SUPREME COURT OF NOVA SCOTIA
Citation: *MacDonald v. D'Aubin*, 2019 NSSC 389

Date: 20191220
Docket: SAR No. 463054
Registry: Annapolis Royal

Between:

Stephen Leonard MacDonald

Applicant

v.

Ralph D'Aubin, Jennifer D'Aubin and
D'Aubin Family Meats Incorporated

Respondents

Judge:	The Honourable Justice Timothy Gabriel
Heard:	July 2 and 3, 2019, in Annapolis Royal and Digby, Nova Scc
Last Written Submissions Received:	October 7, 2019
Counsel:	Jonathan Cuming, for the Applicant John O'Neill, for the Respondents

By the Court:

Introduction

[1] In this case, the Applicant, Stephen Leonard MacDonald (hereinafter either "Mr. MacDonald" or "the Applicant") has applied for relief against the Respondents, Ralph and Jennifer D'Aubin (hereafter either “Mr. D’Aubin” or “Ms. D’Aubin”) and D’Aubin Family Meats Incorporated (hereafter either “DFM”, "the company" or “the corporate respondent”). Mr. MacDonald claims that the Respondents have unfairly prejudiced and/or unfairly disregarded his rights and interests with respect to DFM. He seeks relief pursuant to Section 5, Third Schedule, of the *Companies Act*, R.S.N.S. 1989, c. 81 ("the *Act*"). What he seeks is often referred to as an oppression remedy.

Background – overview

[2] I will begin with a brief overview of the history of this application.

[3] The company began its operations in 2014, its first full year of business was 2015, and it still operates today. Ralph D’Aubin is the owner of 35 shares of DFM, his wife, Jennifer, also owns 35 shares, and Mr. MacDonald owns 30. Both Mr. and Ms. D’Aubin are directors and officers of the company. Mr. MacDonald is not.

[4] The corporate Respondent is a traditional butcher shop run by the Respondents on a day-to-day basis. DFM purchases whole animals from local farms, processes and sells them. They also sell baked goods, farm, dairy and other locally sourced and produced consumables.

[5] The operation was initially conceived as a partnership, and was registered as such with the company's office on June 7, 2013. However, business did not commence at that time, the partnership was dissolved, and the company was incorporated on October 2, 2013.

[6] The parties' respective holdings and their relationship *inter se* were to be governed by the contents of three agreements between the Applicant and the Respondents, all of which were dated September 12, 2013. It would appear, however, that these agreements were not actually executed until sometime shortly after the end of October, 2013.

[7] Stephen MacDonald's affidavit (Exhibit 1) was sworn April 13, 2017. Attached as Exhibits B, C, and D thereto are the three agreements, titled "Agreement", "Supplementary Shareholders Agreement" and "Agreement". I will refer to them as "the shareholders agreement", "the supplementary shareholders agreement", and the "loan agreement" respectively.

[8] The Shareholders Agreement contains the following clause:

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

[9] The Supplementary Shareholders Agreement includes the following:

> 1. Ralph will continue employment with the Company for five years at a salary of $39,000 per year, to be increased annually by an amount equal to the increase in the consumer's price index for Canada, or by such greater amount as the parties may agree.
>
> 2. Jennifer will continue employment with the Company for five years at a salary of $25,000 per year, to be increased annually by an amount equal to the increase in the consumer price index for Canada, or by such greater amount as the parties may agree.
>
> …
>
> 5. Stephen agrees to sell his shares equally to Ralph and Jennifer five years from the date of this agreement (or such later date as may be required to meet the conditions set out in this paragraph) provided (1) Steven's loan to the Company is paid in full (2) all dividends contemplated by this agreement are paid.
>
> The price per share will be the amount agreed by the parties to be the market value of each share, or failing agreement, the amount determined by the Company's accountant to be the market value of each share.
>
> 6. All parties shall have full access at all reasonable times to the accounting records of the Company themselves or by an agent.
>
> 7. Ralph and Jennifer agreed to meet with Stephen monthly to consider all aspects of the Company's business operations.
>
> 8. The parties agree to cause the company to maintain key person insurance on the life of Ralph in an amount at least equal to the total liabilities of the Company.

[10] The Loan Agreement includes the following clauses:

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

> 4. D'Aubin agrees to make its officers, Ralph and Jennifer, available to meet with MacDonald monthly to consider all aspects of the company's business operations.
>
> …
>
> 7. D'Aubin agrees to consult MacDonald respecting any business opportunity that may affect the companies future profitability and any intended capital purchases, borrowings and entering into obligations extending beyond sixty days.

[11] Without recounting the entire contents of the affidavits filed by the parties with reference to this application, it would appear that relations between the two sides, initially amicable, began to unravel in or around late 2015. One cause of this development consisted of the Applicant's perception that the Respondents were not adhering to their contractual requirement to hold proper monthly shareholder meetings. Among other things, Ralph was either not attending some of these meetings, or was attending late.

[12] Mr. MacDonald's second major concern during this approximate timeframe related to requests for disclosure of the company's records. Eventually, he was provided (in 2016) with some of the company's accounting records for 2015, and for the first five months of the following year. However, his position remained that the records were "wholly incomplete" and as such, they could not enlighten him as to the true financial position of the company.

[13] There were other matters of concern that were more fully fleshed out during the cross-examination of the parties. For example, concerns were raised by Mr. MacDonald that the company had "spun off" the sale of certain of their products at a local market to their daughter, who now pursues this endeavour herself. Related concerns were that Ms. D'Aubin had taken a part-time job at another local business for four to six weeks, and that she subsequently founded another business. Some of the services which this other business provides (the Applicant contends) compete with those offered by DFM.

[14] Mr. MacDonald also raised concerns about the Respondents' practice of borrowing money from the company, even though he does not contend that they failed to repay these loans. He also raised an issue related to the property upon which both the D'Aubin family residence and DFM's business premises (in Bridgetown, Nova Scotia) are situate. The Applicant contended that this property ought to be "factored into" the worth of the company, when the value of his shares is considered.

[15] For their part, the Respondent D'Aubins reply that meetings in conformity with their contractual requirements were held, at least initially. They say that these were invariably attended by the company accountant (Mr. Wheaton), as well as Jennifer D'Aubin. Her husband also attended insofar as the demands of running DFM would permit. Moreover, they say that what has really impeded the continuation of these meetings on a regular basis is the manner in which the Applicant conducts himself when attending. They say that, when Mr. D'Aubin is absent, Mr. MacDonald belittles, yells at, and treats the female Respondent rudely, and that this has posed an indelible impediment to the continuation of these meetings, at least on a face to face basis, when Mr. D'Aubin is not available to attend.

[16] Broadly speaking, the Respondents also contend that the Applicant appears to be seeking much more formal meetings, with agendas prepared and circulated before hand. They point out that theirs is a small, family held business. They contend that there was nothing in their manner of conducting operations, either at the time that Mr. MacDonald became involved with the company, or since, that could possibly have led him to believe that their meetings would be conducted in any manner other than an informal one.

[17] Mr. and Ms. D'Aubin also pointed out that they have both worked long and hard hours to get the business up and running, with Mr. D'Aubin often working late into the evening and, at times, sleeping nights at the shop in order to meet customer demands and attend to other matters important to its operational growth. They argue that during its inaugural years, the company had the full and undivided attention of the female Respondent as well (whenever that time was not being taken up by raising their family). Now that the company does not require as much "hands-on" involvement from her, she has become involved first, with a part time job elsewhere, then subsequently with another business. The Respondents dispute Mr. MacDonald's contention that this other business competes with the services offered by the corporate Respondent.

[18] Stephen MacDonald filed an Amended Notice of Application in court on May 29, 2017, seeking a declaration that his rights and/or interests have been oppressed, unfairly prejudiced and/or unfairly disregarded by the individual Respondents. The relief sought by him, at least at the time he filed the notice, was summarized in his counsel's brief dated April 22, 2019, to the following effect:

> The Applicant is seeking an Order pursuant to s.5, Third Schedule, of the *Companies Act*, declaring that the Respondents begin adhering to the terms

outlined in the Shareholder's Agreements and Loan Agreement between the parties, which direction shall include the following requirements:

A. Immediate reinstatement of monthly shareholders meetings which shall follow a proper agenda, prepared in advance, with the participation of all shareholders;

B. Immediate appointment of an accountant/auditor, mutually agreeable to the parties, who has the capacity to keep the accounting records of the company current and who is capable of providing a fair market valuation of the company;

C. That the individual Respondents begin receiving a regular salary, paid bi-weekly, commensurate with the annual salaries contemplated in the Supplemental Shareholder's Agreement and that the Company begin withholding from that salary all statutory deductions, including income tax, CPP, and Employment Insurance;

D. That within 60 days, the accounting records of the Company are to be brought current so that they are readily available, at all reasonable time, to the parties;

The Applicant further seeks an Order, in addition to the above, providing the following direction:

A. That the 2016 accounting records of the company be audited and any amounts paid to personal expenses incurred by the individual Respondents which exceed their agreed upon salaries, be repaid to the company within 30 days thereof;

B. That clause 5 of the Supplemental Shareholder's Agreement, requiring Stephen to sell his shares to the individual Respondents within 5 years of the execution of that Agreement, be stayed until the Company has been operating as a reasonably prudent Company, in similar circumstances, for a period of 5 years;

C. That the company engage the services of a qualified business consultant capable of preparing a five year strategic plan aimed at meeting or exceeding industry profit margin so as to ensure that Mr. MacDonald receives full value for his shares when they are ultimately purchased; and

D. That Stephen be compensated for special expenses incurred in endeavouring to exert his rights;

[19] In the written post hearing submissions filed by counsel for the Applicant dated July 26, 2019, Mr. MacDonald had moderated what he was asking the court to do:

> It is therefore the respectful submission of Mr. MacDonald that the following remedies are appropriate:
>
> 1. An auditor be appointed by the Court to complete audited financial statements for the company;
> 2. The Company be ordered to produce, within 30 days, approved financial statements for The Temple of Queen Event Venue, which statements will detail the revenues that business generates from its competing catering operations;
> 3. Upon completion of audited financial statements for the Company, that the Company be ordered to retain the services of an arm's length, independent business valuation company to conduct a valuation in accordance with the earnings or investment valuation method, which will take into account typical rates of returns for similar businesses.
> 4. Upon completion of the valuations, the parties are given 14 days to come up with an agreed upon share purchase price. Failing an agreement, the parties shall return to court for a determination of the appropriate price.
>
> Alternatively, if the Court disagrees that a buy-out is the appropriate remedy, the Applicant respectfully requests those remedies contained in his pre-hearing submissions.

[20] Each side agrees that the lawyer (John Cameron - now retired), who drew up the agreements had been, coincidentally, their own individual lawyer for a long time before their business relationship came to fruition. It would appear that each side had opportunity to provide input into the contents of the agreements, and took that opportunity to do so.

Issues

[21] The questions to be resolved, then, are as follows:

(a) Have the Respondents oppressed, unfairly prejudiced and/or unfairly disregarded the Applicant's rights and/or interests in relation to the Company?

(b) If yes, what is/are the appropriate remedies?

The law (in general)

[22] As indicated by the relief sought by Mr. MacDonald, Section 5 of the Third Schedule, of the *Companies Act*, R.S.N.S. 1989, c. 81 ("the Act") is the appropriate place to begin. There we find that:

> 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.

[23] What is required is a highly fact specific analysis. It is important to bear in mind that what may be "oppression" in one set of circumstances may not amount to such in another. The onus is upon the Applicant to show on a balance of probabilities that the conduct complained of was oppressive, and to justify the remedy(ies) sought.

[24] The individual claiming oppression must have standing as an appropriate stakeholder in order to do so. Both sides agree that Mr. MacDonald, as a shareholder, is a "stakeholder", thus possessing standing.

[25] In addition, the oppression claimed must be sufficiently connected to the corporate affairs and not be merely the result of a personal dispute. Some harm to the claimant's interest as a corporate stakeholder must be evident.

[26] In *Jeffrie v. Hendrickson*, 2013 NSSC 50 (reversed on other grounds in 2015 NSCA 49), Wood, J. (now, CJNS) put it thus:

> 135 One of the important limitations on the scope of an oppression remedy is the requirement for a connection to the company and its affairs. The stakeholders' interest must be as a shareholder, creditor, director or officer, and the conduct

> complained of must relate to the business or affairs of the company or result from the exercise of the directors' powers. It is also necessary that the alleged misconduct result in some harm to their interest as a stakeholder. For example, in *Merks Poultry Farms Limited v. Wittenberg*, 2010 NSSC 278, Justice Warner found that some of the alleged breaches of the claimant's reasonable expectations were established, but refused to grant a remedy due to the absence of any significant harm. His rationale is set out at paras. 293 and 294 of the decision:
>
> > [293] Of the thirteen specific claims upon which Merks base its claim of oppression, unfair prejudice or unfair disregard of its interests as a shareholder, my analysis supports a finding of breach by SAGI of only two reasonable expectations: the hiring of Gary McAleer at a salary of over $50,000.00 a year without the approval of a two-third majority of all shareholders and the failure to hold a September 2008 quarterly Directors Meeting. The breaches were neither oppressive nor unfairly prejudicial to the shareholders nor unfairly disregarded Merks' interests as shareholders. Neither breach is such that it should lead to any interim remedy.
> >
> > [294] Applying the *BCE* analysis, I find that 11 of the 13 claims were not breaches of reasonable expectations, and the two that were breaches were technical breaches made in the best interests of SAGI and without any oppressive or adverse consequences of substance to Merks.
>
> 136 Personal disputes between shareholders or disagreements over management decisions and corporate policies alone are not sufficient to justify judicial interference through an oppression remedy. Similarly, a corporate deadlock between equal shareholders will not normally justify a finding of oppression and the granting of relief. The exercise of the discretion granted under s. 5 of the Third Schedule of the *Companies Act* is predicated on the finding of unfair treatment and resulting harm.
>
> (emphasis added)

Discussion and Analysis

A. Have the Respondents oppressed, unfairly prejudiced and/or unfairly disregarded the Applicant's rights and/or interests in relation to the Company?

[27] The case of *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, although decided within the context of the Canada Business Corporations Act (CBCA), discussed many of these concepts. For present purposes, it is convenient to begin with the Court's observation at paragraph 68:

> In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation

> asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[28] The court continued thus:

> 70. At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.
>
> 71. It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), Proposals for a New Business Corporations Law for Canada (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: Re Keho Holdings Ltd. and Noble. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.
>
> 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.
>
> (emphasis added)

[29] It is clear from *BCE* that, when assessing the reasonableness of the expectations of one or more of the parties, general commercial practice may play a significant role in the analysis. So too, the type of company, including its size and structure may contribute to the assessment. Certainly, "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" (*BCE*, para. 75).

[30] Moreover, it being a fact specific analysis, past practices may fuel reasonable expectations as well, and they may change over time. Generally speaking, however, if directors depart from a particular past practice in a situation for valid commercial reasons, and the complainant's rights are unaffected, then "there can be no reasonable expectation that directors will resist the departure from past practice" (*BCE*, para. 77, citing with approval *Alberta Treasury Branches v. SevenWay Capital Corp*. (1999), 50 BLR (2d) 294 (Alta.QB) aff'd (2000), 8 BLR (3d) 1, 2000 ABCA 194).

[31] Other considerations may include whether the claimant could have taken steps to protect her/himself against the prejudice asserted, as well as the shareholder agreements themselves, since these latter often reflect the reasonable expectations of the parties. These are merely some examples.

[32] In *BCE*, the Court also pointed out:

> 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.

[33] Further context was supplied:

> 89. Thus far we have discussed how a claimant establishes the first element of an action for oppression -- a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the CBCA. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the CBCA. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the

> oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of Ebrahimi.
>
> 90. In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.
>
> 91. The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the CBCA is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.
>
> (emphasis added)

[34] As noted above, integral to the resolution of the declaration sought by the Applicant is a finding of both unfair treatment by the Respondents, and resulting harm. Through this prism, I propose to focus on each of Mr. MacDonald's concerns.

i) The real property upon which the home and family business sit.

[35] The Applicant's contentions with respect to this point were quite vague. First, in para. 18 of his affidavit (Exhibit "1") he states:

> … Prior to the purchase of the Bridgetown lands, the parties agreed that Ralph and Jennifer could take title to the land [on which their home and DFM's building sits] in their personal capacity, but it was understood that the land would be a factor when considering the value of the Company's assets.

[36] Later, on cross-examination, Mr. MacDonald added that he would have assumed that any reasonable partner would have taken the value of the land into account within this context.

[37] I did not attach very much weight to the Applicant's contention in this regard. A businessman of his acumen and experience would not have left such an important point to an unwritten "understanding" with two business neophytes such as Mr. and Ms. D'Aubin. It would have been written down in a document, and the means by which the land would be "a factor" in the value of the Company's assets would have been spelled out.

[38] Moreover, any attempt to resolve this concern would require an analysis of disparate factors unrelated to the relief claimed by Mr. MacDonald in his application. Title to the real property is and always has been held in the names of Mr. and Ms. D'Aubin personally, and this fact has been known to Mr. MacDonald since its acquisition.

[39] I cannot say, based on the evidence presented by the Applicant, that by taking the position which they have in relation to their personal ownership of the real property, that the noncorporate Applicants have, in effect, unfairly prejudiced or harmed Mr. MacDonald in any way. Should the Applicant wish to dispute the equitable ownership of the real property in question, notwithstanding the title documents themselves, he would have to bring an application focused upon that relief, rather than incidentally include such assertions within the context of the present remedy that he seeks.

ii) The shareholders meetings

[40] The basis for Mr. MacDonald's expectation that he would continue to meet or at least speak with the D'Aubins on a monthly basis is straightforward. To begin, one need look no further than the Supplementary Shareholders Agreement:

> 7. Ralph and Jennifer agreed to meet with Stephen monthly to consider all aspects of the Company's business operations.

[41] This is augmented by the Loan Agreement:

> 3. D'Aubin [the corporate Respondent] agrees to make its officers, Ralph D'Aubin and Jennifer D'Aubin, available to meet with MacDonald monthly to consider all aspects of the Company's business operations.

[42] As indicated, the Applicant also testified that he had wished that these meetings would become more formal, which is to say, preceded by an agenda, held in private, and with business documents prepared. He acknowledged that he expected the formality to increase over time, understanding that the Respondents were new to business. This, *per se*, could not be characterized as an unreasonable expectation.

[43] That said, when one looks at past practices, it is fair to say that Mr. MacDonald could reasonably expect continual communication between he and the noncorporate Respondents. From the start of their relationship in 2013 until the breakdown in late 2015, it appears to be the case that the parties met semi-

frequently and communicated most weeks. The meetings were more casual and the parties often met in public locations.

[44] The Applicant appeared to agree in cross-examination that, at the outset of the relationship, the D'Aubins did not let more than a week go by without communication, although he was having trouble scheduling specific face to face meetings with them.

[45] Ms. D'Aubin conceded that she did not communicate with the Applicant in November and December 2015. There appears to have been communications in at least January, March, May, June, August, September, October, and November 2016 and the parties actually met in January, June, September, and November of that year.

[46] In *Richards v. Richards*, 2013 NSSC 163, the court considered the role of past practices in such a context. In *Richards*, the court was dealing with an interlocutory motion based upon the oppression remedy. One of the objectives of the Applicant was formal monthly meetings, in accordance with the shareholders agreement and also as required by corporate resolutions. In dismissing the complaint, the court wrote:

> 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.

[47] To the extent that more formality was expected by the Applicant with respect to the conduct of their meetings, this was never borne out in actual practice by the parties. Many of their communications were by phone or email, or, if face-to-face, at a restaurant or other location.

[48] When the parties began experiencing difficulties *inter se*, Ms. D'Aubin attributes this to her perception, whether reasonable or not, that she was threatened by the Applicant's behaviour, and that he was bullying her. She testified that his behaviour was markedly different when her husband was present and able to attend these meetings. It appears that much of the difficulty experienced by Mr. D'Aubin in attending some meetings, arose from the fact that he was critical to the day-to-day operation of the business, which is to say, the store itself, particularly during the years when DFM could be characterized as a fledgling operation.

[49] Mr. MacDonald, as I mentioned earlier, could be fairly described as an experienced entrepreneur and investor (at least in comparison with the D'Aubins). The portfolio of other businesses in which he has been involved either in the capacity of principal or investor (to which specific reference need not be made) offers ample testimony to this. In addition, I formed the impression that he is a somewhat intense person. It is not difficult to imagine that the female Respondent would feel intimidated and uncomfortable in dealing with such a personality, in the absence of her husband, without anyone to rely upon other than DFM's corporate accountant (himself also the topic of sharp criticism by Mr. MacDonald by virtue of his failure to keep the corporate books up-to-date – an issue to which we will return).

[50] Equally consistent with the parties' past practice, and responsive to the difficulty in herding everyone together in one place to meet face-to-face, would have been a telephone conference with the Applicant in one physical location, Jennifer (perhaps at home) and Ralph (perhaps at the store).

[51] Moreover, it is unclear on the evidence how extensive were the efforts of Mr. MacDonald himself to circulate agendas and or "talking points" in advance of the meetings which were actually held. Certainly telephone conferencing, for example, would not be inimical to the circulation of such materials by him

beforehand had he wished to do so. The Applicant appears to have conceded that he had the ability to set agendas, for example, in an email to Ms. D'Aubin dated August 26, 2016, (Exhibit 1, Tab G, p.8).

[52] On the facts as presented, I am unable to attribute the failure to hold monthly meetings as contemplated by the various agreements executed by the parties, or in the form that Mr. MacDonald wanted, solely to the conduct of the Respondents. In fact, while such meetings are often a critical requirement to the operation of any corporate entity, it is also understandable that personal tension between the parties may reach a point where it was reasonable for the parties to pursue means other than face-to-face meetings, at least until some of the tension has abated.

[53] As a consequence, I cannot conclude that the failure to hold monthly meetings in accordance with the standards and expectations of Mr. MacDonald has resulted in his having been subjected to unfair treatment, or that he has sustained any loss or harm by their absence.

iii) Failure to consult with the Applicant before "making changes that may affect the profitability of the business".

[54] Broadly speaking, there are three breaches cited by Mr. MacDonald that would fall into this category. They are:

(a) Mr. and Ms. D'Aubin transferred the market sales aspect of DFM to their daughter without consultation in 2018/2019; and,

(b) Mr. and Ms. D'Aubin changed the lease amount that they charged to DFM from $400 per month to $800 per month before the expiry of the latter's lease of the portion of the noncorporate Respondents' real property upon which the business premises are situate; and,

(c) Ms. D'Aubin started a new catering business that competes with some of the services offered by DFM.

[55] These contentions are grounded in clause 7 of the loan agreement, which states:

> 7. [The Respondents] agree to consult MacDonald respecting any business opportunity that may affect the company's future profitability and any intended

> capital purchases, borrowings and entering into obligations extending beyond 60 days.

(a) Transfer of market sales of DFM

[56] Dealing initially with the transfer of the "market sales aspect of DFM", at first blush this looks more serious than it actually was. Although neither party has offered much by way of a contractual analysis, transferring the "market" aspect of the sales to a family member will in many circumstances be seen as constituting the transfer of a "business opportunity" that may affect future profitability.

[57] However, I have not been persuaded that the failure of the D'Aubins to consult with Mr. MacDonald before doing so either breached this clause, or, more generally, amounted to oppression. Based upon the financial documents attached to Ms. D'Aubin's affidavit dated December 12, 2018, in 2015 “market goods” sales of $17,280.43 constituted 3.20% of DFM’s total sales of $534,048.47 (Tab 1, p. 19). In 2016, market sales of $13,932.17 made up a mere 2.3% of the company’s total sales, which had risen to $581,306.20. In 2017, it would appear that total sales were up to $632,853.79, yet the sum of "0" was attributable to the sale of "market goods" (Tab 1, p. 37).

[58] Ms. D'Aubin's testimony was (to the effect) that cutting this proportionately time-consuming activity from the corporate operation provided the noncorporate Respondents with more time to develop the other (more profitable) aspects of the business. She also said that their daughter still purchases the meat which she sells at the market from DFM, and pays rent to the company for the cart that she uses.

[59] Her testimony appears to be borne out by virtue of the fact that the Company’s total sales revenue has increased year by year from 2015 to 2017, based on the limited financials that were available by the time of the hearing. Also, for the first nine months of 2018, total sales revenue sat at $521,261.38. As a consequence, projections for the full year would have it exceeding 2017's total.

[60] In my view, this falls considerably short of establishing oppressive conduct on the part of the directors of DFM. In any event, it would be very difficult to conclude on the basis of the evidence that Mr. MacDonald has been harmed in any way by this behaviour.

[61] This does not appear to have been so much a "business opportunity" in the sense intended by the aforementioned clause 7, as a business "decision" made by

the directors of the company as to how best deploy their limited resources (in terms of personnel). I have not been satisfied that this constituted oppressive behaviour on the part of the Respondents. Moreover, based on the very limited evidence that I have available, it does not even seem to have been a bad business decision either.

(b) Increase of rent charged to DFM

[62] I now consider the change in the lease amount charged by the D'Aubins to DFM for the lease of that portion of the real property upon which the business premises are situate. The evidence suggests that in 2014, the noncorporate Respondents began leasing the property to DFM for $400 per month. The lease automatically renewed on a yearly basis. In about June 2015, the lease amount was increased to $800. Ms. D'Aubin testified that she consulted with local business owners in arriving at this figure, which was much more realistic in terms of the "going rate" in the area.

[63] This action does not appear to have changed the "bottom line" of the company in any meaningful way. Mr. and Ms. D'Aubin (not Mr. MacDonald) are the directors and officers of DFM. Moreover, the D'Aubins are personally responsible for the mortgage on the real property, rather than DFM. I am consequently not satisfied that the decision to raise the rent, in the circumstances in which it was made, constituted a "business opportunity" triggering the application of clause 7.

[64] That said, and as will be subsequently explored more completely, the directors do owe a fiduciary duty to both DFM and all shareholders including Mr. MacDonald. Being fully mindful that DFM is properly characterized as a small closely held family company in the sense intended in *BCE* (supra), the harm to the Applicant's interests lies more in the precedent of unilateral action which has been established, and in the marginal amount of income diverted from DFM’s bottom line, than the actual discernable harm which has resulted to Mr. MacDonald's interests in this specific instance. I will consider this further when I review the overall picture of the conduct of the Respondents to determine whether, holistically, it contributes to a finding of oppressive behaviour.

(c) The catering business

[65] The allegation regarding Ms. D'Aubin's conduct in establishing the catering company ("the Temple on Queen Event Venue" hereinafter referred to as “Temple”) is more concerning. The evidence shows that in early 2017, she established a business partnership with a woman named Cynthia MacDonald, a former DFM employee who was responsible for the catering aspect of DFM's operations.

[66] Temple operates as a venue, restaurant, and catering service. It would appear that the two women are the sole partners or proprietors involved in the business. It seemed to me somewhat of a stretch to conclude that the restaurant aspect of this business could compete in any realistic way with that of DFM, as the evidence does not satisfy me that the latter operates in such a capacity.

[67] With respect to the catering aspect of Temple's operations, it is difficult to conclude other than that such activities, carried out in conjunction with the former DFM employee who had been responsible for that aspect of the corporate Respondent's business while employed there, must compete with DFM. Facially, Ms. D’Aubin’s involvement with Temple appears to run contrary to the fiduciary obligation which she owes to DFM. The significance of the impact upon the corporate Respondent, and upon Mr. MacDonald's interests (if any), cannot be ascertained due, in part, to the absence of DFM's financial records in proper form.

[68] On the basis of the records that are available, DFM's revenues attributable to catering appear to increase steadily from 2014, reaching a high of $38,084.70 in 2017 (affidavit of Ms. D’Aubins, Tab 1). They dropped to $20,405 in 2018. Whether this drop is attributable to Temple is impossible to say with certainty, without more evidence. It appears to be probable that the two are connected.

iv) Issues with the director salaries and employment

[69] The Applicant flags several issues that he claims would fall under this rubric. In particular, he alleges that:

- Both of the noncorporate Respondents paid themselves in excess of the amount stipulated in the supplementary shareholders agreement between the parties;
- The means by which the D'Aubins paid themselves was improper;
- The D'Aubins improperly used company money for personal gain; and
- Ms. D'Aubin took a second job at one point, working part-time for 4 to 6 weeks.

[70] Most of what the Applicant argued in relation to the first three points above related to the Respondents' practice of borrowing sums of money from the company and subsequently repaying it over time. He argues that, notwithstanding the fact that the sums appear to have been repaid, the company is still deprived of the funds in the short term, earns no interest on the loans, and in any event the practice is contrary to Canada Revenue Agency's guidelines. Even though I did not attach much if any weight to the rest of accountant Kevin Burnell's evidence due to his apparently close association with the Applicant and some concerns about his qualification to express some of the opinions which he did, I did accept his contentions that the manner in which the non-corporate Respondents went about implementing and repaying these loans was irregular.

[71] The Respondent's evidence, on the other hand, was that they frequently paid themselves less than that to which they were entitled by way of salary under the extant agreements between themselves and the Applicant. Their practice of augmenting this with loans from the company, which were then repaid, was more responsive to the company's actual cash flow requirements and other needs, and was a responsible way in which to balance those needs in relation to those of themselves and DFM.

[72] The evidence is not sufficient to establish that the D'Aubins were paying themselves, either as salary or as shareholder loans later converted into salary, in excess of the salary stipulated in the supplementary shareholders agreement. Nor was it sufficient to prove that they were improperly using company funds for personal gain. This is (again) largely due to the lack of audited financial records from 2013 to date before the court. Much like my conclusion with respect to the issue of the imposition of a rental increase on DFM, and that which was involved in the female Respondent's decision to incorporate a new catering company that operates in some of the same areas as DFM, I will consider this aspect incrementally when I consider whether, overall, the picture which emerges is one of oppressive conduct on the part of the Respondents.

[73] I will say that the evidence fails to satisfy me that Ms. D'Aubin's decision at one point to take the short term, part-time job referenced above, at a time when the company was past its inaugural phase, amounts to, or contributes to, oppressive conduct on the part of herself or the other Respondents.

v) Failure to ensure availability of financial records

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

[75] This evidence is compounded (first) by the fact that no financial records were made available to Mr. MacDonald at all from 2013 to June 2016. Second, by evidence that DFM's 2013 – 2015 corporate tax returns were not filed until 2017. One does not need to lean very heavily upon Mr. Burnell's evidence to conclude that this is not in accord with the generally accepted accounting principles which Mr. Wheaton ought to have observed in his dealings with DFM's books.

[76] More germane to the present application, however, is the fact that, quite apart from everything else, in most situations, it is reasonable for a shareholder to expect that accurate and complete financial records will be made available to him in a timely manner. Case law is so replete with pronouncements to that effect that it is unnecessary to cite them individually.

[77] On top of everything else, the duty is enshrined in s. 120 of the *Companies Act* as follows:

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

[78] Other examples of statutory noncompliance exist in the present case. Without any attempt to be exhaustive, one might also point to the requirement of the directors to call an annual general meeting each year where an auditor is appointed unless all of the members consent not to appoint one (ss.117-118), and

that the company's financial statements are also to be presented to all shareholders entitled to attend the meeting (s.121(3)) .

[79] These are important, as there has been no reference in the evidence to Articles of Association that either supplant or amend the Regulations enacted under the auspices of the *Act*. Section 21 of the *Act* provides:

> In the case of a company limited by shares and registered on or after the first day of August, 1935, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule to this *Act*, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent, and capable of being changed by the company in the same manner, as if they were contained in duly registered articles.

[80] These regulations task the directors with a duty to:

> 175. … cause proper books of account to be kept of the sums of money received and expended by the Company, and the matters in respect of which such receipt and expenditure takes place, and of all sales and purchases of goods by the Company, and of the assets, credits and liabilities of the Company.

[81] On top of this, the requirement that the Applicant shall have full access to the accounting records of DFM at all reasonable times is mentioned in both the Supplementary Shareholders Agreement and in the Loan Agreement. The latter agreement places a specific onus upon the Respondents to ensure Mr. MacDonald's access to same:

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

[82] The Respondents' counsel argues essentially that Mr. MacDonald has always had the same access to all extant records as the Respondents themselves, and that they always produced these records to him once they had acquired them themselves. With respect, this misses the point.

[83] It is, indeed, fair to observe that this nonfeasance seems to have been more attributable to accountant, Kevin Wheaton, than to the Respondents themselves. However, the directors owed it to themselves, DFM, and to the Applicant to ensure that appropriate steps were taken to correct this long-standing problem. This merely complies with proper commercial conduct – it is obviously recognized as a

good commercial practice to uphold the statutory, regulatory, and/or contractual obligations of the Company.

[84] It appears that part of the reason why the noncorporate Respondents did not take more precipitate action in relation to Mr. Wheaton's dilatory efforts in this respect stemmed from their perception that the Applicant was making repeated efforts to supplant Mr. Wheaton as the company accountant, by installing his "own man" (Mr. Burnell) in that role. It is clear that he did make more than one “forceful request” of the D’Aubins to fire their accountant.

[85] Further, it is not difficult to understand why such requests would trouble the D'Aubins. The Supplementary Shareholders Agreement contains the following provision:

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

[86] This concern about the lack of up-to-date financials with respect to DFM acquired heightened significance because of the Respondents' attempts in 2016 to purchase Mr. MacDonald's shares. The parties, with the assistance of their respective accountants, exchanged figures which can only be characterized as "light years apart".

[87] While the Respondents do not bear the entire blame for this deficiency, it is certainly indisputable that, as directors of the company, the noncorporate Respondents were ultimately responsibility to ensure that the financial statements were up-to-date and in conformity with DFM's legal requirements, as well as its obligations to all of the shareholders. It is not uncommon in many cases, for these requirements to be more “honoured in the breach” than otherwise. However, there comes a point where the delay becomes so excessive that no amount of "explanation" can vitiate or excuse it.

[88] The evidence establishes that the D'Aubins are in compliance with their obligation to repay Mr. MacDonald's shareholders loan. What was originally a $75,000 loan at 5% interest had been paid down to $12,476.71 as of April 15, 2019 (affidavit – Ms. D'Aubin dated May 8, 2019, paras 17 -18). As of that date, and in addition, the corporate Respondent had also paid the Applicant $9,659.18 in interest since the inception of the loan.

[89] Given this fact, if the situation had unfolded as the parties had expected when the agreements were drawn up, the Respondents would soon be able to initiate the steps which would culminate in their purchase of Mr. MacDonald's share interest in the company. However, failure to provide timely financial disclosure, or at all, hampers the ability of the parties to achieve that objective. Neither side has the means with which to properly assess the value of the Applicant's shares, without the availability of proper financial records. Mr. and Mrs. D'Aubin , as the directors, have not properly discharged their responsibilities in this respect.

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

[91] Obviously, in some cases the failure to maintain adequate financial records will not, in and of itself, give rise to an oppression remedy. However, plenty of cases exist in which the need for such a finding is apparent in such circumstances. One authority which bears a few similarities to the case at bar is *Lee et al v. To et al* (1997), 153 Sask.R. 58 (Q B).

[92] In *Lee*, Laing, J. found that a failure to maintain adequate financial records amounted to oppression, notwithstanding any evidence of bad faith on the part of the directors. The Applicant had invested in a corporation which operated a grocery store business. After he began working in the store, difficulties arose between him and the majority shareholder. The business was profitable at the time of the investment, but showed a $177,000.00 net loss over the succeeding four and a half year period. During this period, no income tax returns were filed, and the

books were in an unacceptable state. Financial information was not provided with respect to the business.

[93] In explaining its conclusion, the Court observed:

> 23. Whether the corporation is large or small, financial record keeping, and financial accountability which cannot exist without proper record keeping as reflected in s. 149(1) of the BCA, are fundamental obligations of the directors and management of any corporation. Without the same no proper decision-making can occur by either the corporation, or the shareholders who have invested in the corporation.
>
> 24. To the extent the absence of such financial record keeping occurs as a result of the actions of the majority shareholders, such action or inaction, is unfairly prejudicial to the rights of the minority shareholders, and also unfairly disregards their interests; at least when such minority shareholders have no other means of assessing the business activity, the management, or the financial position of the corporation, as is the case in this matter.
>
> (emphasis added)

[94] I consider the Applicant's right to expect regular financial reporting as reflected in the portions of the agreements that have been earlier referenced, and the female Respondent's acknowledgement in cross-examination of the deficiencies in that respect. I consider the impact which these inadequacies have had upon the parties' ability to fairly value the Applicants shares in their earlier aborted negotiations in that respect. I couple this observation with the fact that the shareholders loan is fully up-to-date and almost paid off, and that the time is approaching when the parties would, contractually, be otherwise entitled to invoke the buy out provisions.

[95] The purchase of the Applicant's shares by the Respondents, enabling the parties to go their separate ways, would likely be the very best case scenario for the present health and future well-being of DFM. However, this cannot happen until proper financial disclosure is made. The records must be compiled to bring the company current with CRA. This process will also arm the parties with the information that they will need in order to do more than guess at the value of Mr. MacDonald's shares.

[96] I further consider the impediment that the lack of availability of this information has posed with respect to the determination of the validity of the Applicant's concerns with respect to Ms. D'Aubin's involvement with Temple,

coupled with the decision to raise DFM's rent, in effect doubling the monthly amount which DFM is required to pay to the noncorporate Respondents personally.

[97] Finally, I also weigh the impact of the Respondents' manner of obtaining personal loans from the company, even though the evidence satisfies me that they are repaid. The absence of accurate financial information and the regular filing of income tax returns makes it difficult to determine whether these loans were re-paid within the 24 month window, which apparently is the period stipulated by CRA within which to do so. It also contributes to the inability to fully measure the extent to which the D'Aubins have been compensated by DFM and whether it accords with the agreements between the parties.

[98] When I consider these matters, I am satisfied that the Respondents' cumulative behaviour in relation to the Applicant, even in the absence of any indication of bad faith on their part, amounts to oppressive behaviour. They should have taken steps necessary to have personnel in place which would implement their obligations to the Applicant and to DFM. Mr. Wheaton was clearly not discharging his duties as the company accountant in a proper fashion.

B. What is the appropriate remedy?

[99] I have earlier set out the relief that the Applicant had requested in his pre-trial submissions (supra, para. 17)

[100] In his counsel's post hearing submissions of July 26, 2019, the Applicant stresses the fact that personal relationships between the parties have deteriorated to a point where their continued cooperation is not possible. While I agree, as noted above, that a share buy out as contemplated by the agreements is needed, the problem is complicated by the aforementioned inadequacy of the financial records of DFM.

[101] Perhaps as a consequence, the Applicant has modified his initial requests and, as of his post hearing submissions, has requested remedies which I set out earlier.

[102] I have a wide latitude to implement whatever remedy is considered to be appropriate. Section 5 of the Third Schedule of the *Act* provides in this respect:

5(3) In connection with an application under this Section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

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

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

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

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

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

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

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

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

(j) an order compensating an aggrieved person;

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

(l) an order liquidating and dissolving the company;

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

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

[103] In *Tri-Mac Holdings Inc. v. Ostrom*, 2018 NSSC 177, Justice Ann Smith observed that:

> 22. … once a court makes a finding of oppressive conduct, it must still determine the appropriate remedy. "In doing so, it should look for a solution that redresses the wrongful conduct, but does not unnecessarily interfere in the company's affairs." (para. 137) Justice Wood referred to the approach

recommended by the authors of *The Oppression Remedy* (Canada Law Book; 2011) at p. 6-7:

> Accordingly, in determining the remedy most suitable to the situation, the court should turn to its findings of fact regarding the reasonable expectations of the shareholders in each case. The court must, however, strike a fine balance between granting shareholders relief in accordance with their expectations and avoiding unnecessary interference in the company's affairs. This balance often leads the court to grant the least obtrusive form of relief, even though the oppression provisions clearly grant the court powers that are nothing less than "formidable".
>
> (emphasis in original)

23. The authors note the important role of reasonable expectations in determining the scope of the remedy at p. 6-8.2 (referred to by Wood J. in *Jeffrie*, at para. 138):

> Despite the reluctance to interfere with discretionary remedies, appellate courts have been led to reverse elements of a remedy granted by the trial judge where, looking back on the finding of fact, the trial judge appears to have granted a remedy that exceeded the plaintiff's reasonable expectations. For example, an aggrieved shareholder must not benefit from an order that compensates the shareholder for a downturn in the business that is not related to the oppressive conduct of which the shareholder complains. Likewise, the court should not grant a remedy that gives a shareholder a "better deal" than if the oppression had not occurred.
>
> (emphasis in original)

[104] Similarly, in *Pelley v. Pelley*, 2003 NLCA 6, the Court opined:

> 37. In *Naneff*, the Ontario Court of Appeal affirmed the decision of the trial judge as to the entitlement of the Applicant to a remedy but allowed the appeal in respect of the remedy granted by the trial judge. In the process of doing so Galligan J.A., speaking for the Court, first discussed the principles which should guide a court in fashioning a remedy where it finds oppression or certain other unfair conduct. This Court, in *McDorman*, adopted as principles to be applied to the civil remedies provisions (sections 368 to 380) of the *Corporations Act*, comments by Galligan J.A., made in relation to the nearly identical provision (section 248) of the Ontario *Business Corporations Act*, or comments by others and approved by Galligan J.A. as follows:

> *The result of the exercise of the discretion contained in subsection 371(3) must be the rectification of the oppressive conduct. If it has some other result the remedy would be one which is not authorized by law.
>
> *Any rectification of a matter complained of can only be made with respect to the person's interest as a shareholder, creditor, director or officer.
>
> *Persons who are shareholders, officers and directors of companies may have other personal interests which are intimately connected to a transaction. However, it is only their interests as shareholder, officer or director as such which are protected by section 371 of the *Act*. The provisions of that section cannot be used to protect or to advance directly or indirectly their other personal interests.
>
> *The law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between the principals.
>
> *They must be expectations which could be said to have been, or ought to have been, considered as part of the compact of the shareholders.
>
> *The determination of reasonable expectations will also, in my view, have an important bearing upon the decision as to what is a just remedy in a particular case.
>
> *The remedy must not be unjust to the others involved.
>
> [Emphasis added]

The foregoing reflect the principles which ought to have guided the trial judge in this case.

[105] I conclude that the remedy which is fashioned must be balanced by a principle of minimal interference: a Court should not interfere unnecessarily in the affairs of a corporate entity. Equally obvious is the fact that the remedy imposed must not be used by the Court to rewrite the agreement between the parties, and/or to leave the Applicant in a better position *vis-à-vis* the company and the other stakeholders than he was entitled to expect beforehand .

[106] Communications between the parties have indeed broken down, and one despairs of the prospect that this may be remedied. The parties' problems have been exacerbated, somewhat, by the length of time that these proceedings have taken to come to a head. I observe that the Applicant's Notice of Application in Chambers was filed on May 2, 2017. Compounding this are those factors which

have contributed to a portion of the angst experienced by Mr. MacDonald, and which have resulted from misunderstandings on his part.

[107] For example, it emerged that the Applicant was concerned that Mr. D'Aubin had failed to implement the "key person life insurance" stipulated in the agreements. As Ms. D'Aubin noted in para. 33 of her affidavit:

> ... Stephen was informed from the outset that Ralph had purchased the key man life policy, but Stephen did not require written proof of purchase. My first knowledge of Stephen's request to be provided with a copy of the policy or document was upon be [sic] served and reading Stephen's affidavit of documents...attached hereto and marked as Exhibit G is true copy of the Manulife Term Policy Statement. The policy is in full force and names the company as the beneficiary.

[108] The Applicant was also upset about not being consulted about the Company (so he thought) having issued further shares to a third- party. He formed the impression that this had happened because the "shareholder's loan" in the amount of $160,544.00 referenced in DFM's 2015 tax return was merely a clerical error. It should have been categorized as a loan made to DFM by that third-party.

[109] These misunderstandings (and some others) could have easily been avoided had the parties been communicating as they should.

[110] Another aspect of Mr. MacDonald's attitude toward DFM was problematic. Despite his acknowledgement that, in his experience, many new companies experience a loss during their first two financial periods, he seemed to have formed rather grandiose expectations as to how quickly he expected this company to generate profits. Whether this was influenced, and if so to what extent, by the need to have his shares reflect maximum possible value before the five year time period (after which the buyout of his shares was to be triggered), is difficult to say. What can be said with some justification is that the parties' current impasse does not appear to be the result of merely the Respondents' actions or inactions. It was truly a "two-way street".

[111] That said, the overarching problem is the need for the parties to disentangle their affairs. This underscores the critical necessity of the availability of proper financial information upon which to base that severance. The remedy which I grant will be constructed around this central concern.

[112] A couple of preliminary observations are appropriate. First, Mr. MacDonald has fashioned his pleadings around the oppression remedy. Under the auspices of these pleadings it would be unfair for the Court to interfere with the apparent title to the real property upon which the noncorporate Respondents' family home sits, as well as the building housing DFM even if an otherwise appropriate evidentiary base upon which to do so existed. The most that can be said at this stage is (to repeat) that it appears that Mr. and Mrs. D'Aubin have held title to the real property in their own names since the inception of Mr. MacDonald's involvement with them.

[113] Second, I am not prepared to order that the partnership in which Ms. D'Aubin is involved (Temple) produce approved financial statements for the business detailing the revenues that it generates from its allegedly competing catering operations. This is primarily because the principals of this business are not before the Court. Ms. D'Aubin certainly is, however Cynthia MacDonald (her partner) is not. Neither she or Temple is a party to these proceedings, and as a consequence neither has been provided with acceptable notice that this relief is being sought by the Applicant with respect to that business.

[114] I am well aware that no solution is perfect. In an ideal world, directors would be able to manage a company's affairs in the best interest of themselves, and that of the company, without acrimony with the other stakeholders. As I consider the matter holistically, it appears that the following relief is necessary, and I so order:

1. An independent auditor shall be appointed to complete audited financial statements for DFM from 2013 to present. It is not felt to be appropriate that the Court involve itself (at this stage) in the designation of who, specifically, shall fulfill the role of auditor. The Respondents must forthwith produce any information or documentation within their possession or control necessary to the auditor in order to discharge his/her duties, and shall promptly comply with all reasonable requests of the auditor made to them.
2. Mr. MacDonald, through his counsel, shall provide his choice for auditor to counsel for the Respondents within 10 days. If the person thus selected by the Applicant to be auditor is unacceptable to the Respondents, they shall provide their candidate (within five days thereafter) to counsel for the Applicant. Due to their previous

involvement in this matter, neither Messrs. Wheaton or Burnell shall be eligible.

3. If the Respondents' candidate is not acceptable to the Applicant, the two candidates thus nominated shall agree on the name of a (third) individual who shall be appointed as auditor. If the two candidates cannot agree, either party may apply to Court to resolve the issue. Each party shall be responsible for the cost of his/their candidate, and the Applicant and Respondents shall each pay 50% of the auditor's fee, subject to the Court's overall discretion as to costs.

4. Within 30 days of the completion of the audited financial statements for DFM, the company shall retain the services of an arm's length business valuator to provide an independent valuation report as to the value of DFM's shares. The cost associated with the preparation of said report will be paid by DFM, again subject to the Court's overall discretion as to costs.

5. Upon completion of the valuation, the parties shall have 14 days (or such further time upon which they may agree or the Court may order) within which to come up with an agreed-upon purchase price for the Applicant's shares. Failing this, the parties may return to court for such further determinations and/or directions as are necessary.

6. The balance, if any, of the loan and interest owed to Mr. MacDonald at the time (if any) would also be paid out to him when his shares are purchased. In the meantime, DFM would maintain all required payments with respect to that loan in accord with the Loan Agreement.

7. The court would retain jurisdiction, in addition to that required to make rulings in conjunction with numbers 3 and 5 above (if necessary) to provide any further directions should unforeseen matters arise while the parties implement these directions.

8. If costs cannot be agreed upon by the parties, they shall be determined by the Court (upon request) upon the completion of the Respondents' purchase of the Applicant's shares in accordance with the above procedure.

[115] I would request that counsel for the Applicant prepare the order.