jaylynn's

assets, without the approval of Sandra and the other shareholders. All shareholders would effectively have veto power.

[59] The distinction between mandatory and prohibitive injunctions is not always clear. Robert submitted authorities which provide distinguishing characteristic to assist in identifying which category of injunction is being sought, including the authorities which follow.

[60] Justice Sharpe, in "Injunctions and Specific Performance", at page 1-1, stated that: "[a] mandatory injunction is one which requires the defendant to act positively", including by taking steps required to "undo some wrong he or she has committed"; and, a prohibitive injunction "restrains the defendant from committing a specified act" which would constitute "wrongful conduct or conduct which would interfere with the rights of another".

[61] The Court in **Burnside Industrial Packaging Ltd. v. Canada Post Corp.**, [1994] N.S.J. No. 204 (S.C.), at paragraph 6, cited with approval the following passage from paragraph 40 of **Gulf Canada Ltd. v. Martin**, [1985] N.S.J. No. 428 (S.C., T.D.):

> "The latter [a prohibitory injunction] is generally to preserve the status quo whereas a mandatory injunction seeks to undo some act and retain the status quo as it was before the act was done."

[62] In **Burnside**, Canada Post had given the Applicants notice that the Dealership Agreements with them were terminated effective immediately, and "established new retail dealers to handle the receipt and delivery of mail and the provision of associated mail services". In those circumstances, the Court concluded that the injunction sought was mandatory in that it sought to "undo the notice of termination and to restore the status quo as it was preceding" the termination of the Dealership Agreements and establishment of new retail dealers.

[63] The Court in **Potash Corp.**, as an aside in the process of articulating and rationalizing its directive that the "serious issue to be tried" standard should, as a "general rule" be applied, even for mandatory interlocutory injunctions, at paragraphs 43 and 44, stated:

> "43 …[T]here are also other considerations which recommend moving away from a regime which requires judges to make strict distinctions between prohibitory and mandatory injunctions. The reality is that the line between the two kinds of injunctions is not always easy to chart and a competent wordsmith can often succeed in dressing up a mandatory-type order in a prohibitory-type costume. As a result, much time and energy can be consumed by the challenge of working through the sometimes cloudy question of whether an injunction is, in fact, prohibitory or mandatory in effect. This is a case in point. PCS says the injunction is prohibitory because it prevents Mosaic from acting unilaterally to determine the effect of the Mining Agreement. Mosaic says the injunction is mandatory because it requires Mosaic to continue delivering potash.
>
> 44 There is another consideration as well. The substantive differences between the impact of mandatory and prohibitory injunctions can be easily overstated. This is because a prohibitory order can often have the effect of forcing the enjoined party to take considerable positive actions. For example,

> as Robert Sharpe points out in *Injunctions and Specific Performance*, supra, at para. 1.540, 'a negative injunction restraining the continuation of a nuisance in effect usually requires the defendant to take positive steps to correct a situation and these steps may be extremely costly.' All of this means that it is more useful for a judge to focus on the practical effects of the injunction than to get bogged down in attempting to make formalistic 'all or nothing' distinctions between what is prohibitory and what is mandatory."

[64] I take this directive on the usefulness of focusing on the "practical effects of the injunction", given that it is discussed in the midst of a discussion that the nature of the injunction be considered at the balance of convenience stage, to be a directive to consider those practical effects at that stage of the injunction test. The shift in standard of proof recommended by the Saskatchewan Court of Appeal has not been adopted in Nova Scotia, and the nature of the injunction must still be considered at the assessment of merits stage. However, it is still useful to assess the practical effects of the injunction in determining its true nature.

[65] In the case at hand, there is a dispute as to what the *status quo* was prior to the acts complained of. Robert indicates that, essentially, he made the business decisions and Sandra handled the administrative duties required to implement those decisions. Sandra indicates that they made business decisions together, including those involving expenditures over $50,000, and sales, leases or mortgages of Jaylynn's assets. She acknowledged this was not done as part of formal directors' or shareholders' meetings. However, she alleged that the decisions were otherwise made in accordance with the 1983 Resolutions and 1994

Shareholders' Agreement, by way of informal discussion, mostly while working at the Home Centre Offices.

[66] I am not to assess credibility at this stage, and I am only to conduct a preliminary assessment of the merits. I cannot determine the actual *status quo*. Therefore, I must determine the standard of proof for the first stage of the RJR-MacDonald Test based on the *status quo* as alleged by the Applicant.

[67] On this interlocutory and interim motion, Sandra is not seeking to undo her notice of termination and be put back into the day-to-day operations of Jaylynn and Holm, performing the same administrative duties she was performing for those companies. She is not asking that she and Robert continue to run the company together as she testified they had been. On an interim basis she is not asking that Duane and Jay be removed as directors and officers, leaving only her and Robert to make corporate decisions, as she indicates was the case prior to the alleged oppression. She is seeking to have the Shareholders' Agreement, particularly Clause 4, and the 1983 Directors' and Shareholders' Resolutions, respected and followed, to the extent possible with the continued involvement, on an interim basis, of Jay and Duane. She is asking that her approval continue to be sought and required for transactions expressed in the Resolutions and Agreement as requiring approval of all directors and shareholders, as she alleges was the case. Sandra's

request that the Resolutions and Agreement be followed, if one ignores past practice, would incorporate the need to hold formal meetings and sign formal resolutions. However, the unanimous approval requirement can be fulfilled without formal directors and shareholders' meetings and signed resolutions. Such meetings and resolutions had not been the practice. They would be a new practice for the directors and shareholders. In addition, Sandra need not be present in the Home Centre Offices for it to occur. Such approval can be sought and provided by email. Robert himself indicated that, towards the "end", in the last 2 or 3 years, they had reached the point where they were discussing business primarily by email, even though they were in their respective offices, close to each other. Therefore, seeking such approval would be a continuation of the practice as alleged by Sandra.

[68] So the "practical consequences" would not require any positive steps by the Respondents which they were, allegedly, not taking before the unilateral conduct complained of. Sandra is asking that the Respondents cease acting unilaterally in relation to matters expressed in the Resolutions and Agreement as requiring unanimous consent.

[69] For this Court to find that the injunction being sought is one which requires Robert (and now Jay and Duane) to do something they were not required to do before, i.e. obtain Sandra's consent to such transactions, it would have to conclude

that such consent was not previously required. That is a determination which must await the final hearing. Sandra alleges that such transactions were only conducted with her consent.

[70] Sandra, on this motion, is not asking that any of the unilateral business transactions be reversed. She is asking that the Respondents be enjoined from unilaterally effecting any further business transactions which are expressed in the Resolutions and Agreement as requiring unanimous consent.

[71] Sandra is also not asking, on an interim basis, that the Respondents remove Duane and Jay as directors and officers and reinstate the corporate governance arrangement to one where the only directors and officers are Robert and Sandra.

[72] Robert submits that, if the court is uncertain whether the injunction sought is mandatory or prohibitive, it should err on the side of caution, and apply the more stringent standard applicable to mandatory injunctions. He argues that: "To do otherwise … could result in the distinction between the two standards being gutted by the manner of pleading."

[73] With respect, in my view, if the court is uncertain whether the injunction sought is mandatory or prohibitive, it should err on the side of caution, and apply the less stringent standard. Otherwise, the manner of pleading, and allegations made, by the responding party, may result in an applicant's access to an

interlocutory oppression remedy being denied, without any assessment of irreparable harm and balance of convenience, simply because he or she, at the interlocutory stage, prior to a final hearing with more complete evidence, and prior to full disclosure and discovery of evidence, is not in a position to establish a "strong prima facie case" or that he or she is "clearly in the right". As indicated in **Potash Corp.**, the burdens an injunction places on the responding party will be weighed as part of the balance of convenience analysis. The burdens of a mandatory injunction, being greater than those of a prohibitive injunction, are more likely to result in the balance of convenience test being determined in favour of the responding party.

[74] I find that: the injunction sought is a prohibitive injunction; none of the other exceptions apply; and, therefore, the "serious issue to be tried" standard applies.

[75] In addition, the Court in **Amaranth**, at paragraph 15, distinguished the cases in which the "serious issue to be tried standard" was applied by noting they involved "closely held private companies". That is the type of company we are dealing with in the case at hand. That is further justification for applying the "serious issue to be tried standard" in the case at hand.

3. GENERAL OPPRESSION REMEDY TEST

a) Test Summarized

[76] The Supreme Court of Canada, in **BCE Inc. v. 1976 Debentureholders**, 2008 SCC 69, at paragraph 68, summarized its two-pronged test for oppression claims generally as follows:

> "(1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms 'oppression','unfair prejudice' or 'unfair disregard' of a relevant interest?" [Emphasis by underlining added.]

b) First Prong - Whether Reasonable Expectation Exists

[77] The Court in **BCE**, provided principles and factors to consider in assessing whether the asserted reasonable expectation exists, stating, at paragraphs 62, 64, 66, and 71 to 84, the following (with references omitted):

> "[62] [T]he concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be 'just and equitable' to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> …
>
> [64] Fair treatment … is most fundamentally what stakeholders are entitled to 'reasonably expect'.
>
> ….
>
> [66] [T]he directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often

coincide with what is in the best interests of the corporation. However, cases … may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

….

[71] Actual unlawfulness is not required … . The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

[72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

(i) Commercial Practice

[73] Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy.

(ii) The Nature of the Corporation

[74] The size, nature and structure of the corporation are relevant factors in assessing reasonable expectations. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

(iii) Relationships

[75] Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. … '[W]hen dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such'.

(iv) Past Practice

[76] Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance. …

[77] It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice.

(v) Preventive Steps

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

(vi) Representations and Agreements

[79] Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties.

[80] Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications.

(vii) Fair Resolution of Conflicting Interests

[81] As discussed, conflicts may arise between the interests of corporate stakeholders inter se and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.

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

[83] Directors may find themselves in a situation where it is impossible to please all stakeholders. The 'fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction'.

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

[78] "[W]hen determining the expectations of shareholders, the court may look to both the spirit and the letter of the shareholders' agreement to help ascertain the intention of the said shareholders"; and, "the Shareholders' Agreement is often viewed as reflecting the reasonable expectations of the shareholders": **Main v. Delcan Group Inc.**, [1999] O.J. No. 1961 (S.C.J.), paragraph 29.

c) Second Prong – Whether Violating Conduct Was of the Type Contemplated as Attracting Oppression Remedies

[79] The Court, in **BCE**, also provided principles and factors to consider in determining whether the conduct violating the claimants reasonable expectations is of the type contemplated as attracting an oppression remedy, stating, at paragraphs 58, 59, 67, and 92 to 94 (with references omitted):,

> "[58] … [O]ppression is an equitable remedy. It seeks to ensure fairness — what is 'just and equitable'. It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
>
> [59] … [L]ike many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.
>
> ….
>
> [67] Even if reasonable, not every unmet expectation gives rise to claim under s. 241 [the oppression remedy section of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44]. The section requires that the conduct complained of amount to 'oppression', 'unfair prejudice' or 'unfair disregard' of relevant interests. 'Oppression' carries the sense of conduct that is coercive and abusive, and suggests bad faith. 'Unfair prejudice' may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, 'unfair disregard' of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.
>
> ….
>
> [92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been

> described as 'burdensome, harsh and wrongful', 'a visible departure from standards of fair dealing', and an 'abuse of power' going to the probity of how the corporation's affairs are being conducted. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.
>
> [93] The CBCA has added 'unfair prejudice' and 'unfair disregard' of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by 'oppression' may fall within s. 241. 'Unfair prejudice' is generally seen as involving conduct less offensive than 'oppression'. Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a 'poison pill' to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm.
>
> [94] 'Unfair disregard' is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant."

[80] The fiduciary duty of directors is a factor which informs the inquiry into whether an oppression remedy is warranted. As noted that duty is owed to the corporation. They must act "fairly and responsibly" in the best long-term interests of a corporation that conducts an ongoing business, such as the one in the case at hand. In so doing, they may consider the interests of shareholders, employees and others. The court must give deference to business decisions that are "within the range of reasonable alternatives". [See paragraphs 36 to 40 of **BCE**.]

[81] The principle that proper deference must be given to business decisions made for the corporation, in determining whether it is appropriate to grant an

oppression remedy, was also highlighted in the following authorities submitted to the Court.

[82] The Court in **Brant Investments Ltd. v. Keeprite Inc.**, 1987 CarswellOnt 135 (H.C.J.), at paragraph 79, stated:

> "Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority."

[83] Similarly, in **Pente Investment Management Ltd. v. Schneider Corp.**, [1998] O.J. No. 4142 (C.A.), paragraph 34, it was noted that:

> "Provided that the directors have acted honestly and reasonably, the court ought not to substitute its own business judgment for that of the Board of Directors."

[84] The Court in **Harbert Distressed Investment Master fund Ltd. v. Calpine Canada Energy Finance II ULC**, 2005 NSSC 211, at paragraph 106, noted that "it must be careful not to inappropriately intrude into the legitimate conduct of a company's business".

[85] The Court in **Maple Leaf Foods Inc. v. Schneider Corp.**, 1998 CarswellOnt 4035 (C.A.), at paragraph 36, stated: "As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision."

[86] The Court in **SCI Systems, Inc. v. Gornitzki Thompson & Little Co.**, 1997 CarswellOnt 1769 (O.c.J., G.D.), at paragraph 59, stated;

> "It is a well recognized rule that the court should not attempt to second-guess the legitimate actions of the management of corporations. This rule avoids intrusion into the day-to-day workings of the corporation and boardroom which would interfere with the conduct of the business."

[87] The Court, at paragraph 60, also stated:

> "[E]qually strict is the requirement that directors must fulfill … [their] fiduciary duties and duties of care … ."

[88] By way of this juxtaposition, the Court emphasized the need to "strike a fine balance between granting shareholders relief in accordance with their expectations and avoiding unnecessary interference in the company's affairs", as stated in section 6:20:10, at page 6-7, of Morrit, Bjorkquist and Coleman, "The Oppression Remedy" (Aurora, Ontario: Canada Law Book, 2004).

[89] The Ontario Court of Appeal, in **Re Ferguson and Imax Systems Corp.**, [1983] O.J. No. 3156 (C.A.), at paragraph 30, stated:

> "[W]hen dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such. In addition the court must consider the bona fides of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholder."

[90] This passage carries an emphasis which differs from the approach in **Gibbons v. Medical Carriers Ltd.**, 2001 MBQB 229, at paragraph 37, that:

> "No element of bad faith or lack of bona fides is required to obtain a remedy under this [the oppression assessment] branch of the application. It is the effect or the result of the activity and not the intention that is crucial."

[91] Thus, it appears that the bona fides of transactions may be a factor to be given more weight in cases involving close corporations, in assessing whether those transactions unfairly prejudice or disregard the interests of the applicant.

[92] The Court in **Paley v. Leduc**, [2002] B.C.J. No. 2845 (S.C.), at paragraph 26, stated:

> "[I]f the director or company has no legal right to commit a certain act, the act may be considered oppressive even if there was no mala fides; however, if it was a legally authorized act, there should be an element of bad faith for it to be oppressive."

[93] And at paragraph 33,

> "With respect to cases involving several acts, I note that where one 'borderline act' may not necessitate a s. 200 remedy, a combination of acts may, in their totality, constitute oppression or unfair prejudice."

[94] The Court in **Safarik v. Ocean Fisheries Ltd.**, [1996] B.C.J. No. 76 (C.A.), at paragraph 6, noted:

> "This was a case of brothers who ultimately could not get on together. The differences which arose here were deeply rooted. Conduct which, if engaged in by strangers, might fairly deserve opprobrium does not necessarily deserve it in the case of intra-family disputes."

[95] However, as noted in **Deluce Holdings Inc. v. Air Canada et al.**, [1992] O.J. No. 2382, the Court need not "be in a position to make an actual finding of 'oppression' before it can" grant an interim oppression remedy.

[96] Such remedies can be ordered against directors personally: **Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.**, [1995] O.J. No. 4048 (C.J., G.D.).

4. ANALYSIS OF WHETHER FIRST BRANCH OF RJR-MACDONALD TEST MET

a) Summary

[97] The Court in **RJR-MacDonald**, at paragraph 78 of the Quicklaw Version, in summarizing the first branch of the test for an interim injunction, stated:

> "At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. … A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law."

[98] At paragraph 49 of the Quicklaw Version, the Court stated that, to satisfy this part of the test, the "threshold is a low one". It continued, at paragraph 50 of the Quicklaw Version, stating:

> "Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable."

[99] **American Cyanamid Co. v. Ethicon Ltd.**, [1975] 1 All ER 504 (H.L.), at page 8, provided the following guidance, which is still helpful, in relation to this branch of the test, where the "serious question to be tried" standard applies:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the clams of either party may ultimately depend … . [U]nless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

b) Jaylynn

[100] Sandra and Robert were initially the only 2 shareholders of Jaylynn. Sandra held 98 common shares; and, Robert held 2, at $1.00 each. Robert says that was to help shelter his income because he was going through a divorce from his former spouse at the time. As a result of a reorganization in 1994, shareholdings were altered to: Sandra owning 10 common shares and 1204 preference shares; Robert owning 10 common shares and 830 preference shares, having exchanged Bridgewater Mobile Home Sales Limited ("BMHS") shares for Jaylynn shares; and, the then Richards' Children's Trust owning 18 common shares. Sandra is still the largest single shareholder.

[101] Sandra alleges Jaylynn has been run "like a *de facto* partnership" between herself and Robert since its inception. For many years, they were the only employees. They lived frugally and contributed all their excess disposable income to Jaylynn. Over about 35 years they, as full partners, developed Jaylynn into a very profitable business. She indicates that: she and Robert "exercised equal

control, voice and oversight of the day to day management and governance of Jaylynn and operated Jaylynn on the basis of consensus"; and, "all major decisions, including those of a financial or planning/strategic nature, were fully discussed between [them] and mutually agreed upon."

[102] She said she took care of all corporate administration, including banking, accounting and auditing matters.

[103] Robert disagrees. In his view the following better describes the situation. When he met Sandra in 1975, he and Jim Eisenhauer owned and operated BMHS, selling new mobile homes and travel trailers, and developing mobile home communities. It made some profit; but, did not have great retained earnings. He indicates there was never any risk of BMHS being put in receivership as contended by Sandra. He hired Sandra as a university student to work in that business, in the position of secretary/receptionist. She had no experience in real estate or land development. He then incorporated Jaylynn to buy, sell and move used mobile homes, so they could avoid paying HST, and benefit from income tax advantages. He did not disagree that he and Sandra started Jaylynn under modest circumstances. BMHS and Jaylynn operated out of the same premises. He had trained his brother in the business. His brother ran their Halifax office, while he stayed in Bridgewater. He sold his brother the Halifax operation and bought Mr.

Eisenhauer's interest in BMHS. In or about 1981, he arranged for Jaylynn to obtain a loan and purchase, from BMHS, Eisenhauer Place, a mobile home community which remains Jaylynn's biggest asset. The purchase price was $250,000. Over the years, the business expanded by: increasing sales; becoming involved in the land lease business; selling modular homes on freehold properties; installing outbuildings; supplying septic systems and water services; and, becoming the recognized retailer for Kent Homes. He was always the entrepreneur and driving force behind Jaylynn and BMHS, and was always responsible for the day-to-day management. He made the decisions and took ultimate responsibility for them. That persisted from inception to separation. Sandra was brought in to perform the clerical and administrative functions previously carried out by a third party employee. He did not view her as being involved in the management of the company.

[104] However, a document prepared by Robert, in preparation for a meeting with the Canada Revenue Agency ("CRA"), on its face, supports Sandra's claim that they ran Jaylynn "like a de facto partnership". The CRA had indicated it was not prepared to accept the share valuations and divisions in the corporate reorganization relating to Jaylynn, in 1994, in which it bought the BMHS shares. The CRA was asking Jaylynn to pay approximately $1 Million in taxes. Robert and

Sandra met with the CRA and succeeded in reducing that tax bill to $300,000. In the first paragraph of a document he prepared for that meeting, Robert stated:

> "BECAUSE SANDRA AND I WERE JOINT SHAREHOLDERS, PARTNERS AND HUSBAND AND WIFE.
>
> ALL OF OUR COMPANYS WERE TREATED AS ONE. WE BUILT THEM TOGETHER AND HAD ALWAYS OPERATED THEM AS ONE BIG POT WITH EQUAL INPUT, EFFORT AND OWNERSHIP."

[105] He agreed he was referring to their group of companies, which contained only Jaylynn and Holm as incorporated businesses. He explained that by saying the companies were "treated as one" he was referring to the fact that their employees served all operations and both companies. That was in response to CRA's position that they had a "passive" business, as an "active" business required five full-time employees. He said he "believed" that paragraph referred to everyone, not just to Sandra and him. He added that he had already provided a list of employees to the CRA.

[106] He disagreed that the paragraph showed that he and Sandra were partners and built the business together. He explained he was merely saying he and Sandra had equal ownership. He was recognizing, and still recognized, her contribution in providing clerical services.

[107] In the second paragraph of the document, Robert stated:

> "AS THE YEARS WENT BY AND OUR BANK WAS NOW UNDER CONTROL. WE FELT IT WAS TIME TO BRING THE COMPANYS TOGETHER. WITH CONSULTATION WITH OUR CA, IT SEEMED LIKE A GOOD TIME TO CRYSTALIZE OUR SHARES AND BRING OUR CHILDREN INTO THE COMPANY AS WELL."

[108] In relation to this paragraph, Robert indicated that by "we", he probably meant Sandra and himself. He indicated Sandra would be involved in decisions because she was a shareholder and shareholder approval was required for certain decisions.

[109] In addition, Robert agreed that, as majority shareholder, Sandra could remove him, yet he still described her function as clerical. He attempted to explain by stating he never anticipated Jaylynn would grow as it has. He acknowledged having made statements in the past to the effect he could not have done it without her, such as at awards presentations where you make such comments.

[110] In his letter of April 13, 2010, to Daren Baxter, Robert stated that he believed he followed the requirement in the Shareholders' Agreement that he take direction from the directors on long term or major decisions. He readily agreed with the suggestion that this meant he was taking directions from Sandra on such decisions.

[111] Robert wrote a document, dated June 23, 2005, thanking Sandra for her good work in dealing with the CRA, in connection with the tax audit arising from the 1994 Corporate Reorganization. The document, among other things, stated:

> "You made it your business to learn the tax rules inside and out so that you could handle what the pro's could not.
>
> ….
>
> You were stonewalled and lied to by CCRA and you were still able to defeat them.
>
> During this almost 7 year process you also had to contend with my very real fear of losing everything, and my overall feelings of total helplessness … .
>
> ….
>
> Without your efforts we could have lost it all. I wish to thank you for all that you did for me, us and the business."

[112] When confronted with this document, Robert explained he wrote it at the request of the marriage counselor. He disagreed that it was Sandra who dealt primarily with, and stood up to, the CRA. He said: she made the initial contact and put the records together; but, he realized things were not going where they should, so he took over and made the presentation to the CRA. However, he noted that Sandra was to be commended for what she did and that she had caught the CRA in a lie, by audio recording them.

[113] Further, Robert's comment that he and Sandra were at a deadlock and could not agree on many points, appears to be inconsistent with his assertion that she was not involved in the management of Jaylynn.

[114] Robert agreed Eisenhauer Place had been the main asset of BMHS. Once that was transferred to Jaylynn, it had essentially all of the assets and BMHS had next to no assets. As 98% shareholder of Jaylynn, Sandra owned nearly all of the business assets. Robert agreed that became a growing issue. He said they both understood it was an unfair division and started the process of arranging for him to get his share. To effect that purpose, Jaylynn bought out his BMHS shares. He took Jaylyn Shares as payment, reducing Sandra's percentage of the Jaylynn shares.

[115] He notes that Jaylynn and Holm "operate under the umbrella of the 'Home Centre Group of Companies', a group of closely-held companies managed and owned by" his family and himself. Jay and Duane were both active in the business before Sandra stopped working there in 2010. He indicates that, in the mid to late 1980's, while Sandra stayed home with their three children, he ran the businesses of Jaylynn and Holm with hired help. Sandra only continued preparing the books from home on a part-time basis.

[116] He says his direction has always been the driving force behind their growth and success. He was responsible for: their day-to-day management; all sales, rental, leasing, and land development operations; and, hiring and firing employees.

[117] Even after the children were grown, Sandra's role was limited to bookkeeping, general accounting, banking, and "administrative" real estate broker

for Holm, without active involvement in sales. She told him she felt unchallenged and could complete her work in a few hours per week.

[118] The Directors' Resolution dated July 13, 1983, provides:

> "BE IT RESOLVED AS A RESOLUTIN OF THE Company that:
>
> 1. That any transaction concerning the transfer of the title of all lands presently owned by Jaylynn Entrprises Limited located off North Street, Bridgewater, Nova Scotia, known as Eisenhauer Place (mobile home park and approximately40 acres-including 9 lots fronting on Seasons Drive) must be signed by the President, Robert J. Richards, President of Jaylynn Enterprises Limited and Sandra L. Richards, Secretary of Jaylynn Enterprises Limited, to be deemed a valid and legal transaction of the transfer of title to said lands.
>
> 2. THAT any monetary transaction of Jaylynn Enterprises Limited, whether it be the purchase or sale of any asset, tangible or otherwise; exceeding the amount of Fifty Thousand Dollars ($50,000.00), must bear the signature of Robert J. Richards, President of Jaylynn Enterprises Limited and Sandra L. Richards, Secretary of Jaylynn Enterprises Limited, to be deemed a valid and legal transaction of the purchase or sale by the Company.
>
> 3. THAT this resolution may not be altered in any way, as to required signatures, or the addition to or deletion of required signatures, without a further Special Resolution of the Company bearing the rightful signatures of Robert J. Rchards, President of Jaylynn Entrprises Limited and Sandra L. Richards, Secretary of Jaylynn Enterprises Limited.
>
> 4. AND IT IS FURTHER RESOLVED that the Articles of Association of the Company shall be amended by adding the following Article:
>
> > No Share or Shares of the Capital Stock of the Company shall be transferred to any person without:
> >
> > The previous consent of a majority of the Directors of the Company expressed by a Resolution passed by the Board of Directors or by an instrument or instruments in writing signed by a majority of the Diretors. A quorum of the Directors shall be Two (2) both of whom must be present at a Directors Meeting in order for the transaction of business. Any Director who is absent at such a Meeting may in advance of the Meeting consent in writing to the transacted at such a Meeting by initialing the Minutes of the business transacted at such Meeting
>
> .

[119] Sandra is of the view that this Resolution was meant to formalize their "mutual expectation" that Jaylynn would continue to be managed and governed as she has described it as having been.

[120] Robert disagrees. He indicates it was "intended only to install some restrictions on their unilateral ability to effect a transfer of stock, a sale of Jaylynn's only significant asset, or a significant monetary transaction which, at the time, could have crippled the company financially".

[121] He was: confronted with the fact he agreed to this resolution; and, asked why he would "handcuff" himself to Sandra in that way if he was making all the decisions. He replied that he did not know why. He did many things he feels he should not have, to go along with what Sandra wanted, even though he saw her as a clerical person, because she is his wife. To him that was more important than any corporate issue.

[122] However, it is noteworthy that, at the time, Jaylynn owned Eisenhauer Place, a major asset, and Sandra owned 98% of Jaylynn; while, Robert was the major shareholder of BMHS, which no longer had such a major asset. That situation makes it more likely that Robert was motivated to initiate and/or support the Resolution for purely business reasons, rather than romantic reasons.

[123] He agreed clause 4 was included so that he and Sandra could control what happened.

[124] The Shareholders' Special Resolution also dated the same date, and passed by Sandra and Robert, contains the same wording as the Directors' Resolution.

[125] Robert indicated the comments he made in relation to why the Directors' Resolution was presented and passed applied to the Shareholders' Resolution. He does not believe they had a formal meeting. However, they completed the process as though they had. They did not have any formal meetings until after Sandra's involvement in the day-to-day operations of the business ceased. He started such meetings because he saw where Sandra had been researching oppression remedies on the computer, and wanted to ensure he was handling corporate affairs in the right way.

[126] He also testified that he did not recall the Resolutions being discussed as an ongoing issue until 2010.

[127] Sandra reluctantly agreed, on cross-examination, that, at that time, the day-to-day business of Jaylynn would not have been impacted by the restrictions in these resolutions, including the $50,000 restriction, and the restriction on the sale of all the Eisenhauer Place lands.

[128] Robert testified that, when the Resolutions were passed, $50,000 was a large sum. Jaylynn's line of credit was at a maximum of $20,000. The maximum purchase price of the homes they bought was $13,000. At the time, he did not think they would ever reach $50,000.

[129] On June 15, 1994, Sandra and Robert, in their own capacities, and in their capacities as trustees under the Richards Children's Trust (the predecessor to the Richards Family Trust (2002)), entered into a Unanimous Shareholders' Agreement which provided, among other things, that:

> " 1.03"Shareholder" means either Robert, Sandra or the Trust.
>
> 1.04 "Shareholders" means collectively Robert, Sandra and the Trust.
>
> Restriction on Shares
>
> 2.01 Except as herein provided no Shareholder shall sell, transfer, assign or otherwise dispose of any Shares or mortgage, pledge hypothecate, charge or otherwise encumber any Shares without the prior written consent of the other Shareholders.
>
> ….
>
> 2.04 The Company shall cause all share certificates now or later authorized or issued to have a notice printed thereon concerning the restrictions on share transfer under this Agreement.
>
> 2.05 Any transfer of Shares permitted herein shall be conditional upon the transferee agreeing to be bound by this Agreement.
>
> **Organization and Management**
>
> 3.01 The Company shall be organized as follows:
>
> (a) there shall be a Board of two Directors;
>
> (b) at all times, the Board of Directors of the Company shall consist of Robert Richards or his nominee, and Sandra Richards or her nominee;

(c) the Company shall have two officers, namely the President and the Secretary. The parties hereto agree that the following persons will be appointed to hold the following offices of the Company:

President – Robert Richards

Secretary – Sandra Richards;

(d) all cheques and other banking documents, deeds, transfers, contracts, agreements and other documents that are required to be executed by the Company from time to time and involve transactions in excess of $50,000.00 shall be executed on its behalf by the President and Secretary unless otherwise designated by a resolution of the Board of Directors. For transactions under $50,000.00, either the President or Secretary may execute the documents on behalf of the Company.

….

3.04 The President of the Company shall be responsible for the day-to-day operation of the Company and shall be given full power and authority to conduct the business of the Company as he deems appropriate, subject to the restrictions contained herein.

Restrictions on Power to manage

4.01 The Board of Directors and officers of the Company shall not take any of the following actions without the unanimous consent and approval of all shareholders, namely:

(a) make any material change to the business of the Company;

(b) enter into any sale, lease or mortgage of the Company's assets;

(c) make capital expenditures in excess of the total of $50,000.00;

(d) borrow funds in excess of a total of $50,000.00;

(e) incur any liability or obligation in excess of $50,000.00;

(f) make, amend or appeal any articles of the Company;

….

(h) pay any dividends or distribute any surplus or earnings of the Company …
.

….

Arbitration

6.01 The parties hereto agree that any controversy arising out of or relating to this Agreement or the relationship of the parties established under this Agreement shall be submitted to final and binding arbitration pursuant to the provisions of the *Arbitration Act* of Nova Scotia. Any dispute hereunder shall

> be referred to a board consisting of three arbitrators, one member each being a representative from the Company's bank, a representative from the Company's accounting firm and a representative from the Company's law firm.
>
> ….
>
> 8.04 the provisions of this Agreement shall apply to any Shares to which any security of the Company may be converted or changed, to any Shares resulting from the reclassification, subdivision, consolidation or corporate reorganization and to any Shares of the Company received by the holders as a stock dividend and to any share or other securities of the Company or accessory company which may be received by the holder of such Shares or amalgamation, reorganization or reconstruction of the Company or to any other Shares which may hereafter be issued to the Shareholders."

[130] In Sandra's view, this 1994 Shareholders' Agreement reflected her and Robert's "full working partnership in the management/governance and operation of Jaylynn" and formalized "the consensus principle of [their] corporate decision making". The children were minors, and she and Robert were to make the decisions.

[131] She submits that Clause 4 of the preamble to the Agreement reflects the purpose of the agreement and shows her and Robert's expectations arising from the Agreement. Clause 4 of the Preamble reads:

> "Robert, Sandra and the Trust wish to provide for the manner in which the affairs of the Company shall be conducted, their obligations with respect to the Company, and the disposition of their shares in the Company on the happening of certain events."

[132] She, agreed that, in 1994, the $50,000 restriction would not generally have affected the day-to-day operations. However, she assumed it would capture some transactions.

[133] She agreed that, at that point, she, Robert and the Family Trust were the only shareholders. Also, the children were very young and had no role in arriving at the agreement.

[134] In Robert's view, it was to put in place restrictions to prevent transactions which could have "crippled" the company at the time.

[135] Robert indicated that, in practice, the restrictions in the Directors' Resolution and the Shareholders' Agreement have never been followed. He used, as an example, the multitude of cheques over $50,000 which, over the years, have been signed by Sandra alone, without a directors' resolution authorizing them. He noted few bore solely his signature.

[136] Sandra acknowledges she did solely sign many cheques over $50,000, even though the Resolutions and Agreement required both her and Robert's signature. However, she denied that showed a practice of not abiding by them. She explained that, though they did not hold formal meetings, nor pass resolutions, she and Robert were both present at the offices and would discuss and agree upon the expenditures in advance, then she was delegated to sign the cheques. She said nothing happened unless they agreed. Yet, she had Daren Baxter, of McInnes Cooper, write Robert a letter which included a statement that the Shareholders' Agreement required all cheques and documents for amounts exceeding $50,000 to

bear both signatures, without including any exception for expenditures they agreed upon, as according to her, had been the practice.

[137] She agreed that the twenty-four Jaylynn cheques in Exhibit F to Robert's Affidavit, written from 2006 to 2008 inclusive, all exceeded $50,000 and were all signed solely by her. They total over $1.6M. One is in the amount of $153,443.04. Another is in the slightly lower amount of $146,813.60. She initially resisted the suggestion that this did not follow the requirements expressed in the Shareholders' Agreement and Shareholders' and Directors' Resolutions. She stated that they followed the "spirit" and "substance" of the Agreement and Resolutions. She eventually, after providing a number of evasive answers, agreed that they were not following the formality of the 1994 Shareholders' Agreement, nor of the Shareholders' and Directors' Resolutions.

[138] She testified that, even though there was never any resolution delegating cheque writing authority to her, it had been the practice for 34 years. In her view, they "lived and breathed" the Resolutions and Shareholders' Agreement.

[139] Robert disagreed with that. He stated that: they rarely discussed transactions over $50,000; he did not delegate the signing responsibility to Sandra; they just went on with business, without thinking about, or paying attention to, the restrictions in the Resolutions and Agreement; and, no resolution authorizing a sole

signature had ever been passed. He regularly arranged deals over $50,000, without Sandra's input or consent; and, she regularly issued cheques to cover the transactions, without consulting with him. There have been hundreds or thousands of transactions over $50,000 and Sandra and he have never sought, nor obtained, consent of all shareholders. However, he agreed that Sandra did not unilaterally sign such cheques and he knew she was signing them. He did not consider these cheques over $50,000, nor the expenditures to renovate the Bowater Unit, to have breached the Resolutions and Agreement.

[140] He indicated that a $50,000 limit does not accord with Jaylynn's current operating needs, past practice, nor commercial reality. Jaylynn, each year, enters into dozens of transactions exceeding $50,000, and 25 to 35 leases, all of which would require unanimous shareholder consent if the restrictions were operative.

[141] Sandra, on cross-examination, provided the following evidence relating to the changes in Jaylynn's business over the years. Their initial capital investment in Jaylynn was $100. It has grown to a company with retained earnings of $1.6M, and $150,000 to $500,000 per year in net, after-tax earnings. Jaylynn started with a $20,000 to $25,000 line of credit, which increased over the years to $900,000. In the late 1970's and early 1980's, it would: buy used mobile homes for $8,000 to $9,000; spend about $1,000 to refurbish them; and, sell them for approximately

$13,000. In 1983 it acquired Eisenhauer Place. In 1994 it started buying new mobile homes, at $28,000 to $30,000, and selling them with a 25% to 30% markup. In 2010 it also acquired LaHave Heights and was developing it, using an approved $1.2 Million credit. It also had other lands for development. By then they were selling mobile homes in the $80,000 to $115,000 range, and modular homes in the $130,000 to $200,000 range. However, in her view, the cost to acquire the bulk of what they sold was about $55,000. It also acquired other lands for development, including Eastland Estates. Today a new mobile home would retail over $50,000.

[142] Clause 4.01 of the Shareholders' Agreement contains restrictions on unilateral action, including restrictions on actions other than the $50,000 spending cap. Robert agreed that Clause 4.01 was included so that those things did not occur without unanimous consent. However, there were many actions he took anyway, even without such agreement, where he felt it was part of the day-to-day operations of the business, such as signing leases. He agreed Clause 4.01 was a restriction in relation to major decisions.

[143] Robert noted "Jaylyn and Holm were small, family-run companies and were not governed by corporate formalities on a day-to-day basis".

[144] He added that during the corporate reorganization which occurred in 2002, shares were issued to Jay, Jordan, Ross, the Family Trust, Sandra and him, and none of the share certificates refer to any of the restrictions, nor state they are non-voting shares. He agreed that Clause 8.04 of the Shareholders' Agreement provides the Agreement shall apply to any new or converted shares. However, nothing was ever done to put that into effect.

[145] Clause 1.04 of the Agreement defines "shareholders" as meaning "Robert, Sandra and the Trust". No other person is included. Clause 2.04 requires the restrictions on share transfer under the Agreement to be printed on the share certificates; and, Clause 2.05 makes all share transfers "conditional upon the transferee agreeing to be bound by [the] Agreement". Those two things were not done when Jay acquired his shares. It is therefore submitted that Jay is not bound by the Agreement.

[146] A Directors' resolution, dated November 29, 2002, was passed giving Robert and Sandra, or either of them, authority to, among other things, transfer or assign shares. Robert indicated this was to enable them to set up the new Family Trust. A resolution was also passed giving effect to transfer of shares to the Family Trust. These resolutions were passed to conform to the Shareholders' Agreement. However, Robert was of the view that, from that point on, there was no need to

further conform to the Shareholders' Agreement. In his view, they abandoned the Shareholders' Agreement in 2002. He also felt that, since there would then be three people voting, instead of two, there was no need for a mechanism, such as arbitration to resolve a "deadlock".

[147] However, in an email dated February 10, 2010, Robert stated, among other things, the following in relation to the Shareholders' agreement:

> "I cannot see where: any one Director, working alone, to bind the company with respect to any changes in the business of the company, entered into any sales leases or mortgages for the company, spend/borrow in excess of $50,000, lend any amount to anyone, or pay dividends, bonuses or redeem securities.
>
> If I were to suggest any change it would be to increase the $50,000 limit to $100,000. That $50,000 limit was set years ago and would represent over $100,000 today.
>
> ….
>
> The existing agreement has and is being followed. I fully intend to operate within the terms of my existing authority. Thanks for the suggestion."

[148] Having had his attention brought to the first paragraph I have quoted from this email, Robert was asked if he was saying he knew of no situation where he acted unilaterally in relation to the items he listed. He answered "yes". However, it was not clear whether he was agreeing he was saying that in the email, or in the hearing of the motion, or both.

[149] However, either the comments in the email, or both the comments in the email and his evidence relating to it, appear inconsistent with paragraph 57 of his

affidavit, which states that "none of the restrictions" in the Resolutions or Agreement "have ever been followed"

[150] These comments were made in response to an email from Sandra dated February 9, 2010, proposing a resolution template for actions requiring unanimous shareholder consent. They are inconsistent with a view that the Shareholders' Agreement had been abandoned. Robert indicated he no longer agreed with his comments regarding an intention to operate within his authority under the terms of the agreement.

[151] Further, Robert agreed that, in his response to Daren Baxter's letter of April 11, 2010, which directed him to follow the Shareholders' Agreement, he did not indicate that it had been abandoned. Instead, he responded to Mr. Baxter that: he was following it; he did take direction from other directors regarding "long term" and/or what he considered "major decisions"; many of the restricted actions raised were not affected by him alone; and, he wished clarification of how he was alleged to have breached the agreement. He testified that he should have stated the Shareholders' Agreement was abandoned, because it was. He did not know why he had not. He explained that: he was dealing with many problems at the time (e.g. marriage breakdown, and Sandra trying to cut Jaylynn's credit); he had no money for a lawyer; Mr. Baxter's email communication to Sandra had indicated they just

wanted to scare Robert; and, in effect, they had been breaching the terms expressed in the Agreement, but he did not know it at the time. For example, he did not realize that signing long term leases that were automatically renewed was a breach. He also said they went over the $50,000 limit. In his reply, he had also asked for clarification, which was never provided.

[152] In his letter to Kara Craig, on or shortly after April 10, 2010, Robert also made reference to his authority under the Agreement. However, he explained he included that reference not knowing if it had any power at all. He was desperate because he did not want the company to fold due to a reduced line of credit. So he used what he could to ensure Jaylynn's financing remained in place.

[153] Robert also agreed he should have told Sandra the Agreement had been abandoned. He said he did say to her that, if she believed it was in effect, it had a provision for arbitration. That is Clause 6.01.

[154] Sandra agreed she had no reason to dispute the new shares had no restrictions.

[155] Sandra agreed, on cross-examination, to the following regarding the 2002 corporate reorganization. A new trust was created and there was a re-ordering of shares. It was implemented as a tax and estate planning vehicle. Class D voting shares were added. She did not know they were voting shares when she prepared

her affidavit. Paragraph 6 of her Affidavit, where she said she did, is an error. She now understands they were voting shares; but, is of the view they were supposed to be non-voting shares. She has been informed Jay is entitled to vote his shares. Jay did not sign the agreement. The Family Trust is a signatory to the Agreement.

[156] She agreed that, even though the Shareholders' Agreement requires unanimous consent for certain decisions, and even though Jay, Jordan and Ross became shareholders, she never sought their consent. She also agreed that she never insisted on a new shareholders' agreement when Jay, Jordan and Ross became shareholders.

[157] After 1993, Sandra and Robert received no employment income from Jaylynn. Instead, they withdrew varying amounts from Jaylynn. After 2002, they would authorize Jaylynn to pay dividends to the Family Trust. Those funds would be distributed and returned to Sandra and Robert, who would use them to repay amounts they had drawn from Jaylynn.

[158] Sandra indicates she expected that: Jaylynn would continue to have only herself and Robert as directors and officers; they would both continue to have an equal voice in Jaylynn's management and governance; major decisions would require consensus between them; and, she would continue to receive annual dividends on her shares.

[159] Clause 3.01 of the Shareholders' Agreement states, among other things:

> "(b) … the Board of Directors of the Company shall consist of Robert Richards or his nominee, and Sandra Richards or her nominee;
>
> (c) the Company shall have two Officers, namely the President and the Secretary. The parties hereto agree that the following persons will be appointed to hold the following offices of the Company:
>
> President – Robert Richards
>
> Secretary – Sandra Richards"

[160] Robert explained he and Sandra were named as President and Secretary because those are the positions they held at the time. Sandra's position is that Clause 3.01 is to be interpreted as requiring that she and Robert be the, and the only, directors and officers of Jaylynn.

[161] Despite wanting to force strict compliance with the Agreement, Sandra herself has failed to comply with Clause 6.01 which requires disputes "arising out of or relating to this Agreement or the relationship of the parties established under" it to be referred to Arbitration.

c) Holm Realty

[162] Sandra and Robert each own 50% of the shares of Holm Realty. Until September 16, 2010, they were the sole officers and directors. They took only dividends from Holm Realty, no employment income.

[163] Sandra alleges that she and Robert expected Holm would be managed and governed in the same way she described Jaylynn as being managed and governed, except that, as real estate broker for the corporation, she would have to be responsible for its trust account. She indicated that Robert was responsible for sales, and she was responsible for the administration. She expected to receive dividends on her shares from time to time.

[164] Robert indicated he saw her work as broker being "basically clerical". He was of the view she was not involved in the management of Holm.

d) Allegedly Oppressive Conduct and Sandra Richards' Actions

i) Bowater Unit Dispute Leading to Insistence on Formality

[165] Sandra submitted that Robert's unilateral actions in relation to what they referred to as the "Bowater Unit" amounted to oppressive conduct. She acknowledged this event was the genesis of the corporate dispute and, ultimately, the matrimonial dispute between Robert and her.

[166] A dispute arose between Sandra and Robert in relation to whether the offices from which Jaylynn and Holm operated should be moved to the Bowater Unit building. Sandra did not feel it was a good business move. She felt it was a poorer location because of diminished visibility. She disagreed with it, and she told

Robert he could not unilaterally go ahead with the move. He needed her agreement.

[167] She said that Robert lying to her about his plans for the Bowater Unit, and going ahead with the project, while they were out of the country on vacation, in December of 2009 to January of 2010, is what lead to the fracture in their relationship. She indicated that, on their return from vacation, Duane took her on a tour of the work done and advised her that he had told Robert to tell her what was happening while they were on vacation. She added that she "gave instructions" about one year earlier that no more money was to be spent on the Bowater Unit.

[168] Sandra acknowledged writing the cheques to cover the invoices for work done on the Bowater Unit.

[169] She knew the children supported setting up the offices in the Bowater Unit.

[170] Robert felt it was a good move as the existing offices were too cramped and required clients to negotiate stairs. He continued to direct the work and arrangements required to effect the move. The Bowater Unit was listed for sale; but, did not sell. However, the old office location sold for $265,000, while the cost of purchasing and renovating the Bowater Unit was only $130,000, resulting in a net gain for Jaylynn. He was of the view that any diminished visibility would be minimal as the new offices are on a property abutting the old offices. He indicated

Sandra: was aware of the work on the Bowater Unit; picked out materials for it; and, kept tabs on the budget for it. He also said that: she initially agreed with the project; and, they were well into it before she changed her mind, and eventually stated that she did not want any more money spent on Bowater. She had agreed to add the Bowater Unit to their existing offices. However, the property was too small. They then looked at the adjacent property where it now stands. However, Sandra wanted the greater visibility she felt the Wileville Subdivision would provide. Robert felt that location was too expensive. He did not want to invest that much into offices. In addition, it would only provide visibility for people travelling from Yarmouth towards Halifax. It would not provide visibility for people travelling from Halifax to Bridgewater. At one point, she agreed to the Bowater Unit being used as offices in its current location. However, after the project was started she opposed it. He still proceeded unilaterally with the expenditures because he was of the view that the project had to be completed, either to be used as offices or to sell.

[171] Duane indicated that the main purpose for renovating the Bowater Unit had always been corporate office space, knowing that, if the right buyer came along, it would be sold. He is of the view that Sandra knew that as she approved expenses all along. He said she even debated with Robert who would have the larger office planned for the front of the building. He added that, at the end of 2009, renovations

were already substantially complete. Sandra denied that, stating it was intended for resale, not to be used for corporate offices, and the work done while they were on vacation added to the cost of dismantling if the Unit was sold. They returned from vacation on January 5, 2010. Exhibit 9 of Sandra's Affidavit is the General Ledger Report showing the Bowater Unit Expenditures from January 19 to March 11, 2010, totaling $55,790.37, and an opening balance of $28,700. Sandra asked Duane to initial that ledger. He indicated his initialing was a confirmation that the amounts shown were spent on the Bowater Unit, not that the opening balance was $28,700.

[172] Both Jay and Duane supported moving the offices to the Bowater Unit.

[173] Sandra indicates that Robert told her he was of the view that the Agreement only required unanimous consent for the sale of land lease communities and that, as President, he possessed a veto vote which would allow him to proceed as he wished in any event.

[174] Robert submitted that his actions in relation to the Bowater Unit were authorized under Clause 3.04 of the Agreement as part of conducting the business and its day-to-day operations. He further submitted that Sandra did not like it when her opinion in relation to such day-to-day matters was overruled. Therefore, when she did not get her own way in relation to the Bowater Unit, she decided to "make

life miserable" for Robert and to walk away from involvement in Jaylynn's day-to-day operations.

[175] Robert provided Sandra with a note indicating he agreed to pay Sandra "one half of all costs incurred by Jaylynn since Dec/09, to improve the Bowater unit" provided that, "should this unit be sold at or above cost" he would receive that amount from the sale proceeds. Sandra took that note as a recognition of their "equality in corporate affairs". Robert indicated he signed the note to pacify her, confident Jaylynn would not lose money on the Bowater unit, so he would never have to pay.

[176] Sandra demanded payment on the note. Robert refused, as Sandra had not put any personal money into the project and Jaylynn had profited on the transaction.

[177] Sandra indicated the corporate relationship became strained when the new offices were being built against her wishes. She indicates she did not leave, she was "forced out" and "constructively dismissed". She was not happy to be excluded from management and governance decisions, which she had participated in until 2010.

[178] On March 13, 2010, they separated after 34 years in their marital relationship; but, continued to reside in the same house.

[179] Sandra told Robert he was required to comply with the restrictions in the Resolutions and Agreement; and, if he did not, she would approach "BMO" to put in place a requirement that cheques over $50,000 bear both their signatures. Robert continued with his Bowater Unit plans.

[180] Sandra indicated she initially went to the bank to see if she could impose this two-signature requirement. She said she was informed that BMO could not put in place and monitor such a requirement. Following that, between April 8 and 10, 2010, (purportedly on behalf of Jaylynn), she made a formal request to reduce Jaylynn's operating line of credit, first from $900,000 to $250,000 , then to $150,000. She said she did this to halt: Robert's unilateral activities, which she feels were unauthorized; and, the spending. She also wanted to stop Bowater which she saw as a bad investment.

[181] She knew Robert, Jay, Ross and Duane did not feel it was a bad investment. She did not know whether or not Jordan did. He had not told her he thought it was a bad investment. She knew they were developing LaHave Heights at the time. Yet, she did not think it would place Jaylynn in financial jeopardy, and she did not tell anyone she was doing it, including the President and the shareholders. She admitted Jay, Duane and Ross were shareholders and she had access to them. However, she evaded directly answering the question suggesting

she could have gone to them before going to BMO to reduce the line of credit. She merely stated that she did not think it would affect their shareholdings. She acknowledged that no one told her they wanted the line of credit reduced, including Robert, Jay, Ross, Jordan and Duane. She acknowledged she did not tell any of them, in advance, she was going to ask BMO to reduce the line of credit. She said she did not discuss it with anyone from Jaylynn because she did not consider she had a responsibility to arrange a meeting to discuss that.

[182] The e-mail in which Sandra initially indicated to BMO that she wanted to reduce Jaylynn's operating line of credit to $250,000 was sent April 8, 2010, at 4:45 pm. A printed copy of it is in Exhibit K to Robert's Affidavit. It is addressed to Kara Craig, the BMO Relationship Manager responsible for the Jaylynn Accounts. It states, among other things: "[M]aybe for now we better set the limit of the new loan that will require both our signatures to $250,000 til the dust settles or something from inventory sells." She was asked to explain what she meant by "til the dust settles". After initially providing an evasive answer, she said she meant until people discovered what she had done, as she knew there would be "repercussions". Therefore, she knew her actions would not be approved by others, and did not want to consult with them regarding, nor forewarn them of, the actions she was taking.

[183] She said she sought the line of credit reduction in her capacity as "financial manager and administrator" of Jaylynn. She was asked whether she knew of any company where the financial manager and administrator could reduce the company's line of credit. She evaded the question by saying she did not go for that reason, but was told she could accomplish it as guarantor. However, she then acknowledged she did not know of any other example where a guarantor could do that.

[184] In an e-mail showing as having been sent April 9, 2010, at 8:59 am, Ms. Craig asked Sandra to provide her a formal request to reduce the "FBOA" limit. "FBOA" is the acronym used for "First Bank Operating Agreement" and is a reference to Jaylynn's operating line of credit. Sandra responded with a formal request at 9:21 am to reduce it from $900,000 to $250,000, then with a further formal request on April 10, 2010, at 12:56 pm, to reduce it to $150,000.

[185] Both of Sandra's formal request e-mails also requested that "any further term debt to be incurred by Jaylynn … pertain only to the completion of the last 30 lots in LaHave heights".

[186] She did not tell Robert what she had done. She only asked Kara Craig to send a copy of the confirmatory email to Robert, with a copy of the new

documentation and term sheet, after her steps to reduce the line of credit were complete. That was in her email to Ms. Craig of April 9, 2010, at 10:09 am.

[187] Sandra denied trying to control or "bootstrap" the company with such reductions. She said she did it "as a matter of prudence and fiscal control" because she could not put in place the two signature requirement. She had attempted to put that in place even though, since 2006, her signature had been the sole signature on at least 24 Jaylynn cheques exceeding $50,000.

[188] Robert said that even after he told her that reduction in the line of credit would destroy Jaylynn, and asked her to send an e-mail to BMO asking them not to reduce the line of credit, she refused to do so, stating she did not care. Sandra acknowledged Robert asked her to tell BMO she changed her mind, and she refused. Robert stopped the process of reducing this line of credit by way of a letter to Kara Craig. However, BMO eventually did reduce it to $500,000 and advised they required Sandra's signature to access funds slated for LaHave Heights.

[189] Sandra indicated she "did the calculation" and felt the day-to-day expenses would be covered; but, the reduction would stop expenditures on the new office building. She agreed it was her unilateral attempt to stop the move to Bowater.

[190] Robert submitted it was a vindictive attempt to cripple Jaylynn, at a time when Sandra planned to depart from its day-to-day operations because her point of

view regarding the Bowater Unit was not followed. He also submitted that, if she had been successful, it was the most lethal blow she could have struck Jaylynn with. It was not in Jaylynn's best interests. He acted in Jaylynn's best interests in writing Ms. Craig and having the reduction reversed.

[191] Robert commented on the statement in Sandra's e-mails of April 9, 2010, at 9:21 am, and April 10, 2010, at 12:56 pm, to BMO, that "the completion of the last 30 lots in LaHave heights … is anticipated to be at an approximate cost of $600,000". He said Jaylynn has spent $1.2 Million on LaHave Heights, the mortgage for which was approved by Sandra and Robert, and still has to spend $400,000 to $500,000 to complete the project.

[192] Robert agreed both he and Sandra remained guarantors for Jaylynn's indebtedness to BMO, up to an amount of which he was uncertain. He said the financial statements say $300,000 and BMO said it was $650,000, joint and several. However, they have agreed to remove Sandra if requested by him.

[193] Also in early April of 2010, Sandra had Daren Baxter, of McInnes Cooper, write Robert a letter telling him he was required to comply with the terms of the Agreement. The letter is dated April 11, 2010 and is attached as Exhibit "O" to Robert's Affidavit. Among other things, it threatens that BMO may "terminate lending facilities" and is copied to Kara Craig.

[194] Sandra testified that, following the Bowater dispute, she wanted more formal procedures within the business relationship between her and Robert. In her view, he had lied to her about the Bowater Unit, and that changed the arrangement. That is why she had Mr. Baxter write the letter.

[195] At discoveries Robert said he believed that the Bowater Unit situation precipitated the end of their marriage. At the hearing he testified that he did not see the situation, at the time, as a reason for divorce. In his view the expenditures they were disputing were minor compared to the total cost of the project. However, he was shown the General Ledger Report for the Bowater expenditures. He agreed that: the opening balance in January 2010 was $28,700; Bowater had been purchased for $4,500; the closing balance as of March 11, 2010, was $84, 490.37; and, that shows the amount spent on Bowater, from January to March of 2010, was about $57,000, which is an expenditure over $50,000. He explained the total cost of the project was $130,000 because they also had paving done and an air conditioning system installed. However, the paving was done after they moved into the unit, which was in July of 2010.

ii) Stopping Draws From Jaylyn and Holm

[196] Sandra is not seeking an interim order requiring Jaylynn to reinstate the prior income stream she obtained from it. However, she alleges that the cessation of payments amounts to oppressive conduct because it was done to freeze the funds until their matrimonial asset division issues were settled, rather than for a bona fide business reason. She indicated she believed Robert was trying to starve her into a discounted settlement and that the withholding of income had the effect of preventing her from pursuing an oppression remedy.

[197] In May of 2010, Robert stopped payments to Sandra and himself from Jaylynn and Holm. He also told her she was no longer authorized to sign cheques from Jaylynn and Holm Accounts.

[198] Her, and Robert's, only source of income then was their RRSP's. She says Robert would no longer allow her employment in either company. She felt he was trying to starve her into a forced settlement of matrimonial and corporate issues.

[199] In relation to Sandra's expressed expectation that she would continue receiving monies from Jaylynn and Holm, Robert indicated the following. On June 3, 2010, he advised her that neither of them were to take any personal funds out of Jaylynn and Holm until their matrimonial issues were resolved. He expected that would happen within 30 to 60 days and they each had a $75,000 personal line of credit to keep them going in the meantime. He had to access his personal line of

credit and his RRSP's to cover his expenses. He denies Sandra's allegation that he did it to pressure her into an unfavourable settlement and prevent her from having the resources needed to pursue her rights as a shareholder and director of Jaylynn and Holm. He indicated he proposed they each take $5,000 per month out of the business to cover their personal expenses. However, they could not reach agreement on that. Further, Holm has not issued dividends since 2007 in any event. Robert said Sandra wanted $130,000 per year for herself.

[200] Sandra said she understood the offer to be for a one-time $5,000 draw, on the expectation matters would be resolved in a month, and, if not the question of another draw could be revisited. She acknowledged no agreement was reached.

[201] Robert said he suggested a separate one-time draw of $5,000 each because he needed funds for a retainer. However, as noted in his email to Sandra dated June 3, 2010, she had taken $12,000 instead, and Robert considered the extra $7,000 to be part of matrimonial assets.

[202] Robert agreed that they previously removed about $157,000 per year from Jaylynnn through the Family Trust.

[203] Sandra received no income until after the Court of Appeal, in **Richards v. Richards**, 2012 NSCA 7, ordered Robert to pay her spousal support.

[204] Robert did not feel there was anything wrong with not paying Sandra from the business if he did not take anything either.

[205] Sandra agreed that, from 2002 to 2010, Jaylynn paid dividends only to the Family Trust, except for nominal dividends which had to be paid to the preferred shareholders whenever dividends were paid on common shares. She said the dividends to her would have usually been in the $500 to $600 range, while the dividends to the Family Trust would have been around $220,000.

[206] She also agreed that Holm had only declared dividends once or twice.

[207] She argued that she expects to continue to be involved in Jaylynn's affairs with Robert and to be paid as she was before. However, she is not seeking such reinstatement of employment and income on this interlocutory motion. The lack of employment and income is simply presented as part of the alleged global oppression.

iii) Termination or Cessation of Employment

[208] On September 17, 2010, Robert e-mailed her advising her that her services as a bookkeeper were terminated.

[209] On September 23, 2010, Sandra commenced a divorce action. She acknowledged the parties have not been able to agree on much in that action.

[210] Robert indicates that Sandra has been saying she wanted out of Jaylynn and Holm since 2004 or 2005, because: she felt the meetings at home, in which the children participated, were stupid; she felt unchallenged; and, wanted money to start a consulting business. In addition, on April 13, 2010, she sent an e-mail, to all of the office personnel at the Home Centre, which indicated she was leaving her employment with the "Group", and forwarded it to Robert. She agreed, and added she also sent it to Jay and Duane. Robert indicates he accepted that as her resignation. She agreed she told Robert, in the Spring of 2010, she did not plan on continuing as Broker for Holm. She explained that was based on her understanding the arrangement she had with Robert would close. Robert indicated she agreed to stay as broker until June 1, 2010. Robert arranged an alternate. In June of 2010, Robert asked her to continue doing the books from home, and to continue as broker. He says she refused.

[211] He adds that, when he terminated her, he asked her to return what he considers to be a corporate laptop computer she was using and the corporate records in her possession. She continues to refuse to do so.

[212] Jay confirmed Sandra had been expressing, for some time before 2010, that she did not want to remain part of the group of companies. However, after her e-mail of April 13, she told him that it was only meant to be a statement she was leaving her Broker position with Holm. Robert indicated she did not communicate that to him. He understood she was resigning from everything. He added that he pleaded for her to continue working at the office because he was in love with her.

[213] Duane indicated that Sandra, after the disagreement between her and Robert regarding the Bowater Unit, following their return from vacation in January of 2010, made it clear, in multiple conversations, that she no longer wanted to be involved in Jaylynn's day-to-day operations. When asked to comment on this portion of Duane's evidence, Sandra said that this was "the final straw" and it was clear "things had to change". I took her comment to be an acknowledgement that she communicated that to Duane.

[214] Sandra indicated Robert refused to provide her with keys to the new offices in the Bowater Unit. He discouraged her attendance at the corporate offices. He prevented her from having access to corporate financial records and information.

[215] Robert indicated he saw no need for her to have keys because she was not involved in the day-to-day operations, and had told him she had no intention of entering the new offices. Further, in her last days her attitude and behaviour in the

offices created tension and unpleasantness. Robert believed that her presence would only serve to undermine the company. Even when she was working from home, she would sometimes go to the offices and, according to Robert, harass and interfere with staff. The working environment has improved since she left. He says he did keep her informed of all significant business decisions.

[216] Sandra reiterated, on cross-examination, that she sent the April 13, 2010 e-mail to staff, with the intention of winding down her involvement, because she believed she and Robert had reached a resolution in relation to the business. She indicated, after that fell through, she intended to stay. However, it is noteworthy that April 13 was only two days after the letter dated April 11, which Daren Baxter, at Sandra's request, sent Robert, directing him to follow the strict express requirements of the Shareholders' Agreement, and threatening legal action if he did not. It is also only three days after she sent the email to Kara Craig formally, and unilaterally, requesting that the FBOA limit be reduced to $150,000 knowing it would have "repercussions" because others involved in Jaylynn would not approve. Further, in her April 8, 2010 e-mail to Kara Craig, Sandra had already stated: "[W]e won't be able to keep the lights on <u>til I get out</u>." [Emphasis by underlining added.] In those circumstances, at that time, it appears unlikely that she and Robert had reached even a tentative resolution of issues relating to the business. It appears more likely that Sandra made the decision to "get out"

following what she considered unilateral and unauthorized actions by Robert in relation to the Bowater Unit. That time-frame is supported by Sandra's response to the suggestion this motion for an interim oppression remedy was made because of the divorce action. She responded that "initially" she wanted out of the business, then, when she saw Robert's reaction, she wanted out of the marriage.

[217] In addition, her April 13 email is dated the same day as Robert's response to Mr. Baxter. That response would have communicated to Sandra that Robert did not feel he overstepped his authority, and was not about to reverse his decision, in relation to the Bowater Unit. The timing of the two communications suggests that Sandra's notice of departure may have been prompted by Robert's response.

[218] She also agreed that she had told the boys she was considering leaving the business. She was not sure whether that was in 2009. She said she "threatened" to go off on her own to "get attention". She had: the name "Tuff Tax Talk" in mind for her business; the idea of giving advice to other firms; and, scanned PDF documents for use in commencing such a business.

[219] Sandra continued to provide services to Jaylynn from home, at least in May, June and July, and perhaps until she was terminated in September 2010.

iv) Exclusion and/or Refraining From Participating in Corporate Governance

[220] Sandra submitted her level of participation in Jaylynn was changed by the acts of the individual Respondents. Her position as an officer of Jaylyn was changed from Secretary to Education Officer, with no job description. Her position as a director and an officer of Jaylynn was diluted with the addition of Jay and Duane as directors and officers. She submitted that thwarted her reasonable expectation that she and Robert, or their nominees, would remain the only 2 directors and officers.

[221] On an interim basis she is not seeking an order that the corporate governance revert to her and Robert being the only directors and officers. However, she presents the alleged exclusion as part of actions which, individually and/or collectively, amount to oppression.

[222] On September 16, 2010, Sandra and Robert attended a shareholders' and directors' meeting of Holm. Robert used his casting vote to block Sandra's nomination for re-election as director and officer. He allegedly commented that if she resumed the marriage he would end the "insanity", and she could participate in the companies as before. The same day, he had her removed as broker.

[223] Robert noted that, he was made aware, around May 29, 2010, that Sandra had deposited, in her personal account, a cheque, from Holm's account, in the

amount of $29,000. The cheque was dated May 31, 2010. However, upon receiving a warning call from BMO about the transaction, Robert intervened and it was stopped. She did that unilaterally without Robert's knowledge. He asked her why she did it. She told him she was claiming it as the value of her shares in Holm. Robert agreed it represented about one half of the cash in the account, at the time, and she owned half of the shares. However, there were still cheques to come out of the account. He also indicated it was his understanding that the cheque had been deposited and the entry had to be reversed. In addition, he correctly suggested, in closing submissions, that the proper approach would have been to request a payment of dividends from Holm. As a shareholder she was not authorized to unilaterally remove funds representing her share of the equity in the company.

[224] She acknowledged on the stand having written the cheque to herself, knowing it belonged to Holm, not her. She said she thought she wrote it on June 2 or 3, 2010 and back-dated it to Holm's year end, May 31. She was asked whether she ever told Robert. She initially evaded the question, then admitted she had not, even though he was the president. She also admitted she had not requested authorization.

[225] Robert said he had felt she could no longer be trusted to carry out her fiduciary duties to Holm. On August 13, 2010, he gave notice of an Annual

Meeting of the Directors and Shareholders of Holm, to be held September 16, 2010. He says he blocked Sandra's nomination at the September 16 meeting because of her conversion of the funds.

[226] Robert acknowledged that, at Sandra's initiation, they separated on or about March 13, 2010; but, continued to reside together in the matrimonial home for a while, even though he had another place. He moved out totally around August 7, 2010, when Sandra made it clear that continued attempts to reconcile would be fruitless. The August 13 Notice was sent shortly thereafter. It was the first formal meeting of Holm since its inception. However, Robert asserts that it was done because he then understood the formal corporate requirements and wanted to ensure they were fulfilled.

[227] Sandra started the Divorce Action on September 23, 2010.

[228] Robert sent her notice of a July 11, 2011 meeting of Jaylynn Directors. She refused to attend, fearing removal as a director and an officer as had happened with Holm, even though Robert said he assured her he would not. She requested business be conducted by written resolutions.

[229] On August 5, 2011, she received notice of an annual general meeting of Jaylynn Shareholders, scheduled for August 12, 2011. The Notice was dated August 4. She tried to have it postponed to August 25, 2011, to allow more notice,

circulation of advance information, such as an agenda and financial information, and so that her sister, Carolyn Lohnes, who is also a trustee of the Family Trust, could be in attendance. Robert refused to accede to her request for an adjournment. On his direction, the meeting proceeded on the 12th, followed by a directors' meeting. Sandra was not in attendance. Jay and Duane were added as directors. Robert remained as Director and President. Sandra remained as Director and Secretary. From Jaylynn's inception to then, Sandra and Robert had been the only directors of Jaylynn, and this had been the first formal meeting of Jaylynn's shareholders.

[230] Robert explained there was no consultation regarding scheduling, and no circulation of any agenda, nor financial statements, as that had never been done in the past. Sandra agreed that, prior to 2010, there had been no advance circulation of agendas and financial statements.

[231] He kept the initial meeting date because he felt Sandra was merely trying to stall business which had to be attended to. In his view, she chose not to participate. He added that, as a director, she can call a meeting at any time, and has never done so.

[232] It was suggested to Robert that Jaylynn having more than 2 directors, and having directors other than Robert and Sandra, or their nominees, was contrary to

Clause 3.01 of the Shareholders' Agreement. Robert indicated he read the Shareholders' Agreement as requiring that both he and Sandra (or their nominees) be directors, but also allowing other directors to be added, as permitted by the Articles of Association. Further, he did not feel that the Shareholders' Agreement was still in effect at the time in any event.

[233] Sandra submitted that paragraphs (a) and (b) of Clause 3.01, read together, are to be interpreted as requiring that Sandra and Robert, or their nominees, be the, and be the only, directors. Those paragraphs read as follows:

> "(a) there shall be a Board of two Directors;
>
> (b) at all times, the Board of Directors of the Company shall consist of Robert Richards or his nominee, and Sandra Richards or her nominee;"

[234] She further submits that paragraph (c) requires that Robert be President, and that she be Secretary, which she points out was the case for 34 years.

[235] She made Robert aware she considered the Jaylynn business conducted at the August 12 meeting invalid.

[236] Robert acknowledged that, even though he had found out about Sandra taking money from Holm in May of 2010, he did not take any steps to change her involvement in the governance of either corporation until after August 5 or 6, when he concluded there was no hope of her remaining in the marriage. He explained he

had not taken such steps before because he loved her and wanted to do what he could to salvage the relationship.

[237] He realized he had to start doing something to protect Jaylynn's funds. He changed the signing authority in Holm. He opened Credit Union Accounts, and transferred Jaylynn funds into them. The Credit Union High Interest Savings Account for Jaylynn was opened Jan 3, 2012, with a $300,000 deposit transferred from Jaylynn's General Business Operating Account, which had been opened at the Credit Union probably on Dec 9, 2011. Sandra is not a signatory on the Credit Union accounts, which require only one signature; but, he believes she is still a signatory on the BMO accounts.

[238] Robert testified that he did not deposit the proceeds from the sale of 198 North Street into the Jaylynn account because Sandra could take it, as she had taken money from Holm. Those proceeds were deposited into the Credit Union Business Account on December 9, 2011. Other Jaylynn funds are also being deposited into the Credit Union Accounts. He rejected the suggestion he did it to keep financial information from Sandra. He noted that the quarterly reports and yearly financial statements would reveal the handling of those funds, and added he had nothing to hide.

[239] An annual general meeting of the shareholders of Jaylynn was scheduled for October 7, 2011. By e-mail dated September 27, 2011, Sandra advised she could not attend because she had to attend university. The meeting was held, followed by a directors' meeting. She did not attend. Duane, Jay and Robert were present. Duane, Jay, Sandra and Robert were elected as the directors. The nomination of Sandra for the position of Secretary fell for lack of a seconder. Robert remained President. Jay became secretary. Duane became Vice-President. Sandra's position changed to "Education Officer". A resolution was also passed naming Duane, Jay and Robert as the only signing authorities on behalf of the Company. Sandra was excluded. Robert also sent a letter to Kara Craig, at BMO, asking that Sandra be removed from having signing authority. However, it is Robert's understanding that BMO kept Sandra as a person authorized to sign cheques. Robert explained that he had tried to maintain Sandra as Secretary; but, was not supported. She was named Education Officer because it was felt she had to be an officer. From Jaylynn's inception to then, Sandra and Robert had been the only officers of Jaylynn. Sandra was Secretary and Robert was President.

[240] Sandra was not asked whether she consented to being education officer and she was not provided any description of her duties as education officer. Robert indicated that title was selected because Sandra was always interested in education.

[241] The changes to Jaylynn's signing authorities were made in the face of the 1983 Directors' Resolution Number 3, which provided that no alteration regarding required signatures could be made "without a further Special Resolution bearing the signatures of" Robert and Sandra.

[242] Sandra said she did not take the meeting seriously, because there was no agenda, and she felt her class was more important. Robert suggests that such prioritization of her university class, over a corporate governance meeting, at a time when she claims to have been oppressed, raises questions about whether she really was, and considered herself to be, oppressed.

[243] She agreed she "probably" could have attended both meetings. She also stated that she attended the one meeting of Holm held since then.

[244] Robert indicates that, in the years following 2002 or 2003, they held business meetings around the kitchen table at home, where Jay, Jordan and Ross voted, along with Sandra and him, on Jaylynn and Holm business issues. The issues were resolved by majority vote. Jay, their oldest son, was 18 in 2002, Jordan was 16, and Ross was 14. He presented, as Exhibit 7, typed agendas for, and his handwritten notes of, such meetings in 2007. The meetings were called "Board Meetings". Jay prepared and circulated the Agenda for meetings, in advance, to Jordan, Ross, Duane, Sandra and Robert. Robert made handwritten notes on his

copy of the Agenda, and on additional pages, during each meeting. Those are reproduced in Exhibit 7. Exhibit 7 also comprises documents entitled "Organizational Goals", prepared by Robert and discussed at such meetings. Some of them also contain Robert's handwritten notes. There is an email dated February 16, 2007, from Jay to Duane, Sandra and Robert, proposing a draft agenda for the next "Board Meeting", and asking for any additions to it. There is also an email from Robert to Sandra, dated February 19, 2007, addressing "tonight's 'Board' meeting". Robert indicated these meetings occurred in the offices at 198 North Street. Most of the time they were attended by Sandra, Jay, Jordan and himself. They made decisions as a group. He says they continued until 2009 or 2010, at which point Sandra refused to attend any more meetings. This evidence was presented to counter Sandra's suggestion of a reasonable expectation that only she and Robert would be involved in corporate management and governance.

[245] Robert testified that, at first, they only brought the boys into the business discussions to prepare them for the business. Later they started voting, at family meetings, on things like: repaving Eisenhauer Place; and, providing a waterline to lots to hook them up to the Water System, so as to save $2,000 per lot on individual wells. He agreed these decisions would fall under his authority to direct the day-to-day business of Jaylynn. Similarly, the issues noted in his email regarding a meeting of October 18, 2004, relating to staffing and salary

arrangements, were within his authority in any event. These are things he could have done unilaterally. However, there were some issues involving expenditures over $50,000, such as the Bowater Unit.

[246] Jay also provided evidence that he and his brothers have been involved in the Jaylynn decision-making process since 2002, including a majority vote process. He said Duane participated, but did not vote. These evolved into regular family business meetings starting in, or about, 2007.

[247] Nevertheless, well after these meetings commenced, and before anyone other than Sandra and Robert became a director or an officer, Robert advised Mr. Baxter, in a letter dated April 13, 2010, that he was following the Shareholders agreement, including by taking direction from other "directors" regarding "long-term" and/or what he considered to be "major decisions".

[248] Sandra indicated it had been their hope that their three sons would take over the business; and, they involved them in business decisions. However, they did not intend that Duane would be involved. She recalled only one time when the children were brought into a discussion to help sort out a disagreement between her and Robert. Robert was budgeting for signage, pay increases and new hires. She brought the "boys" in to introduce a level of accountability. He reduced his plans to something she could agree with. Jay was not present because it was his birthday.

The others were there; but, she did not know if they spoke much. She felt they were present to eat pizza. She contrasted that "meeting" with family "discussions" about the business. She said that is all they talked about, which, in her view, made the family dysfunctional. They talked business every day. At page 47 of the transcript of her discovery, she had stated that they had such family "meetings" every day at home as they operated the business "24/7".

[249] She agreed Jay became part owner of Jaylynn, as part of estate planning. However, she was of the view that only her and Robert would know whether the Shareholders' Agreement remained in effect thereafter. She added that she was the only one who understood the financial aspect of the business. She stated as well that, even though they gave the sons shares, she and Robert acted as though they ran the company.

[250] In addition, Sandra acknowledged that, in 1994: the only shareholders of Jaylynn were her, Robert and the predecessor to the Family Trust; and, the children were minors. In the 2002 Corporate Reorganization, Jay acquired his own voting shares. She feels they were supposed to be non-voting shares. She acknowledged Jay was not a signatory to the Shareholders' Agreement. She could not say whether there were any restrictions noted on Jay's share certificates. Jay gave evidence that his shares did not have the restrictions described in the Shareholders' Agreement,

and neither did those of the Family Trust. Clause 8.04 of the Shareholders' Agreement provides that the agreement applies to new shares. However, during the 2002 Reorganization, they did not inform the children about the restrictions specified in the Shareholders' Agreement.

[251] Robert was cross-examined in relation to the Jaylynn Directors' Resolutions dated August 12, 2011. They authorize various transactions with the President as sole signatory, including: sale of specified lands; and, sale of all Jaylynn Lands within Nova Scotia. They also authorize the President to be the sole signatory on documents required to: complete the expansion of LaHave Heights; renew mortgages, deeds, contracts, agreements, right of ways, tenders or permits; and, carry out the day-to-day affairs of Jaylynn. Some of these transactions and documents would result in expenditures or income amounts exceeding $50,000. They could all be completed without Sandra's consent, and despite her objection. Robert explained, in relation to the authorization in connection with the sale of the old corporate offices at 198 North Street, that it was included because he knew Sandra would hold up the sale and they had an opportunity to sell it above appraised value, which they did not want to miss. The sale was close to falling through. Similarly, Jaylynn almost lost a sale in relation to 220 North Street, another property specified in the Resolution. The Resolutions were passed at the meeting where Jay and Duane had just been appointed directors, and the Draft

Resolutions had just been provided to them at the Directors' Meeting. Robert acknowledged he did not advise Sandra in advance of these Resolutions, which were proposed and drafted by him. He said he had no communication with her, and she knew of the problems he was trying to address. He was of the view that, in the circumstances, the only way they could get things done for Jaylynn was by way of that Directors' Meeting, which Sandra refused to attend. Robert indicated he has not done anything with the general powers in that resolution. Sandra submitted that the roughly $460,000 increase in the long term debt, in March of 2012, was an example of such unilateral action. However, there was no evidence that it was not approved by Jay and Duane.

[252] Jay testified to his understanding of the effect of the August 12, 2011 Directors' Resolutions. In his view, if Robert wishes to sell a major asset or make a major decision, the issue must be brought before the Board of Directors for a vote. He may only effect the transaction if approved by the Board. He may not do so unilaterally. The one signature requirement was only to expedite approved transactions.

[253] He acknowledged his understanding arose from what Robert told him, rather than from the wording of the Resolutions. He did not recall seeing the Resolutions prior to the meeting. He agreed Robert pays him; but, added he has

opposed him in the past despite that. He conceded it may have been preferable to put the pre-approval requirement clearly in writing. However, he noted he had confidence in, and trusted, Robert, so he was not concerned. He disagreed Sandra would be removed from the decision making process, because she would be entitled to vote as a director.

[254] Duane also testified that he understood the Resolutions to give the President authority to execute documents, with his signature alone, to implement steps approved by a majority of the Board of Directors. However, he indicated he objected to Resolution 9 during discussion, and abstained from voting on it. Resolution 9 is the one authorizing: the sale of all of Jaylynn's Lands; and, the sole signature of the President on documents required to give effect to the conveyance of those lands. He felt it was something which should be put before the shareholders. He was questioned in relation to many of the specified properties which were authorized by resolution to be sold and noted those had already been approved. He also agreed that, seeing now, after hearing the questioning in Court, how the Resolutions could be interpreted, they should be worded differently.

[255] Robert did not indicate that he gave Jay and Duane such assurances, nor of other limitations to his authority to act unilaterally under these Resolutions.

[256] Robert provided the following example of a step taken by Sandra, which he took to be a step towards shutting Jaylynn down, as he says she threatened to do. Jaylynn had placed two orders with Kent Homes. They already had a buyer for one of the units. However, at some point between April and July of 2010, Sandra sent Kent Homes an e-mail asking them to hold the orders "in abeyance". Robert had to call Kent and inform them Jaylynn wanted the units and would pay for them. This is the type of occurrence which would engender fear of Sandra stalling transactions requiring immediate action.

[257] Robert testified that: he had seen on the computer where Sandra was researching oppression remedies; so he took the corporate governance steps he did to ensure no one would say he was not following required steps.

[258] Robert also testified that Sandra did not play any role in Jaylyn between September of 2010 and September of 2012. The Respondents are of the view that Sandra's non-participation in meetings amounted to walking away from corporate governance activities.

[259] However, for about 34 years before that, Sandra and Robert were the only officers and directors of Jaylynn.

v) Disclosure of Corporate and Financial Records

[260] She requested disclosure of financial and corporate records of Jaylynn and Holm. Prior to June 21, 2012, she had only received the 2011 annual financial statements for Jaylynn, which she had received in September of 2011. She has subsequently been provided which additional information.

[261] Her access to banking information was limited to what she could see online using her BMO Bank Convenience Card. Once Jaylynn's banking began to be primarily handled through its Credit Union Accounts, Sandra no longer had access to banking transaction information.

vi) Amounts Paid and Received by Jaylynn and Self-Dealing

[262] On January 20, 2012, the Nova Scotia Court of Appeal ordered Robert to pay Sandra $6,000 per month in spousal support. Following that, Jaylynn, in 2012, paid out the following amounts which Sandra suggested were improper and not in the interests of Jaylynn (in addition to being unauthorized where they exceeded $50,000, since they bore only Robert's signature): $203,000 in trust to Romney Law Inc. on January 24; $425, 585.75 to Acadia Equipment Rentals Ltd., a

company owned by Duane ("Acadia"); and, $206,007.76, $30,893.10 and $84,174.92, on March 14, April 18 and May 24 respectively, to Value Added Investments Limited, a company owned by Robert, at the time, ("Value Added"). She suggested a similar view of the financing arrangement whereby Jaylynn, on March 15, negotiated a new long term loan of $1,259,431.85, and paid off existing loans, leaving a loan balance of $455,340.01, while having, by May 25, spent all but $288 of the $353,756.31 in its accounts and used up $406,130.71 of its $500,000 line of credit. She was concerned about her personal guarantee, to the Bank, on Jaylynn's debts.

[263] Sandra noted that Robert did not disclose to her the nature and purpose of the transactions with Value Added, which had, until 2011, in her view, been only a shell corporation. She views these transactions as being for the purpose of benefitting Robert, Duane, Jay and their Corporations, not Jaylynn.

[264] She expressed concern that the Jaylynn modular home bearing stock number 1905 had been sold and the sale proceeds, estimated at around $200,000, had not been put in Jaylynn's account. She acknowledged Philip Romney's letter that he returned the $203,000 held in trust; but, noted it was not deposited in Jaylynn's BMO account.

[265] Regarding Sandra's concerns over these payments, Robert stated they were all for legitimate business reasons and Jaylynn remains well capitalized. Also, Jaylynn opened accounts at LaHave Credit Union, because of Sandra's prior interference with Jaylynn's BMO banking. The $203,000 returned from Romney Law Inc.'s trust account went to one of Jaylynn's Credit Union accounts. It was money relating to a transaction that did not materialize.

[266] Robert testified that the Credit Union Accounts are not used for anything other than corporate business, except for "the odd item" where suppliers mistakenly bill the corporation for a personal item. When that happens, he reimburses the corporation and adjusts the accounting accordingly.

[267] Robert provided evidence that Acadia has been responsible for a significant amount, if not all, of Jaylynn's land development since shortly after Duane returned from Alberta in 2003; and, now oversees all Jaylynn's land development operations. Duane's evidence confirmed this arrangement and provided a memorandum of understanding, dated November 11, 2002, between Jaylynn and Acadia outlining it. The memorandum of understanding is signed by Robert, Sandra, Jay and Duane. Robert and Duane both provided invoices for the $424,585.75, and the $13,185.61 interim amount, paid to Acadia.

[268] Sandra commented on the description of services accompanying the invoice for the $424,585.75 in services Acadia provided to Jaylynn. She pointed out the $750 hourly rate for "construction, supervision and planning" in April and May 2011, and stated that had never been approved. It was pointed out to her that, elsewhere in the description of services there is an hourly rate of $80 per hour for other services provided by Duane. She did not oppose the suggestion that, in the early 2000's, they were paying Duane $65 per hour. However, when faced with the suggestion that the $750 per hour was really a typographical error, and it should be $75 per hour, she merely responded that Duane never provided an invoice before. She also pointed out that the expenses were identical on multiple days. She asked where the topsoil was and where the purpose of the expenses was shown on Jaylynn's financial statements.

[269] Sandra also commented on the Acadia Rental Division invoices attached as Exhibit "D" to Duane's Affidavit, in support of the interim bill to Jaylynn in the amount of $13, 185.61. She suggested the invoices included invoices for $2,000 worth of tires Robert was getting, from Duane, for the Jaguar Duane leases to Robert. However, she did not point out that invoice and it is not apparent.

[270] She further stated that Robert runs personal expenses, such as house cleaning, through Jaylynn.

[271] However, she said she never raised concerns about such points with the President because she did not have much opportunity to speak with him.

[272] Robert also testified that he has had Value Added for four or five years. He, Duane and Jay are the directors. He is President. Duane is Vice-President. Jay is Secretary. Sandra has never been a shareholder, officer, nor director. Jay and Duane became officers around the time of a closing on Westside Estates, which Sandra was opposing. Value Added took over responsibility for the water distribution system because Sandra objected to Jaylynn doing so.

[273] He noted that he owns 49 shares of Value Added, while Duane and Jay now each own 25. Some of the payments to Value Added represent the amounts required, considering HST, for Robert to withdraw the salary of $157,000 imputed by the Court of Appeal, for the purpose of determining spousal support obligations. He said he had no other way of paying spousal support than by drawing some income from Jaylynn. He is doing that by hiring himself out as a consultant to Jaylynn, through Value Added. The cheque dated Nov 29, 2012, in the amount of $16,202.35, from Jaylynn to Value Added, was for consulting fees, to enable him and Sandra to have money. He does not take a salary out of Jaylynn as President. Doing it this way was tax advantageous. Jaylynn and Value Added have different year ends. Last year he took too much money out of his RRSP's, which put him in

a higher tax bracket. Going through Value Added allowed him to push some of the income into the next year, so that he could get things straightened out. He consulted with the directors of Jaylynn, except Sandra, who was not present at the meeting, and they approved it. He agreed it was not on the agenda for the meeting.

[274] The other payments to Value Added were in connection with transactions for the sale of two homes purchased from Hospitality Homes Ltd. It was done through Value Added due to ongoing concerns with Kent Homes. However, the sales to the customers were made through Jaylynn. These transactions occurred in 2012. The Hospitality Homes invoices are dated June 13 and September 19, 2012. Both had prior agreements of purchase and sale between Jaylyn and the customers. One home was marked up by Value Added in the amount of $15,000 before being invoiced to Jaylynn. The other was marked up by about $11,600. Robert explained that the mark-up was because Value Added had expenses, such as freight and permits. He agreed the actual expenses would be less than the mark-up. He agreed the net mark-up, after expenses, for both units, could be around $17,000. He added that, once the exact costs to Value Added are determined, the surplus will be paid over to Jaylynn. However, he has neglected that task, as well as other tasks, because he has been busy with the litigation between himself and Sandra. He testified these were the only two homes purchased through Value Added, and were

the only two "Hospitality" homes Jaylynn sold. Jaylynn only sold four homes in all in 2012.

[275] Robert acknowledged that his, Duane's and Jay's interests in Value Added put them in a conflict of interest situation in relation to running transactions through Value Added as they did. However, he felt his involving Duane and Jay, as opposed to acting on his own, and there being a paper trail to show he had nothing to hide, would be adequate. He admitted not telling Sandra about the transaction; but, added she would have known had she attended the Directors' Meetings.

[276] He says the proceeds of the sale of the home bearing stock number 1905, being $151,134.28 were deposited in the Jaylynn Credit Union Corporate Account.

[277] In relation to the new loan funds, Robert indicated BMO did not require Sandra's signature to advance them and her personal guarantee was limited to $300,000, while his is $500,000.

[278] Robert was cross-examined in relation to a $15,000 payment to Blois, Nickerson and Bryson in Trust, on August 16, 2012, from the Jaylynn Credit Union Chequing Account. Robert explained he initially attempted to retain them to represent the Trust. However, that approach was rejected by Sandra. The firm ended up representing Jay. So the $15,000 paid to them is now "on the books" as an advance to Jay.

e) Whether Serious Question To Be Tried Regarding Oppression

[279] The Respondents submitted that the only relevant alleged oppression is that which would lead to the imposition of the restrictions sought by Sandra. In their view, that limits the Court's consideration to the actions taken in relation to the Bowater unit. Jay submitted there was only a "possible" breach in connection with the Bowater unit expenditures because it is alleged that Sandra initially agreed, then changed her mind. It is also submitted that the Bowater breach would be a trivial to moderate, three year old breach which ought not justify the drastic interlocutory oppression remedy sought. Jaylynn further submitted that there was no evidence that the Bowater transaction caused any harm to Jaylynn or Sandra.

[280] However, as noted at paragraph 33 of **Paley v. Leduc**, in "cases involving several acts, … where one 'borderline' act may not necessitate a … remedy, a combination of acts may, in their totality, constitute oppression or unfair prejudice." Therefore, in my view, the other alleged incidents of oppression are to be considered as well.

[281] I have already discussed evidence and submissions relating to the events Sandra alleged occurred, and submitted amounted to oppression, or unfair prejudice to and/or unfair disregard of her rights as shareholder, director and

officer of Jaylynn and Holm. To recap, they included the: unilateral action in relation to the Bowater Unit; discontinuance of draws from Jaylynn and Holm for improper, non-business motives; termination of her employment with Jaylynn and Holm; steps taken to exclude her from participating in the governance of both corporations; limiting of her access to corporate and financial information; and, self-dealing and conflict of interest of the personal respondents.

[282] I am not, at this stage, to assess credibility. I am only to determine whether there is a serious question to be tried in relation to Sandra's allegation that Jaylynn has been managed, operated and/or governed in a manner that is oppressive to her, unfairly prejudices her, or unfairly disregards her interests.

[283] The oppression she alleges specifically in relation to the Bowater Unit issue is the unilateral action taken by Robert in the face of her opposition to the continuation of the project to renovate or convert it into corporate offices. She argues that, even if it was a wise business decision, it was still carried out in an oppressive manner. She is not asking the Court to assess the wisdom of the Bowater Unit business decision. Her submission is that the manner in which the Bowater decision was made and implemented was oppressive. She is implicitly asking the Court to assess whether there is a serious question to be tried in relation to whether Robert acted "honestly and reasonably".

[284] Robert's evidence was that: between January 19 and March 11, 2010, alone, Jaylynn spent $84, 490 on the Bowater Unit; and, in all, it spent about $139,000. Those amounts exceed the $50,000 limit specified in the Resolutions and Agreement. Sandra alleges this was the first time Robert acted unilaterally, in the absence of consensus.

[285] She submitted she had a reasonable expectation major decisions would be made by her and Robert on a consensus basis, and transactions would not be effected in contravention of the Resolutions and Agreement. Her expressed expectations included full participation in day-to-day management and corporate governance.

[286] Robert questions how she can have that continued expectation if she left her employment and has failed to attend shareholders' and directors' meetings.

[287] The Respondents submit that Sandra's position is based on the 1983 Resolutions and the 1993 Shareholders' Agreement, and ignores that: they purportedly do not apply to day-to-day operations, by virtue of Clause 3.04 of the Agreement; and, the $50,000 limit on transactions without unanimous consent was allegedly never followed. However, those are points in dispute, and there are conflicting statements from Robert regarding whether that $50,000 restriction, and other restrictions, were followed.

[288] The Respondents argue that Sandra has no reasonable expectation that she can veto mobile home sales, specifically, when: such sales were not caught by the $50,000 cap in 1983 and in 1994, when the Resolutions were passed and the Agreement was entered into; and, even once the price of mobile homes exceeded $50,000, she allegedly never was consulted in relation to any sales of such homes.

[289] The final hearing judge may accept Sandra's evidence regarding the practice followed to give informal effect to the "spirit" of the $50,000 transaction limit restriction, even though she agreed they did not not follow the strict procedural requirements of the Resolutions and Agreements. He or she may place significant emphasis on: that alleged past practice; the fact the restrictions are contained in a written agreement between the parties; and; the fact that the amount has not been changed by resolution as provided for in the Resolutions and Agreement. Less emphasis may be placed on the fact that these were closely-held family businesses, so as to justify greater flexibility in and acceptance of informality and lack of strict adherence to resolutions, agreements and articles.

[290] Alternatively, the judge at the final hearing may determine that the parties reasonably expect the Resolutions and Agreement to be followed now that there is a drastic rift between Sandra and Robert, even if he or she finds they were not followed when their relationship was better. Such a determination may be based on

it being unnecessary, at the time, to insist on such adherence to formality because the corporations were closely controlled by a tight family unit. Their relationship at the time, could be seen as justifying reasonable expectations that the strict formalities would not be insisted upon. That close relationship no longer exists. Therefore, it may be determined that this reasonable expectation no longer exists.

[291] The judge would be likely to attach significant weight to the fact that, in 1983 and 1994, when the $50,000 one-signature limits were put in place, they would not have impacted the day-to-day operations of Jaylynn. In my view, that factor makes it more likely that the judge would find that it was not in the reasonable expectation of the parties that the $50,000 restriction would be followed. The judge could easily find that Robert's authority, under section 3.04 of the Shareholders' Agreement, to handle day-to-day operations, over the years, has come to include transactions exceeding $50,000. However, that does not mean that it is not a serious issue to be tried. The restriction still has not been removed by further resolution or agreement, as was provided for. Therefore, the judge may conclude that the parties are bound, and reasonably expected to be bound, until that happens, either by consent, or by court order. As noted in **RJR MacDonald**, at paragraph 50, as long as there is a serious question to be tried, I must move to the next stage of the interlocutory injunction test, "even if of the opinion that the plaintiff is unlikely to succeed at trial".

[292] The final hearing judge may interpret the Resolutions, Agreement and Articles as permitting the corporate governance changes effected in and after September of 2010. If so, he or she would have to find the changes were effected for *mala fide* reasons, rather than for the best interests of Jaylynn and Holm, to conclude there has been oppression. There is evidence that Robert's actions in removing Sandra as an officer of Holm came shortly after it became clear there would be no reconciliation, even though her attempt to take money from the Holm account was a few months earlier. There is evidence of payments from Jaylynn to Robert, through Value Added, which had not occurred before, as well as a flurry of expenditures and incurring of debt following the spousal support order. There is Robert's acknowledgement that he took the position neither of them would receive money from Jaylynn or Holm until matters were settled. In light of this evidence, the final hearing judge could find *mala fides*. Therefore, even if the judge were to conclude that the corporate governance changes were "legal", there would still be a serious question to be tried in relation to whether they were effected for *mala fide* reasons, and fit in one of the three oppression categories.

[293] That is in addition to the serious question to be tried in relation to whether the changes were prohibited by the Agreement, and thus illegal, in which case there would be no need to find *mala fides*. It is open to the judge to determine the

Agreement remained in effect and to interpret it as requiring Sandra and Robert to be the only directors and officers of Jaylynn.

[294] Either way, the allegation of oppression based on the changes in corporate governance is not frivolous or vexatious.

[295] The personal respondents also passed a resolution purporting to cancel Sandra's signing authority. In **Bayliss v. Harris**, [1993] O.J. No. 2655 (O.C.J., G.D.), at paragraphs 12 and 13, "cancellation of … signing authority", along with "exclusion from management", was found to amount to oppression under the Ontario *Business Corporations Act* ("O.B.C.A.").

[296] Robert's submission that Sandra was not excluded from corporate governance, but, rather, chose not to participate in the meetings, could reasonably be rejected , and Robert's refusal to adjourn the meetings as requested, particularly where the notice period did not meet the requirements of the *Companies Act*, could reasonably be accepted as part of actions unfairly disregarding or prejudicing her interests.

[297] The August 12, 2011 Directors' Resolutions, on their face, purport to give Robert unilateral authority, as sole signatory, to effect various Jaylynn transactions, including those involving transactions exceeding $50,000 and the sale of all lands. Particularly in relation to the authority to sell all Jaylynn lands, there

is, in my view, a serious question to be tried in relation to: whether that runs contrary to the way Jaylynn operated for over 33 years, and thus contrary to Sandra's reasonable expectations; and, whether that unfairly disregards Sandra's interests, or is unfairly prejudicial to her. Given that Jaylynn's assets and operations are primarily land-based, it is reasonably arguable that the ability to sell all of Jaylynn's lands against her wishes meets at least one of those manners of oppression.

[298] The alleged need to pass these Resolutions to "get things done" could reasonably be rejected on the basis that Sandra had already shown some readiness to sign a resolution authorizing the sale of land by signing the Directors' Resolution dated June 22, 2011. Her adding her own conditions to the resolution, even though it was only to sell portions of lots to the Town of Bridgewater to improve the street infrastructure, provides some support to Robert's position on that point. However, it does not make it a foregone conclusion that the Resolutions were justified as being in the best interests of Jaylynn.

[299] Even if the Resolutions are interpreted as requiring a majority vote before Robert acquires the ability to act unilaterally as sole signatory, in relation to major transactions, it still would represent a dilution of Sandra's voice in relation to such decisions. She would have gone from having one half of the votes, to having only

one quarter of the votes, leaving open a serious question to be tried as to whether it unfairly prejudiced her interests.

[300] Sandra submitted that Robert's motive for cutting off income from Jaylynn, and excluding her from corporate governance, was akin to the situation in **Naneff**. In that case, the parents, having gifted shares to their children, removed one son as officer of the company and excluded him from "all participation in and management of the business, when they became unhappy with his personal lifestyle outside of the business". The Court held that corporate law did not permit such steps to be taken for the extraneous personal purpose of teaching the wayward son a lesson that his lifestyle would not be tolerated, when that lifestyle "had no adverse effect on his business/company life". To the extent that Robert may have taken steps to demonstrate his displeasure with Sandra abandoning reconciliation efforts, it would constitute the type of personal extraneous purpose referred to in **Naneff**.

[301] In the case at hand, Sandra's actions in attempting to reduce the line of credit and convert money from Holm did adversely affect the business. Those were purported by Robert to be business considerations which led to some of the actions complained of, even though the corporate actions were taken well after the events, and, with the exception of the cutting off of income, only after reconciliation

attempts ceased. However, given the timing, it is reasonably open to the judge, on the final hearing, to find the actions were taken for extraneous, non-business reasons. In fact, the Court of Appeal, in **Richards v. Richards**, 2012 NSCA 7, at paragraph 27, concluded that the findings of, and evidence before, the judge who heard the motion for interim spousal support, revealed that:

> "Ms. Richards had no money because Mr. Richards changed the financial status quo. … She would have had money had she agreed to settle all issues -- not just the issue of interim support."

[302] Such a finding would further be supported by the statement which Sandra alleges Robert made, and which was not refuted by him, to the effect that, if Sandra resumed the marriage, he would "end the insanity" and that she could be involved in both companies as she had before. That statement was purportedly made immediately following the September 16, 2010 meeting in which Robert blocked Sandra's re-election as director and officer of Holm, which was about three and one-half months following the attempted conversion of Jaylynn funds.

[303] "[I]mproperly reducing a shareholder's dividend" was specified as an example of "unfair disregard", at paragraph 94 of **B.C.E.**.

[304] The same comments are applicable to whether or not the judge could reasonably find that the termination of her employment, which occurred the day after that meeting, on September 17, 2010, was oppressive. That issue imports the

additional factor that Sandra sent the email dated April 13, 2013, signaling her voluntary departure. Despite that, she continued to provide services to Jaylynn and Holm. In addition, the evidence that she was only resigning from the position of Broker for Holm may be accepted. Therefore, it is still reasonably open to the judge to determine that she was terminated, for improper, non-business reasons.

[305] Similarly, the long delay between the conversion of funds from the Holm Account, and the opening of the Credit Union Accounts, could reasonably result in a finding that those accounts were opened to shield Jaylynn's banking transactions from Sandra's view, rather than for legitimate business reasons. Such a finding could reasonably support a conclusion that such a blocking of Sandra's access to information unfairly disregarded her interests. Refusal to provide "financial information and access to the files and business records" was found to amount to oppression under the O.B.C.A., at paragraphs 12 and 13 of **Bayliss v. Harris**.

[306] "[F]ailing to disclose related party transactions", and "preferring some shareholders with management fees", are included as a specific examples of "unfair prejudice" at paragraph 93 of **B.C.E.**. The personal Respondents conceded that they did not inform Sandra of the related party transactions conducted through Value Added. Robert conceded he was paying himself "consulting fees" through

Value Added. It is open to the judge to conclude that those actions amounted to breaches of fiduciary duty owed to the corporation and "oppression".

[307] In **Paley v. Leduc**, 2002 BCSC 1757, the Court dealt with circumstances which were somewhat similar to those in the case at hand. At paragraphs 37 and 38, it stated:

> "37 In the case at bar I have considered the fact that Joji's is a "family company". I have also considered the fact that because of the bad blood that exists between the parties, it is now impossible for the company to function effectively.
>
> 38 Paley and Leduc functioned as partners in both businesses between 1996 and March, 2002. Paley continued to work full-time in Joji's and continued to invest significant sums of money in Joji's and JHS, even after the personal relationship between Paley and Leduc had ended. By withholding financial information from Paley; by beginning to treat Paley as nothing more than an employee of Joji's to be summarily dismissed; and by ultimately depriving Paley of all of the benefits of share ownership, Leduc acted in a manner that was oppressive and unfairly prejudicial to Paley."

[308] The same finding could reasonably obtain in the case at hand.

[309] The judge hearing the application could reasonably find that the evidence: supports "the reasonable expectation asserted by" Sandra; and, establishes that "the reasonable expectation was violated by conduct falling within the terms 'oppression', 'unfair prejudice' or 'unfair disregard' of" Sandra's interests in Jaylynn and Holm.

[310] Therefore, there is, in my view, "a serious question to be tried" in relation to whether the conduct complained of falls within one of the three categories of

"oppression" contained in Section 5 of the Third Schedule to the Companies Act; and, I must go on to the second branch of the RJR-MacDonald Test.

5. ANALYSIS OF WHETHER SECOND BRANCH OF RJR-MACDONALD TEST MET

[311] The court in **RJR-MacDonald**, at paragraph 59, stated, with case references omitted:

> "**59** "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration."

[312] The Court in Rogers **Communication Inc. v Shaw Communications Inc.**, 2009 CarswellOnt 5489 (S.C.J.), at paragraph 67, noted that: "Evidence of irreparable harm must be clear and not speculative."

[313] Sandra indicated the following in relation to funds available to Jaylynn between January and May of 2012. On January 3, Jaylynn had, at BMO, $117,590.86 in its operating account and $236, 165.45 in its savings account. It also had access to a $500,000 unused line of credit. In March, an additional

$455,340.01 from a new long term loan was available. By May 25, all Jaylynn had left to spend was about $99,000 of its line of credit and $288 in its savings account.

[314] She said Jaylynn's BMO Account had, since June 2012, been overdrawn twice, which had not been the case in the past. It was suggested to her that the overdraft occurred only once, at the end of the month, while awaiting rental income, and lasted only 24 to 48 hours. She was unable to say how long it lasted, nor how many times it occurred.

[315] She was of the view that Jaylynn's reduced liquidity and increased indebtedness, had "the very real and imminent potential to financially cripple" Jaylynn.

[316] She was also concerned Jaylynn would be unable to redeem her preference shares valued at $1,769,000. She is the largest shareholder. Her preference shares, along with those of Robert are to be paid out first. She suggests that, because of her priority position, she would suffer a greater loss than their children, who do not own preference shares, should Jaylynn go bankrupt.

[317] She pointed out that she remains a guarantor for Jaylynn's indebtedness, even though she no longer has the control she purportedly had. She emphasized that the August 12, 2011, Directors' Resolution, expressing that Robert has

unilateral authority to deal with major assets, which he did not previously have, further diluted her voice in Jaylynn's governance.

[318] Sandra fears that, given her loss of corporate control, Robert, Jay and Duane will wrongfully divert funds from Jaylynn to themselves and their corporations, which may lead to her losing the value of her interest in Jaylynn. She highlighted, as a related party and/or self-dealing transaction, the sale of modular homes, with a mark-up, through Value Added. There were also payments of consulting fees to Robert through Value Added.

[319] Sandra submitted that this constellation of factors and circumstances constitutes irreparable harm.

[320] She added she has already lost her livelihood and would "not rule out" returning to work for the Home Centre Group of Companies, if there was an opportunity to do so.

[321] Nevertheless, she agreed that, as of March 31, 2011, there was nothing to show Jaylynn was devalued, and it appeared to be in relatively good shape.

[322] The unaudited financial statements for Jaylynn, from 2008 to 2011, show the following net earnings: $209,284 for 2008; $146,997 for 2009; $518,796 for 2010; and, $269,801 for 2011. They show the following retained earnings:

$1,139,253 in 2008; $1,012, 596 in 2009; $1,350,730 in 2010; and, $1,620,531 in 2011.

[323] Sandra agreed that the unaudited financial statements show that, in 2012, Jaylynn had retained earnings of $1,770,590, which was an increase over that in 2011.

[324] However, she stated that, when you deduct the profit from the sale of land it would show a net earnings loss for 2012. She testified that: to "normalize" the statements, $209,000 should be deducted from the $150,000 net income shown, because the sale of 198 North Street was a one-time transaction; and, when that is done, it would show a loss of about $60,000.

[325] She agreed that, if Jaylynn is allowed to continue to operate as it is now, any harm resulting from that will be financial in nature.

[326] According to Robert's July 18, 2012 affidavit, Jaylynn had: $705,707.20 deposited in the Credit Union; $84,493.58 available under the line of credit; $686,784.28 in inventory; and, $136,186.39 expected from the sale of a unit in LaHave Heights by the end of the month. He anticipated retained earnings in 2012 to be higher than in 2011. According to the unaudited financial statements for 2012, that proved to be the case.

[327] Robert testified that, at the time he gave his testimony, Jaylynn's finances were as follows. It had a $9M floating charge debenture with less than $7M credit available, having already used alot. It had an operating line of credit of $500,000. It had $120,000 to $150,000 in BMO. It also had funds in the Credit Union, including $469,000 in the savings account and $8,700 in the chequing account. In addition, it had $600,000 in line of credit funds available. It also had $750,000 in inventory to work with.

[328] Jaylynn's use of Credit Union accounts, in my view, addresses Sandra's concerns over the dwindling BMO funds.

[329] Robert agreed that in January 2012, Jaylynn had about $1M available to it; and, by December 5, 2012, it had about $200,000 available to it. However, he added that it had the inventory purchased with the funds used. In his view the increase in assets made up for the funds used.

[330] That view makes sense and is supported by the increase in retained earnings.

[331] Robert agreed that the redemption value of Sandra's shares was $1.76 M.

[332] He is of the view that Jaylynn is well capitalized, has significant cash reserves and inventory, and has sufficient assets to payout all obligations and

preference shares, if it liquidates its assets. That was not refuted by Sandra. Therefore, at this point, there is no apparent risk to the value of Sandra's shareholdings.

[333] Sandra's concerns are over Jaylynn's future financial health.

[334] Jaylynn's net earnings from 2008 to 2012 have fluctuated. The evidence did not fully establish the reasons for that. The evidence that home sales are not always consistent provides a partial explanation.

[335] Sandra's rough and impromptu accounting calculations, if correct, suggest that, for 2012, Jaylynn should be shown as having an operating loss of approximately $60,000. There was no expert evidence regarding whether the 2012 Financial Statements were prepared in accordance with generally accepted accounting principles. In my view, Sandra's evidence does not establish that they were not, and the 2012 Financial Statements are more likely to be correct than her rough and impromptu calculations.

[336] It is noteworthy that, on March 14, 2012, Jaylynn paid $206,007.76 to Value Added, as consulting fees, to provide the income attributed to Robert by the Court of Appeal, from which he could pay the spousal support ordered. If the pre-existing method of extracting personal monies from Jaylynn had remained in place, this $206,007.75 would have shown as part of Jaylynn's net earnings for 2012.

Therefore, even if Sandra's accounting approach is the correct one, Jaylynn's income was, in reality, still consistent with its historical fluctuating income pattern.

[337] More importantly, the retained earnings shown in the evidence reached their highest point in 2012.

[338] Jaylynn's retained earnings have increased each year from 2008 to, and including, 2012 when they rose to $1, 770, 590. Assuming the 2012 Financial Statements are accurate, Jaylynn is now better capitalized, and provides its shareholders more equity, than it has, at least since 2008. Therefore, it is now in a better position to purchase Sandra's shares.

[339] The Respondents correctly point out that any loss Sandra may suffer can be compensated by payment of money. She has not shown that Jaylynn is not likely to have the ability to buy out her shares, which she is content to sell at a price of $1,760, 000. Rather, more likely than not, Jaylynn has, and will continue to have, the ability to buy out her shares. In my view, the continually increasing retained earnings support that conclusion.

[340] In addition, as a preference shareholder, she is more likely to be able to extract value from the company for her shares, should the company show signs of failure.

[341] Further, as submitted by Jaylynn, there was no evidence that Sandra's shares have diminished in value, nor that she has asked Jaylynn to redeem them.

[342] I cannot find that Sandra has provided clear evidence: that Jaylynn is in any "real and imminent" danger of becoming financially crippled and rendered incapable of redeeming her shares; nor, of other irreparable harm. Rather she has provided only speculation that the equity and profitability in Jaylynn may collapse under poor management and governance.

[343] Similarly, I am of the view that she has not established any real increase in risk that her personal guarantee will be called upon.

[344] As noted by Robert, the transactions through Value Added are all accounted for, and can be factored into any final determination. As such, they do not create irreparable harm.

[345] The August 12, 2011, Directors' Resolution creates a risk that Robert could sell off Jaylynn's major assets, and, divert the funds, thereby jeopardizing Jaylynn's survival. However, there is no evidence of that being a realistic risk. All indications are that Robert wishes to expand the company, not dismantle it. Further, such a drastic move would not go undetected, and Dwayne and Jay, being intimately involved in the day-to-day operations, would, more likely than not, become aware of any such attempted move by Robert.

[346] Sandra commenced her oppression remedy application on April 17, 2012. It was suggested that her delay in commencing the Application indicates there is no irreparable harm being caused to her. Sandra explained that she had no money to commence the Application until April of 2012, when she began receiving spousal support, including retroactive spousal support. However, she agreed that, prior to that, she had three law firms under retainer. Ferrier Kimball represented her in her corporate capacity. McInnes Cooper represented her on estate issues. Mr. Dexter represented her in relation to her divorce.

[347] The evidence does not establish that her role and presence in the business was such that Jaylynn would suffer loss of goodwill if she remains uninvolved in its management and business operations. Therefore, it has not been shown that even her complete absence would result in irreparable harm to Jaylynn and Holm, and, thus, indirectly to her shareholdings in those companies.

[348] She did not receive an income as an employee of Jaylynn and Holm. Their income was in the form of dividends, most of which were through the Family Trust. She is still receiving income in the form of Spousal Support, and she is free to further her education, which appears to be important to her. Therefore, the cessation or termination of her employment appears to have resulted in more

benefit than harm to her. If it did result in any harm, such harm can be compensated by an award of damages upon a final determination.

[349] Based on these points, I find that Sandra has not established that refusing the injunction requested would result in any irreparable harm to her.

[350] Therefore, it would be unnecessary to address the third branch of the RJR-MacDonald Test. However, I will address it in any event.

6. ANALYSIS OF WHETHER THIRD BRANCH OF RJR-MACDONALD TEST MET

[351] The court in **RJR-MacDonald**, at paragraphs 62 & 63, stated:

> "**62** The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: 'a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits'. …
>
> **63** The factors which must be considered in assessing the 'balance of inconvenience' are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:
>
> > [I]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> He added, at p. 409, that 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.'"

[352] The **American Cyanamid** case referred to in **RJR-MacDonald is American Cyanamid Co. v. Ethicon Ltd.**, [1975] 1 All E.R. 504 (H.L.). The Court in that case noted that the extent to which each party would suffer

disadvantages that cannot be compensated in damages is a significant factor in assessing the balance of convenience.

[353] In addition, the Court in **American Cyanamid**, at p. 511, stated:

> "Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at trial is to postpone the date at which he is to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at trial."

[354] The Court in **American Cyanamid**, also at p. 511, further stated:

> "[I]f the extent of the un-compensable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent on the facts disclosed by the evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party."

[355] Robert is receiving monies from Jaylynn through Value Added. Sandra says that, as a result, she would suffer more harm than Robert if Robert is allowed to continue to conduct Jaylynn in the ways complained of.

[356] Jaylynn receives approximately $100,000 per month in rent on leasehold mobile home lots and commercial properties. Sandra questioned, given that income, how the Respondents' fears, that Jaylynn would go bankrupt if she were able to control its transactions, are justified.

[357] However, Robert notes that only about one quarter or less of the rental amount is net income. Sandra agreed the net rental income was approximately $22,000 per month. Further, Robert indicated Jaylynn has recently lost $5,800 in monthly rental payments.

[358] Sandra added that the thirty-four years she acted as administrator of Jaylynn shows her record of working for the profitability of the company.

[359] Robert provided evidence that increasing inability to reach agreement with Sandra at the Board level, for either Jaylynn or Holm, started as early as 2002. However, to avoid putting further strain on their marriage, he refrained from using a casting vote, which he sees the Articles of Association as providing him, to break deadlocks.

[360] Robert indicates: the ongoing divorce proceedings are highly contentious; their relationship is very strained; and, their limited interactions are hostile. Towards the end of Sandra's involvement in the day-to-day business of Jaylynn and Holm, the working relationship between them was virtually unmanageable. They were unable to cooperate on even basic issues, such as bill payments.

[361] Robert agreed with the suggestion that they operated Jaylynn and Holm for several years with their relationship being quite strained. They attended marriage counselling for at least 5 years, and maybe as long as 7 years. He agreed they had

problems for a long time. Then, around 2003, it got to the point where they were in a "deadlock" regarding Jaylynn and Holm. Robert also testified that he and Sandra were at a deadlock as to how the Family Trust Shares should be voted. He was of the view that everything was an issue. He would do all he could to resolve the issues so that the companies could continue functioning.

[362] One example he gave of the inability to reach agreement is the following. He wanted to service homes in Westside Estates with a waterline distribution system, rather than individual wells, because they had a well on another lot which could service 11 or 12 homes. He calculated that an initial investment of $25,000 in the waterline system would save them $100,000 to $115,000. They could reduce the purchase price of each lot by about $2,000 and still make more profit. Sandra opposed that and refused to sign the deed to two properties because of it. Therefore, he started Value Added to take over the responsibility of supplying the water lines, and remove the potential liability from Jaylynn. He added that they even failed to reach agreement over expenditures as little as $300.

[363] Robert's evidence was that, in the last four years, they could not agree on much of anything. Starting in 2008 or 2009 Sandra would oppose almost anything he proposed for the business. Yet, the business still made a profit. He further testified that: he took the position that he would do what needed to be done, even if

she opposed him; and, they went over the $50,000 limit many times, without discussing the expenditure.

[364] Towards the end, everything became more of an issue and they started communicating mostly by e-mail. He instituted that process in an effort to curb Sandra changing her mind on various points, which he described as being that "the target kept moving". By 2009 and 2010, their business communications were almost exclusively by e-mail.

[365] He testified that the threat was always there from Sandra that she would put him out of business if he did something she did not want him to. He indicated that, as early as 2007, she had been saying she would get out and take her money with her.

[366] He said she wanted equal say and kept interfering. He was in marriage counselling. He was trying to include her and involve the boys, so she would not feel he was "dictating".

[367] Robert also testified Sandra was "trying to get her money out" and using the water line issue as a reason

[368] Yet, Robert agreed that 2010 was, up to that point, their best year. He attributed that success to changes he had implemented increasing the profitability of the business.

[369] Sandra alleged that Jaylynn's financial situation has worsened since her involvement has been diminished. She pointed to increased debt, and reduced available credit and funds, as well as a BMO account having been overdrawn. However, she did not factor in increased assets and developments, nor the length of the period during which the account was overdrawn.

[370] Robert sees the ongoing divorce proceedings as having changed the relationship between Sandra and him. He stated that: Sandra has made it clear that she will try to shut him down; and, she has also already tried to steal corporate funds. They no longer trust each other.

[371] He fears she would block leases and other transactions if she was back in the business operations.

[372] Sandra indicated the first words they exchanged in a couple of years were at a social engagement the week prior to the commencement of the hearing of this motion, when he purportedly directed negative comments towards her. Despite that, Sandra appears to downplay the severity of the acrimony between them. She

agrees their relationship is strained; but, says one must expect discontent as part of a divorce.

[373] She says she has put Jaylynn's interests ahead of her personal interests; but, Robert has not.

[374] Robert is of the view that "handcuffing" Jaylynn to the restrictions in the Resolutions and Agreement would make it impossible for Jaylynn to carry on its day-to-day operations. It enters into dozens of transactions exceeding $50,000, and 25 to 30 leases, each year. Jay and Duane corroborate this view. Jay adds that decisions in relation to such transactions have to be made on the spot. Requiring strict compliance with the restrictions would prevent such regular transactions unless the unanimous consent of all shareholders could be obtained. That would cause significant interference with the day-to-day operations of Jaylynn. Jay feels it would at least result in unrecoverable business loss, and may lead to its bankruptcy. Robert feels there is no reasonable possibility he and Sandra will be able to cooperate given their current relationship and dealings. Further, he submits it would be impractical to obtain such unanimous consent for the large number of transactions that would require it.

[375] Robert is of the view that Sandra would use the restrictions to veto profit generating operations to threaten the viability of the company and, thereby, pressure him into a settlement in the matrimonial proceeding.

[376] He points to the wide range of situations which might be considered by Sandra as falling within the categories in Clause 4.01 of the Agreement, rather than under his authority to handle the day-to-operations, pursuant to Clause 3.01. For example, paragraph (a) of Clause 4.01 includes "any material change to the business of the Company" as something requiring unanimous consent. What constitutes a material change to Sandra, may be something which does not seem material to Robert, or anyone else. Paragraph (b) requires unanimous consent to "enter into any sale, lease or mortgage of the Company's assets", without any financial limitation. That can cover a lot of transactions in which Jaylynn is involved on a regular basis. He fears Sandra would use these broad categories to exercise her veto power and paralyze Jaylynn.

[377] Sandra submits that the requested injunction would not implicate her in the day-to-day affairs of Jaylynn. That would be Robert's area of authority and responsibility.

[378] Robert indicates he intends to maximize the value of Jaylynn and Holm so that he can phase out of the business and hand it over to his children. He does not

want to deplete the assets of a business he feels he has spent almost 40 years building.

[379] Sandra indicates that, if Jaylynn is devalued, the detrimental effect on her will be greater than that on the children, because her shares are Class A Preference Shares. She is also the largest single shareholder.

[380] Robert and Sandra both say they are prepared to put the best interests of Jaylynn ahead of their own. If that is the case, they should be able to cooperate sufficiently to continue running Jaylynn as a viable business until the final determination of this matter. Determining whether that is the case requires an assessment of their respective credibility, motives and proven history.

[381] I will first discuss a number of factors relating to Sandra's Credibility.

[382] Sandra generally tended to be evasive. Examples of her evasiveness follow.

[383] She resisted admitting Jaylynn took title of Eisenhauer Place from BMHS. She initially would only acknowledge Jaylynn took title in 1983.

[384] She was evasive on the suggestion Jaylynn started to sell new mobile homes in the early 1990's. She eventually said that, "if you call 1994 the early 1990's", then she agreed.

[385] It was suggested to her that, in 1983, when the Resolutions limiting one signature transactions to $50,000 or less were passed, it would not have impacted Jaylynn's day-to-day business, she hesitated, requested clarification, evaded by saying she did not know what other business there might be, before finally answering: "Probably not, I can't say for certain."

[386] She did not agree that there were no restrictions on Jay's shares as she has not seen them. When asked if she had been advised if that was the case, she responded that she was not familiar with the content of the shares, evading the question as to whether she had been advised there were no restrictions on Jay's shares.

[387] It was suggested to her that, the way in which they verbally agreed to expenditures over $50,000, for which she solely signed the cheque, did not conform to the formal process required by the 1994 Shareholders' Agreement. She initially resisted the suggestion, by being evasive, and then agreed.

[388] She rejected the suggestion that her relationship with Robert was "fractured" in 2012, stating that it was only strained. She later volunteered that it was "fractured" because Robert lied to her about the Bowater Unit Project, creating an apparent internal inconsistency in her evidence.

[389] At the hearing she testified that she insisted the proceeds of the old office building be paid down on debt because the bank had included, as a term of lending, that an amount she believed to be $125,000 be paid down on the long term debt. At discoveries she had indicated it was so that Robert would not have more operating capital to spend at his discretion. Thus her evidence at the hearing on this point was inconsistent with her discovery evidence.

[390] When a portion of her discovery evidence was put to her, she indicated that the examiner, Colin Bryson, had "put the answer in her mouth". The transcript revealed it had been said as part of her own narrative, free of suggestions. However, she resisted agreeing with the suggestion that Mr. Bryson did not "put that answer in her mouth", by engaging in a long, evasive explanation before admitting it.

[391] She was coy when confronted with an allegation of having surreptitiously recorded a conversation between her and Robert. She started by saying she never had a microphone. She then acknowledged having her cell phone operating as an audio recorder. After being pressed on the issue of not having told Robert she was recording, she agreed that she did not verbally tell him she was recording. However, she indicated she showed him the phone which, in her view, amounted to communicating she was recording.

[392] She was asked to explain what she meant by "'til the dust settles" in the e-mail in which she initially indicated to BMO that she wanted to reduce Jaylynn's operating line of credit to $250,000. She initially provided an evasive answer, re-iterating that she had approached BMO to change the signature card, and Kara Craig's purported response. The question was put to her again. She answered that she meant until people discovered what she had done, as she knew there would be "repercussions".

[393] She was asked whether she ever told Robert she wrote herself the $29,000 cheque from the Holm Account. She initially evaded the question by talking about: settlement discussions; her lack of money; and, the cheque not clearing. Upon it being asked again, she responded that she did not.

[394] As Mr. Ryan was reading her a portion of the transcript of her Discovery dealing with family meetings she became argumentative.

[395] In my view these factors significantly diminish her credibility.

[396] I will now discuss a number of factors relating to Robert's credibility.

[397] As a general comment, Robert answered questions in a straightforward, responsive, un-evasive, and non-argumentative fashion.

[398] Robert admitted he put 98% of the shares in Jaylynn in Sandra's name when it was first incorporated to shelter his income because he was going through a divorce from his former spouse. That is a statement against interest which may be taken as a sign of increased credibility.

[399] He readily admitted he was mistaken regarding the number of trustees for the Family Trust at the time of the 1994 Reorganization.

[400] He readily conceded that, the comment in his letter of April 13, 2010, to Daren Baxter, that he believed he followed the provisions in the Shareholders' Agreement requiring him to take direction from the directors on long term or major decisions, meant he was taking directions from Sandra on such decisions. This shows he was able to make reasonable concessions.

[401] However, the points which follow negatively affect his credibility.

[402] In my view, he refused to concede a point it appeared he reasonably ought to have conceded. The first paragraph from the document he prepared for the meeting with the CRA was put to him. It reads:

> "BECAUSE SANDRA AND I WERE JOINT SHAREHOLDERS, PARTNERS AND HUSBAND AND WIFE.
>
> ALL OF OUR COMPANYS WERE TREATED AS ONE. WE BUILT THEM TOGETHER AND HAD ALWAYS OPERATED THEM AS ONE BIG POT WITH EQUAL INPUT, EFFORT AND OWNERSHIP."

[403] He rejected the suggestion this expresses that he and Sandra were partners and built the business together. After some hesitation and pondering, he explained he was saying they had equal ownership. In my view, Robert's words clearly indicate he and Sandra were partners and built the business together. It goes even further and says that they contributed equal "input" and "effort" to the companies. There is nothing else in the document which detracts from that interpretation. Further, it does not appear to make sense that the "we" in the second paragraph, would refer to Sandra and him, while the "we" in the first paragraph would refer to all employees. It may be that he only included that passage in the document to lead the CRA to believe it was the true state of affairs, even though he did not see it as being so. However, he did not provide that explanation, nor any other explanation for why he might have written something he did not believe to be a true reflection of the actual circumstances.

[404] His contention that he made the business decisions does not appear to be consistent with his statement that he and Sandra were at a deadlock on most issues.

[405] Robert provided affidavit evidence that that "none of the restrictions" in the Resolutions or Agreement "have ever been followed". He also testified that he made the business decisions, including those involving expenditures over $50,000. However, in an email dated February 10, 2010, to Sandra, which he confirmed at

the hearing, he indicated he knew of no situation where he acted unilaterally in relation to items requiring unanimous consent under the Resolutions and Agreement. The email contents appear to be inconsistent with the evidence he presented at the hearing.

[406] In my view, consideration of all these factors leads to a finding that Robert was generally credible, but raises concerns regarding the credibility or reliability of the portion of his evidence dealing with Sandra's role in the business.

[407] Further, the timing of the opening of the Credit Union Accounts raises concerns about the credibility of his evidence regarding the motive for opening them. It does not appear to make sense that it was done to protect Jaylynn's funds from conversion, when Sandra's conversion of Holm's funds had occurred over two and one-half years earlier, and the end of hope for reconciliation, which resulted in a shift in Robert's approach, had occurred over two years earlier.

[408] However, as a general comment, I found Robert to be significantly more credible and reliable than Sandra.

[409] Sandra said she felt reducing the BMO Line of Credit was putting Jaylynn's interests ahead of her own. I accept Robert's evidence of the jeopardy that would have created for Jaylynn. In the circumstances, it did not make sense that reducing the line of credit to $150,000 would be in Jaylynn's best interests.

More likely than not, she knew she was not acting in Jaylynn's best interests when she attempted to reduce the line of credit. That is why she knew there would be "repercussions". Even if that was Sandra's honestly held view, it creates a concern that even what she perceives as her own well-intentioned actions would jeopardize Jaylynn's operations.

[410] She agreed on cross-examination that the main relief she seeks is the redemption of her shares. She is happy to sell her shares at the approximately $1,760,000 they are valued. If the Court does not grant that, she is seeking the type of injunctive relief sought in this motion.

[411] Thus, more likely than not, she has a greater interest in ensuring she gets paid the value of her shares quickly, than in the continued growth of Jaylynn. Her priority is liquidity, not development and long term viability.

[412] For example, she initially refused to agree, with Robert, to sell the old corporate offices for $265,000, unless Robert agreed to apply the proceeds against Jaylynn's long-term debt. She only agreed after BMO, in an email from Kara Craig dated August 11, 2011, advised that BMO "required … that the proceeds be used to provide cashflow/operating funds for Jaylynn". Her priority was diminishment of long-term debt, not ensuring operating funds.

[413] Similarly, both Jay and Robert deposed that Sandra "suggested 'her money' had been used on the Bowater Unit and advised she wanted 'her money'". Therefore, she prepared the document dated January 15, 2010, which Robert signed, in which he agreed to pay Sandra one half of Jaylynn's Bowater Unit Expenditures (from December of 2009), on the condition that he could recover that amount if there were sufficient proceeds of sale to cover it. Essentially this was to guarantee that what Sandra considered to be her one half of Jaylynn's funds would not be lost on a bad investment. Again, it demonstrates her priority was ensuring she could get what she considered "her money" from Jaylynn, not Jaylynn's development. It also shows she failed to appreciate that they were Jaylynn's funds, not hers. Robert said he signed only to appease her. He correctly submitted it was not usual for a director, officer and shareholder to guarantee, to another director, officer and shareholder, funds belonging to the company.

[414] Similarly, Duane deposed that Sandra advised him "that she would not consent to the sale of new homes unless she received half of the profits from the sale of those homes". This was not refuted by Sandra. Again, this indicates she considered half of Jaylynn's revenues to be hers, which is inconsistent with Jaylynn's existence as a separate legal entity.

[415] Jay is looking forward to earning a good living from Jaylynn for many years. Therefore, there is no question that he wants it to survive and thrive. He is of the view that the business positions and actions taken by Sandra show that she is not looking out for the best interests of Jaylynn. He gives as examples: her opposition to the Bowater Unit which, according to him, was a good business move; her desire to reduce long term debt needed to develop LaHave Heights; her opposition to the development of Westside Estates; her unilateral attempt to reduce the BMO line of credit; and, her attempt to take $29,000 from the Holm Account. He sees her goal as being to "get at" Robert, rather than benefit Jaylynn.

[416] There was no evidence that Jay was embroiled in the matrimonial dispute between his parents. His interest is in ensuring the continued viability of Jaylynn. As such, his concerns for Jaylynn's future are to be given serious consideration.

[417] Duane indicated that, in 2010, after Robert and Sandra separated, Sandra told him that the only way she would consent to the sale of any new homes was if she received half of the profit.

[418] It is noteworthy that Clause 4 of the Shareholders' Agreement provides for any one of the Directors and Officers to have veto power in decisions requiring unanimous consent. Robert, Duane and Jay only expressed concern over Sandra having such veto power. I infer, therefrom, that they anticipate being able to reach

unanimous agreement amongst themselves, or at least trust that no one, amongst the three of them, will use his veto power for improper purposes.

[419] Sandra did sign a Jaylynn Directors' Resolution, dated June 22, 2011, approving the sale of portions of properties on North Street, in Bridgewater, to the Town of Bridgewater which it required to upgrade the Street. However, she only signed the Resolution after adding interlineations providing that: both her signature and Robert's would be required on the Deed; and, the proceeds of sale were to be applied to the "BMO FRTL (830) upon its maturity". The Respondents submit this demonstrates her inclination to micromanage, and get into the day-to-day affairs of, Jaylynn's business activities. Some of the lots were part of Eisenhauer Place, in relation to which, according to the 1983 Directors' Resolution, transfers of title require the signatures of both Robert and Sandra. Robert did not re-sign the Resolution after the interlineations. He feared the two-signature requirement would lead to problems getting Sandra to sign the deed. However, the sale did go through. Sandra, in final submissions, pointed out that the interlineations pre-dated the August 11, 2011 email of Kara Craig directing that the proceeds of the sale of the old corporate offices be used as operating funds; and, prior to that, BMO had required that proceeds of sale be applied to the loan. However, BMO was obviously flexible, and Sandra was not prepared to agree to Jaylynn seeking that

flexibility in relation to the sale to the Town, nor in relation to the sale of the old corporate offices, prior to BMO's directive.

[420] As noted at paragraph 38 of ***B.C.E.***:

> "The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation."

[421] Of all Jaylynn's directors and officers, Sandra appears to be the least concerned about its long-term interests.

[422] Robert indicated Sandra told him that when she was finished with him he would have nothing left. She agreed she may have told him that, after April 2010, "in the throes of divorce"; but, she did not recall saying it. Robert indicated he thought it was around September of 2010, or a little sooner, that she told him that. They were in the garage, in the process of erecting a real estate sign on the front lawn. He had been pleading with her to stay and did not find the experience an easy one. I accept that she did tell him that "in the throes of divorce".

[423] Sandra's attempted conversion of $29,000 from Holm, and her attempted reduction of Jaylynn's BMO line of credit, in my view, are inconsistent with her alleged ability to put Jaylynn's interests ahead of her own.

[424] Even though Sandra appears less interested in the long-term health of Jaylynn than the Respondents, and she, more likely than not, did threaten to take steps to ensure Robert was left with nothing, she does have an interest in Jaylynn remaining a viable corporation, at least until she is able to extract the $1.76M in share value she owns. Therefore, it is unlikely that she would intentionally take sufficient steps to drive Jaylynn into bankruptcy. However, her proven history of prioritizing her interest in extracting "her money" from Jaylynn, in my view, would likely distort her assessment of the reasonableness of business decisions, and create a real risk that she would use her veto power to pressure Robert, and any others involved in Jaylynn's governance, to buy her shares, rather than for legitimate business reasons.

[425] Sandra currently owns 1204 preference shares in Jaylynn, and Robert owns 730. As part of the Divorce proceeding between them, Robert is seeking an equal division of those preference shares. He indicates they always had an agreement that would happen if they separated.

[426] There was evidence that Robert made a motion for case management in the Divorce Action to move it along. The motion was opposed and rejected. In the within Application in Court there is an outstanding motion by Robert to convert to an action. Sandra was prepared to consent to that motion, subject to a case

management judge being assigned. Robert was not prepared to agree to case management. Thus, it appears that: Sandra is more interested in the main Application herein being expedited to a final hearing; and, Robert is more interested in the Divorce Action being expedited to a final hearing. A possible explanation for their differing priorities is that, if the corporate issues are decided first, Sandra's entitlement will be based on her current shareholdings. If the Divorce Action is decided first, it may result in Sandra being required to transfer some of her shares to Robert.

[427] The evidence in this motion supports a finding that Robert, Jay and Duane want to continue active employment in Jaylynn, while Sandra wants out. If Sandra's consent is required as expressed in the Shareholders' Agreement, she can block Jaylynn's modular home transactions and further development. In that way she could use the interim injunction she requests to pressure Robert into a compromised settlement in the Divorce Action, and/or to pressure Robert, Jay and Duane to take the corporate steps required to buy her out so they can maintain their chosen source of employment.

[428] Leaving matters as they are would avoid that eventuality, while giving no significant leverage to Robert.

[429] There is an order in place requiring Robert to pay Sandra $6,000 per month spousal support and she is in the matrimonial home. Therefore, her personal financial pressures have been alleviated. The value of her shareholdings in Jaylynn and Holm is being maintained by the efforts of those interested in the development of those companies as a source of future employment. Any transfer of funds or transactions to those individuals, or the corporations they control, can be recaptured in a final accounting. Therefore, refusing the injunction would not put immediate pressure on Sandra to settle. At worst, it would delay settlement because there would be less pressure on the individual Respondents to settle.

[430] If Jaylynn is left free to pursue development opportunities, resulting in reduced liquidity, it can sell acquired assets later to buy out shareholders such as Sandra. However, if those development opportunities were to be blocked by Sandra, it would be much more difficult to recapture them.

[431] Further, Sandra and Robert hold Class A Preference Shares, which take priority over the other shares. They are only superseded by the obligations to the bank and to pay taxes. That further reduces the risk of Sandra not being paid the value of her shares.

[432] Robert agreed that the redemption value of Sandra's shares was $1.76 M. He indicated, based on that value, that Jaylynn had sufficient assets to payout all obligations and preference shares, if it liquidated its assets. That was not refuted by Sandra. As such, at this stage, there is no apparent risk to the value of Sandra's shareholdings.

[433] Robert appears to be interested in using available funds and credit for Jaylynn developments. He appears to agree on the value of Sandra's shares. He says Jaylynn has sufficient assets to buy out Sandra's shares. Sandra is prepared to sell her shares at the agreed value. Yet, despite being concerned about how much of his time the litigation is consuming, I have seen no evidence that he is trying to arrange Jaylynn's affairs for such a buy-out to occur. Consequently, his current priority appears to be Jaylynn's continued use of all available capital, including Sandra's share of it. That may be motivated, not only by a desire to develop Jaylynn, but also by the improper desire to make Sandra wait for "her money". The timing of some of his actions and his acknowledgement of extreme acrimony makes it likely that this improper motive co-exists with the proper motive of building Jaylynn's business. However, his desire to appease Sandra and salvage the marital relationship had previously caused him to initially refrain from taking action to block Sandra's control of Holm, even after she attempted to convert some

of its funds to her own use, which was a serious breach of fiduciary duty on her part.

[434] I agree with the Respondents' submissions that end of hope for the continuation of the marital relationship, and the ongoing acrimonious divorce battle, along with the lack of trust, between Robert and Sandra, have made it unlikely that they will be able to cooperate in the governance and operation of Jaylynn, and reach consensus as required to continue smooth operation of the business. They have not even been able to agree on the scheduling of meetings.

[435] I have arrived at this finding even though: they operated the business together while they could not agree on much and had a lot of conflict; and, during that time, according to Resolutions and Agreement, Sandra had veto powers, but, Jaylynn grew and thrived. That arrangement continued even after Sandra attempted to convert money from the Holm Account to her personal use. In my view, at that point, there was still hope of salvaging their personal relationship. Therefore, the parties' actions, more likely than not, were moderated by that goal.

[436] That goal has been abandoned. They are beyond conflict and disagreement. They are beyond hope that the personal relationship will be salvaged.

[437] Robert and Sandra, in my view, are currently at war over both matrimonial and corporate issues. Considering that, as well as the points I have noted in relation

to their respective credibility, apparent motives, and history of dealings involving Jaylynn and Holm, I find it unlikely that they will be able to cooperate sufficiently to co-govern and co-manage Jaylynn in a manner consistent with its best interests. It is more likely that they will not be able to do so. I am of the view that Robert is more likely to put Jaylynn's best interests ahead of personal interests, than Sandra is. Further, the personal interests he may seek to advance in the future would likely be limited to delaying Sandra's receipt of the value of her shares. Those interests are unlikely to lead to steps that would jeopardize Jaylynn's continued viability and growth.

[438] This stage of the test requires a balancing of irreparable harm. I have already concluded that Sandra has not established irreparable harm. However, even considering all potential harm, irrespective of whether or not it is irreparable, I am of the view that there is more risk of harm, and of harm of a greater magnitude, to the Respondents, if I grant the injunction, than to Sandra, if I do not. In my view, the freezing of Jaylynn's operations, or even a portion thereof, due to the inability of Robert and Sandra to cooperate and reach a consensus, significantly risks causing irreparable harm in the form of a downhill spiralling of the business due to that inability to function as it has been, and in the form of lost business growth opportunities.

[439] Jaylynn ought to be permitted to continue to operate and grow freely, without the constraints of business decisions made for personal reasons, while Robert and Sandra sort out their corporate and matrimonial disputes.

[440] In my view, there is a wide enough difference in the disadvantage to the parties that it is unnecessary to consider the respective strengths of the parties' cases.

7. ABILITY TO GRANT INTERIM INJUNCTIVE RELIEF FROM OPPRESSION WITHOUT RJR-MACDONALD TEST BEING MET

[441] Sandra provided cases indicating that interim injunctive relief from oppression may be granted even if the applicant has not satisfied the three-part RJR-MacDonald Test.

[442] The Court in **Le Maitre Ltd. v. Segeren**, [2007] O.J. No. 2047 (S.C.J.), at paragraph 30, stated:

> "It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty in the law. As such, typically, a moving party should not expect to obtain interlocutory injunctive relief unless it is able to successfully address the factors to be considered on such a motion. That said, there may be some circumstances where interim relief pursuant to section 248(3) is merited absent all of the traditional considerations associated with an interlocutory injunction. The dictates of fairness may be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience,

> irreparable harm or an undertaking as to damages." [Emphasis by underlining added.]

[443] However, in that case, the court found that the three-part test had been met. It did not have to determine whether "the dictates of fairness" were "so overwhelming" that it could grant the requested relief without the test being met.

[444] In **Ellins v. Coventree Inc.**, [2007] O.J. No. 1118 (S.C.J.), the Court, at paragraph 40, stated:

> "An interim order may be made under section 248 without an actual finding of oppression where the record suggests a *prima facie* case and the Court concludes that making the order would be the fairest thing to do in the circumstances.3 The applicant need not establish irreparable harm and the fact that there are other avenues for addressing the matters complained of, including the use of 'the normal corporate machinery', is not a bar to the application of the remedy."

[445] However, the Court in **JLL Patheon Holdings v. Patheon Inc.**, [2009] O.J. No. 2202 (S.C.J.), disagreed with such a general abandonment of the three-part test, stating, at paragraphs 43 and 71:

> "43 I also agree with the respondent that, except in special circumstances, it is necessary to demonstrate a risk of some irreparable harm to the applicants. Insofar as the decision of Lax J. in Ellins v. Coventree Inc. … may suggest otherwise, I decline to apply that decision to the present circumstances for the reason that the presence or absence of harm is, in my opinion, a relevant consideration in this proceeding that is not appropriately dealt with solely in connection with the balance of convenience.
>
> ….
>
> 71 The applicants also argue … that demonstration of irreparable harm is not required where fairness dictates a remedy in oppression cases. While this is undoubtedly correct, the cases indicate that this principle is only applied in special circumstances in which the dictates of fairness are so overwhelming as

> to forego the requirement of demonstration of irreparable harm." [Emphasis by underlining added.]

[446] The Court in **Connelly v. Connelly-McKinley Ltd.**, 2010 ABQB 515, relying on **Le Maitre**, noted, at paragraph 13, that "relief may be granted even where the usual test cannot be met".

[447] In that case, a mandatory injunction was sought. Therefore, the Court applied the "strong *prima facie* case" standard to the merits assessment branch of the usual test. It found that the applicant had established a serious issue to be tried, but not a "strong *prima facie* case". Yet, it went on to grant an interim injunction as oppression relief.

[448] This approach does not appear to conform to that proposed in **Le Maitre, Coventree** and **Patheon**. Those cases appeared to propose that the Court could "forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages", in exceptional circumstances, where the "dictates of fairness" require it. They did not expressly state that the merits assessment branch of the test could be ignored.

[449] Certainly, it would not be appropriate to grant an interim injunction where there is no serious issue to be tried. In **Connelly**, the Court found that there was irreparable harm and the balance of convenience favoured granting the interim injunction. Therefore, it may really be a better authority for the proposition that,

where the "strong prima facie case" standard would otherwise apply, it may be sufficient to establish a "serious issue to be tried", in exceptional circumstances, where "dictates of fairness" require it, and where the second and third branches of the RJR-MacDonald Test have been met.

[450] However, in my view, the circumstances of the case at hand are not such as to warrant an interim injunctive remedy without the three stages of the test being satisfied. Therefore, it is unnecessary for me to determine whether the merits assessment standard can be modified in exceptional circumstances.

[451] The case at hand is not one in which the "dictates of fairness" require an abandonment of any of the parts of the test. Robert, with Jay and Dwayne's cooperation, took the actions he did, at least in part, in response to Sandra attempting to: block the Bowater Project; reduce Jaylynn's BMO Line of Credit; and, convert funds from the Holm Account. In addition, the decision to take those actions was influenced by Sandra's threat that she would ensure that Robert was left with nothing. Even if it is ultimately found that they acted wrongly, Sandra's actions, in my view, were not likely taken in the best interests of Jaylynn, nor for legitimate business reasons. They at least prompted, and may have necessitated, the actions taken by Robert. I accept Robert's evidence that his initial forbearance was motivated by his strong desire to salvage their marriage. In my view,

otherwise he would have taken steps prior to September 2010 to protect Holm and Jaylynn. Given those circumstances, the current situation is not sufficiently unfair to Sandra to warrant granting her interim injunctive oppression relief without her having established the second and third branches of the usual test.

8. ADDITIONAL POINTS

[452] As stated by Justice Saunders, as he then was, at paragraph 27 of **Noreco Inc. v Laserworks Computer Services Inc.** (1994), 136 N.S.R.(2d) 309 (S.C.):

> "No matter what test is applied, the ultimate question remains the same: Is it just or convenient that I exercise my judicial discretion by granting the temporary but drastic remedy of interlocutory injunctive relief? I have considered the cases referred to me by counsel. They suggest to me a healthy reticence in allowing interlocutory injunctions. It is, after all, an extraordinary remedy reserved to those cases where there is clear evidence of circumstances necessitating its imposition. The reasons for restraint are obvious. To permit the application is to impose a harsh remedy at the interlocutory stage before there has been a thorough, proper and vigorous determination of the rights and obligations of the parties. There is also a heightened risk of error when applications are limited to affidavit evidence which may or may not be tested by cross-examination. ..."

[453] Further, an oppression remedy is an equitable remedy. Therefore, the clean hands doctrine applies. By her own admission, Sandra tried to take 50% of the monies from the Holm account and unilaterally tried to reduce Jaylynn's operating line of credit. In my view, those actions were not taken in Jaylynn's best interests. They make it that Sandra has not come to Court with clean hands.

[454] These are additionals reason to refuse the interim injunctive remedy requested.

[455] Robert also submits that Sandra must have had a Machiavellian motive to join her son and stepson in the within Application, and thereby bring them into her dispute with Robert. Sandra retorts that, if Jay and Duane participated or acquiesced in the self-dealing through Value Added, they are also in breach of their fiduciary duty. I am unable to conclude she had such a motive. Therefore, it provides no further ground for refusing the interim injunctive remedy requested.

[456] It may also be determined that the timing of some of Robert actions, such as arranging the meeting to exclude her from the governance of Holm, and the commencement of payments to himself through Value Added, were *mala fide*, and thus show his hands are also unclean. However, it is unnecessary to make that determination at this point. He is not seeking any interim remedy.

9. INTERIM PRODUCTION OF CORPORATE AND FINANCIAL INFORMATION

[457] Sandra seeks an order requiring the individual Respondents to provide her copies of the following documentation relating to Jaylynn and Holm, which has not

already been provided, on an ongoing basis, until final adjudication of her main application:

> "i. All agenda, minutes and resolutions relating to all meetings and activities of the shareholders and Board of Directors … ;
>
> ii. All monthly banking statements together with copies of all cancelled cheques drawn on the accounts …;
>
> iii. The current financial statements … within fourteen (14) days of … receipt of same from its accountants."

[458] She also seeks an order requiring that she, "and/or her accountant, be granted reasonable access to all corporate records, including financial records" of Jaylynn.

[459] Robert agreed to supply, on an ongoing basis, information: contained in monthly reports; supplied to the corporations' bankers; shared at meetings of shareholders and directors, including in response to questions by Sandra; and, relating to extraordinary expenses, such as those being incurred for business expansion or development. He opposes a requirement to provide every invoice and cancelled cheque, and does not want Sandra contacting the employees of the corporations to obtain information.

[460] While Sandra was working in the day-to-day operations of Jaylynn and Holm, she looked after financial, banking and accounting matters. As such, she had ready access to information. She deposed that Robert now refuses to provide her

"with meaningful and on-going disclosure and access to financial books and records of both companies".

[461] She also provided evidence that, prior to the actions complained of, they gave information to the accountant each year, and whatever resolutions or other corporate documentation had to be prepared was prepared by the lawyer for their signature. Robert testified that there were quarterly reports and yearly financial statements.

[462] Sandra has had, and continues to have, online access to Jaylynn's BMO banking records, including the ability to view PDF copies of cheques.

[463] She has no such access to Jaylynn's Credit Union Accounts.

[464] The chequing account at the Credit Union was opened in December of 2011, and the savings account was opened in January of 2012. Robert explained that these accounts were set up because he was concerned about Sandra taking money from Jaylynn's BMO Accounts. However, the basis for that concern, Sandra taking money from Holm's Account, had occurred in the spring of 2010, over two and one-half years earlier, and there is no evidence of any further event occurring since. Thus it appears more likely that real purpose of the Credit Union Accounts was to make the banking information inaccessible to Sandra. That is certainly a finding that is open to the judge on the final hearing to make.

[465] Whether that was the intention or not, the establishment of the Credit Union Accounts has had the effect of eliminating Sandra's ready access to information regarding Jaylynn's ongoing banking transactions.

[466] The switching of accounts changed the *status quo*.

[467] The following words of Justice Warner, in **Merks Poultry**, at paragraph 297, are applicable:

> "The purpose of an interim order is to attempt, if possible, to preserve balance, and to encourage the parties to resolve the issues themselves without damaging the business. When parties are so focussed on their own interests, and fail to see their common interest in the success of their joint enterprise, the responsibility of the Court is to take only measures that are absolutely necessary to preserve the *status quo* until trial."

[468] As noted in **820099 Ontario Inc. v. Harold E. Ballard Ltd.,** [1991] O.J. No. 266 (O.C.J., G.D.), any oppression remedy must be tailored to correct the wrong "to even up the balance, not tip it in favour of the hurt party", and "the surgery should be done with a scalpel, … not a battle axe".

[469] Jaylynn sales of two modular homes were made through Value Added, which is owned by Robert, Duane and Jay. Those transactions included a mark-up to the credit of Value Added. Robert indicated that, once Value Added's expenses were calculated, the excess mark-up would be returned to Jaylynn. However, over five months after the completion of the transaction, that had still not happened. Sandra was unable to access the information required to monitor those transactions

because Jaylynn's Credit Union Accounts were used. She only became aware of the transactions during the discovery process associated with the within oppression application. There is no indication, in the evidence on this motion, that these transactions were referred to in any meeting notices, agendas, or minutes. Thus, it has not been shown that there was notice to Sandra that she should attend the corporate meetings to obtain such information. Given the individual Respondents' relationship with Value Added, as officers and directors of Jaylynn, they had an obligation to disclose, to the other officer and director, Sandra, such related party transactions, and the conflict of interest, or potential conflict of interest, arising from them. They did not do so. She was left without the information required to protect Jaylynn from potential self-dealing on the part of the Individual Respondents.

[470] Similarly, Robert payed himself consulting fees, from Jaylynn, through Value Added, without consulting with Sandra, nor even informing her. That had not happened before the spousal support order which emanated from the Court of Appeal.

[471] Failing to disclose such "related party transactions" was specifically cited, at paragraph 93 of **BCE,** as an example of conduct amounting to unfair prejudice of interests. In my view, there is even a strong *prima facie* case that the non-

disclosure of this information, did "unfairly prejudice" Sandra's interests in, and obligations to, Jaylynn as a shareholder, director and officer.

[472] Given that the attempted conversion of Holm funds occurred over two and one-half years earlier, the use of the Credit Union Accounts would appear to be excessively distanced from the purported legitimate business purpose of protecting the funds from conversion by Sandra. She has a right to know about such transactions. They affect her interests and duties as an officer, director, shareholder and guarantor. The information, which would otherwise have brought her attention to them, was blocked by the switch to the Credit Union.

[473] This blocking of access to banking transaction information aggravates the un-disclosed, related party transaction situation. It limits Sandra's ability to take steps to protect Jaylynn's best interests. It also breeds distrust, which is counterproductive to the ideal goal of having corporate management working together, in Jaylynn's best interests.

[474] Sandra raised the question of how she can be expected to fulfill her duty of care as Director and Officer of Jaylynn without ready access to such information.

[475] Sandra is still a director and an officer of Jaylynn. Continued ready access to information regarding Jaylynn's banking transactions can only assist her in fulfilling the responsibilities associated with those positions.

[476] She submitted that: she is not seeking un-trammelled access to all information; and, in a computer age, access to information can be accomplished with much more ease than before.

[477] Sandra herself has not provided the laptop computer requested by Robert. She claims it to be her personal computer, bought by the family, not a business computer.

[478] Robert made an application for the return of the desktop computer. Sandra agrees it is a business computer. She said he received it three days before the application. She said he removed other records from the house, suggesting he could have taken the desktop too.

[479] She said she had kept a copy of corporate financial records, and Robert had not kept his copy. She made a copy of hers and gave it to him. However, she agreed that was only within the couple of weeks preceding the commencement of the hearing of this Motion. She still has Jaylynn Records in her basement that have not been provided to Robert.

[480] Robert indicated he did not remove all corporate documents from the matrimonial home because they were in storage and he had no need for them. Some of the items he left behind because he had no room left in his truck to transport them. He now does not think he can get in, as he does not have a key.

[481] Robert testified that Sandra's constant requests for financial disclosure have increased the workload of the Jaylynn staff who have to copy the information for her.

[482] An oppression remedy is an equitable one. "It seeks to ensure fairness – what is 'just and equitable'": **BCE**, paragraph 58.

[483] In my view, cutting off Sandra's access to Jaylynn's banking information, by conducting its banking through new accounts, for which she has no access, including on-line access, constitutes even a strong *prima facie* case of unfair disregard for her interests. Making arrangements for her to have such access is necessary to maintain the access-to-information *status quo* which existed prior to the unfair steps taken to block that access. As submitted by her, she is entitled to such transparency. She needs it to help identify and investigate potential self-dealing which may seriously jeopardize Jaylynn. It will preserve some balance between the parties. It will also encourage resolution by alleviating distrust arising from concealed banking transactions.

[484] I am <u>not</u> of the view that Sandra's failure to turn over the laptop and dated corporate information establishes unclean hands of a nature which warrants denying her an otherwise appropriate interim equitable remedy. There is a legitimate dispute over whether the laptop is her personal computer or not. Robert

had ample opportunity to remove the dated corporate records stored at the matrimonial home. Sandra did not block their removal. Robert simply chose to leave them there. It was not established that there was any present need to retrieve them.

[485] I am also not of the view that Sandra's past actions in reducing the BMO line of credit and writing herself a cheque from the Holm Account create, at this stage, an unreasonable risk of her using any online banking access to the Credit Union Accounts to withdraw funds, reduce available credit, or otherwise attempt to sabotage Jaylynn. If the bank is able to limit her online access to viewing information only, that will eliminate all risk. Otherwise, the risk will be adequately managed by the circumstances. Sandra is in the midst of a court proceeding seeking a final oppression remedy. Any such unauthorized action would be detected, and would likely be very detrimental to her claim. Therefore, it is very unlikely that she would repeat such actions.

[486] In my view, Sandra does not require access to all documentation regarding every Jaylynn transaction to preserve the status quo and encourage resolution. For example, she does not require access to all contracts and invoices, which the Respondents suggested she was seeking. In my view, at this stage, that is not necessary. It will suffice if she is provided access to the: banking information;

monthly reports; information provided to Jaylynn's bankers and accountants; agendas, minutes and resolutions for and from all directors' and shareholders' meetings; information she can obtain by attending the shareholders' and directors' meetings, including by asking questions, and by having her accountant deal with Jaylynn's accountant to obtain reasonable sharing of information; and, financial statements, within 14 days of receipt from the accountant. Of course, such dealings with the corporations' accountant should be kept to a reasonable duration and frequency. There was insufficient evidence for me to determine specifically what would be reasonable. The reasonableness of the duration and frequency will depend upon the complexity, quantity and urgency of relevant information. She should also be provided with online access to the Credit Union Accounts. However, if possible, that access should be limited to the ability to view transactions and PDF copies of documents, with no ability to effect, nor block, transactions.

[487] Given that, at least in the interim, Sandra is not a director or officer of Holm, she does not require the same information in relation to Holm, that she does in relation to Jaylynn. In my view, her interests as a shareholder, on an interim basis, will be sufficiently regarded and protected if she is provided with access to the: monthly reports; information provided to Jaylynn's bankers and accountants; agendas, minutes and resolutions for and from all directors' and shareholders'

meetings; information she can obtain by attending the shareholders' meetings, including by asking questions; and, financial statements, within 14 days of receipt from the accountant.

D. CONCLUSION AND ORDER

[488] Based on the forgoing, I conclude and order that:

i) Sandra's motion for an interim injunction ought to be, and is, dismissed.

ii) The Respondents ought to, and shall, arrange for Sandra to be provided access the following information relating to Jaylynn:

a. Banking information in the form of online access to information in all bank accounts, including the Credit Union Accounts, but, if possible, limited to the ability to view transactions and PDF copies of documents, with no ability to effect, nor block, transactions;

b. Monthly reports;

c. information provided to bankers and accountants;

d. agendas, minutes and resolutions for and from all directors' and shareholders' meetings;

e. information she can obtain by attending the shareholders' and directors' meetings, including by asking questions;

f. all financial statements of Jaylynn, within 14 days of these being received from the accountant having prepared them; and,

g. information she can obtain by having her accountant deal with the corporations' accountant to obtain reasonable sharing of

information, provided that the dealings with the corporations' accountant are kept to a reasonable duration and frequency, to be determined in accordance with the complexity, quantity and urgency of relevant information.

iii) The Respondents ought to, and shall, arrange for Sandra to be provided access the following information relating to Holm:

a. Monthly reports;

b. information provided to bankers and accountants;

c. agendas, minutes and resolutions for and from all directors' and shareholders' meetings;

d. information she can obtain by attending the shareholders' meetings, including by asking questions; and,

e. all financial statements of Holm, within 14 days of these being received from the accountant having prepared them.

E. COSTS

[489] A decision on costs will follow.