SUPREME COURT OF NOVA SCOTIA

Citation: *H&N Enterprise Inc. v. Novacation Inc.*, 2020 NSSC 303

Date: 20201023
Docket: Hfx No. 499827
Registry: Halifax

Between:

H&N Enterprise Inc. and Brent Hering

Plaintiffs

v.

Novacation Inc., Fred M. Kern, Stephanie Ager Kirz, Anthony E. Smith, Plum Holdings, LLC, The Kirz Revocable Trust, Whyte Dog Holdings, LLC, Odin Nutraceuticals Inc.

Defendants

DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: October 21, 2020, in Halifax, Nova Scotia

Written Decision: October 23, 2020

C**ounsel:** Michael Richards, for the Plaintiffs
Colin Bryson, Q.C., for the Defendants Anthony Smith and Novacation
Kelly Shannon, watching brief for the Defendants Fred Kern and Plum Holdings

By the Court:

[1] In the underlying proceeding the Plaintiffs claim remedies for improper, oppressive and tortious conduct by the Defendants. The Plaintiffs have brought this emergency motion for interim injunction pursuant to *Civil Procedure Rule* 41 and s. 5 of the Third Schedule to the *Companies Act*, RSNS 1989, c.81 ("*Act*"). The Plaintiffs seek to enjoin the forfeiture of their shares as a result of their refusal to pay an assessment as required by the Articles of Association of the Respondent company, Novacation Inc.

Factual Background

[2] The Plaintiff, H&N Enterprises Inc. ("H&N") is a shareholder in Novacation Inc. ("Novacation"). The Plaintiff Brent Hering ("Hering") is the principal of H&N and a director of Novacation.

[3] Novacation is the owner of Strum Island, Mahone Bay, Nova Scotia on which it has constructed a luxury house for the purpose of rental and/or resale for profit.

[4] The other shareholders of Novacation and their principals are The Kirz Revocable Trust (Stephanie Kirz), Whyte Dog Holdings, LLC (Stephanie Kirz) and Odin Nutraceuticals Inc. (Anthony Smith). All are Defendants in the underlying proceeding.

[5] The other Defendants are a former shareholder, Plum Holding Inc., LLC, and its principal Fred Kern.

[6] The Articles of Association of Novacation were put in place in 2016 when H&N was the sole shareholder. They contain a provision that requires its shareholders to fund the operating losses of Novacation through *pro rata* assessments of its shareholders. The Articles further provide that the shares of shareholders can be forfeited should they not pay their assessments.

[7] Novacation has not been profitable since at least 2017, and has regularly assessed its shareholders for its operating shortfalls.

[8] H&N commenced the underlying action in August 2020. The Plaintiffs claim against Novacation and its remaining shareholders and former shareholder for certain improper, oppressive and tortious conduct.

[9] On July 1, 2020, Novacation issued an assessment to its shareholders to cover operating losses for the remainder of 2020. H&N's share of the assessment was US $97,000. The other shareholders paid their respective assessments totalling $242,500 by August 10, 2020. H&N refused to pay its assessment, and pursuant to the Articles of Association, Novacation issued a forfeiture notice on October 8, 2020 giving the Plaintiffs until October 26, 2020 at 4:00 p.m. Atlantic Time to pay the assessment or forfeit their shares pursuant to Article 4.5(a) which provides:

> Forfeiture of Shares. If an owner fails to pay any call by its due date, the Board may give Notice to such Owner demanding payment of the call, plus accrued interest and all expenses incurred by the Company due to the non-payment, stating a date at least fourteen (14) days distant and a manner at which payment must be made, and providing that all of the Owner's shares in the Company, together with all of his/her rights relating to the Company, shall be forfeited in the event full payment is not so made…

[10] The Plaintiffs seek an interim order for an injunction restraining Novacation from improperly forcing the Plaintiffs to forfeit their shares in the corporation until after such time as the parties can return before The Honourable Court to provide a more fulsome record in a motion for an interlocutory injunction.

[11] By correspondence dated October 14, 2020 the Plaintiffs sought and obtained the court's determination that the matter was to be heard on an emergency basis with the normal timelines abridged. That day, the court gave directions for the Plaintiffs to file their motion materials and brief by the end of the day on October 19, 2020 with any response materials to be filed by the end of the day on October 20, 2020. The hearing was scheduled for October 21, 2020.

[12] I have reviewed the materials filed by the Plaintiffs and on behalf of Novacation, Odin Nutraceuticals and Anthony Smith.

Status of Counsel for Novacation

[13] In advance of the hearing the Plaintiffs took issue with the retention of counsel by Novacation. The Plaintiffs argue that the president of the Defendant corporation (Smith) does not have authority to retain and instruct legal counsel to respond to this interim injunction motion. No provisions of the company's articles or the *Act* were cited to support the notion that the president was not authorized to retain legal counsel to defend the company. I note here that the articles provide that the officers of the company have the powers extended to them by the *Act*, the articles and "as is customary". I consider it customary for the president of a company to be able to

retain and instruct legal counsel to defend a legal proceeding brought against the company.

[14] For good measure, a meeting of directors was held on October 19, 2020 when by resolution they directed that the president retain counsel to defend the company on this motion. The Plaintiff Hern, as a director, was given notice of the meeting and attended with his legal counsel. He abstained from the vote on the basis that it was a conflict of interest for any director to participate in the vote because they are parties to the underlying litigation.

[15] The Plaintiffs refer to the text of Article 2.1(e) as support for the argument that the directors' resolution has no force or effect and that counsel for the corporation has no authority to speak for the corporation:

> **Conflict of Interest**. No Director shall be disqualified by the office of the Director from contracting with the Company either as vendor, purchaser or otherwise, nor shall any such contract, or any contract or arrangement entered into or proposed to be entered into by or on behalf of the Company in which any Director shall be in any way interested, either directly or indirectly, be avoided, nor shall any Director so contracting or being so interested, be liable to account to the Company for any profit realized by any such contract or arrangement by reason only of such Director holding that office or of the fiduciary arrangements thereby established; however, the existence and nature of the interest of the Director must be declared by the Director at a meeting of the Directors. In the case of a proposed contract such Director shall declare the interest at the meeting of Directors at which the question is first taken into consideration, or if the Director was not then interested, at the next meeting held after the Director became so interested, and when the Director becomes interested after it is made the Director shall declare the interest of the Director at the first meeting held after the Director becomes so interested. No Director shall as a Director vote in respect of any contract or arrangement in which the Director is so interested or if the Director does so vote the vote of the Director shall not be counted.

[16] This Article, with respect, addresses the circumstance of a director voting on a contract with a party that the director has an interest in. In this case that would require the director to have an interest in the law firm retained by the company. There is no suggestion that any director has such an interest. This Article does not in any way restrict the directors from authorizing the president to retain counsel to respond to an injunction motion against the company.

[17] Accordingly, I find that legal counsel for the company is authorized to represent the company in this interlocutory injunction motion and I admit the affidavit evidence and accept the brief filed on behalf of the company.

[18] If I had found otherwise, I would have permitted counsel to represent Odin Nutraceuticals and Anthony Smith as intervenors pursuant to Rule 35.10 and s. 4(2) of the Third Schedule of the *Act* for the limited purpose of responding to the interim injunction motion on behalf of the company.

[19] The Plaintiffs sought to proceed on an emergency basis with timelines abridged. It would not be fair or just to proceed with Novacation being undefended.

Injunction

Evidence

[20] At the outset I will address the evidence filed by the applicants in support of the motion.

[21] *Civil Procedure Rule* 39 provides:

> 39.02 (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.

[22] The Plaintiffs' motion is supported only by an Affidavit of Plaintiffs' counsel, Gavin Giles, Q.C.

[23] It is agreed that paras. 4 to 9 and 24 are not controversial. The Respondent submits that the fourteen-paragraph summary of the Statement of Claim in paras. 10 to 23 is not evidence. I agree. It is allegations of fact and argument. There is no sworn affirmation of belief in the alleged facts. No explanation was offered for the absence of affidavit evidence from Mr. Hering.

[24] Paras. 10 to 23 of the Giles Affidavit do not meet the test set out by this court in *Waverley (Village) v. Nova Scotia (Municipal Affairs)*, 1993 NSSC 71. I do not consider them as evidence of fact.

The Issue

[25] The issue is whether the Plaintiffs are entitled to the interim injunctive relief sought, pursuant to s. 5 of the Third Schedule of the *Companies Act*, the "oppression remedy" provision.

The Law

[26] Section 5 of the *Companies Act* provides as follows:

> (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;
>
> …
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
>
> (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;

[27] Complainant is defined as follows:

> (i) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a company or any of its affiliates,
>
> (ii) a director or an officer or a former director or officer of a company or of any of its affiliates,
>
> (iia) a creditor of a company or any of its affiliates,
>
> (iii) the Registrar, or
>
> (iv) any other person who, in the discretion of the court, is a proper person to make an application under this Section

[28] The Plaintiffs state that they meet the definition of "complainant" under the Act by virtue of their shareholding in Novacation, and the fact that they are also a director. This was not disputed at the hearing.

Civil Procedure Rule 41

[29] *Civil Procedure Rule* 41.04 (2) provides:

> (2) A judge who is satisfied on all of the following may grant the motion:
>
> > (a) the party claims an injunction or receivership as a final remedy in the proceeding, or it is in the interests of justice that an injunction or receivership be in place before determination of the claims in the proceeding;
> >
> > (b) the party has moved, or will move, for an interlocutory injunction or interlocutory receivership and is proceeding without delay;
> >
> > (c) an urgency exists and it cannot await the determination of the motion for an interlocutory injunction or interlocutory receivership;
> >
> > (d) considering all of the circumstances, it is just to issue an order for an interim injunction or interim receivership.

[30] The Plaintiffs have filed the required undertaking.

[31] In *St. Mary's University v. Atlantic University Sport Association*, 2017 NSSC 294 Smith, ACJ (as she then was), summarized the law relating to interim injunctions as follows at paras. 43 to 48:

> 43 An application for an interim injunction will be granted when the court is satisfied that there is a serious issue to be tried; the applicant demonstrates the likelihood that it will suffer irreparable harm if the injunction is refused; and the balance of convenience is in the applicant's favour. The onus is on the applicant to satisfy the court that all three branches of this test have been met.
>
> 44 The first part of the test is generally not considered to be particularly onerous. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, the Court described the "serious question to be tried" test as having a low threshold requiring only a preliminary assessment of the merits of the case. At para 50 the Court stated:
>
> > 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.
>
> 45 A higher test applies, however, when the result of the motion will amount to a final determination of the matter (*RJR MacDonald Inc. v. Canada (Attorney General)*, supra, at para 51). In that case, a higher test of a strong prima facie case will apply.
>
> 46 In addition, a higher test is said to apply when the court is being asked to issue a mandatory injunction (as compared to a prohibitive injunction). In *D.E. & Son Fisheries Ltd. v. Goreham*, 2004 NSCA 53, the Court of Appeal stated at para 10:
>
> > ... At issue was the strength of case the applicant must demonstrate in order to succeed on an application for a mandatory injunction. It is generally

> accepted that the test is more rigorous than that applied where a prohibitory injunction is sought ...

47 In that same case, the Court stated the following in relation to the test that should be applied in an application for a mandatory interim injunction at para 11:

> . . . It was error here for the judge to roughly equate the tests for granting summary judgment and that for a mandatory interim injunction. Because summary judgment ends the litigation without a trial, the test is an onerous one. The plaintiff must "prove the claim clearly" and the defendant must be unable to set up a bona fide defence or raise an issue against the claim which ought to be tried (per Cromwell, J.A.: *D.E. Fisheries and Sons*, supra, at para 2). An application for a mandatory interim injunction, in contrast, is not a final determination and is eventually superceded by the result after trial. Appropriately, the threshold test which the plaintiff (applicant) must meet is a lower one. The requirements for a mandatory interim injunction have been discussed and debated in numerous authorities. It suffices, here, to say, that the plaintiff is not required to "clearly prove" his claim to the exclusion of any defence which may be set up by the defendant. The application is, instead, assessed by the strength of the applicant's case coupled with a consideration of the issues of irreparable harm and the balance of convenience. We agree with the submission of the appellant that the judge erred at law in failing to make an independent inquiry into the merits of the application and to clearly recognize that the test for a mandatory interim injunction differs from that for summary judgment.

48 In *Injunctions and Specific Performance* (Toronto: Canada Law Book, looseleaf), Sharpe J. warns against taking too formalistic an approach when dealing with an injunction motion, stating at 2.600 to 2.630:

> Although reference has been made throughout the discussion to the *American Cyanamid* formula, it now seems clear that neither it nor its adoption by the Supreme Court of Canada should be applied mechanically. As already noted, there has been a significant retreat from the assertion that consideration of the merits should never play an important role. The seeming rigidity of the remaining items in the formula is also regrettable, and the direction given by *Cyanamid* and *RJR-MacDonald* should be seen as guidelines rather than firm rules. The terms "irreparable harm", "status quo" and "balance of convenience" do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another. The Manitoba Court of Appeal has quite properly held that "it is not necessary . . . to follow the consecutive steps set out in the American Cyanamid judgment in an inflexible way; nor it is necessary to treat the relative strength of each party's case only as a last step in the

process". A similar view was expressed by the Saskatchewan Court of Appeal:

> . . . the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.

Treating the checklist of factors as a "multi-requisite test" will often produce results which do not reflect the balance of risks and do not minimize the risk of non-compensable harm. As Lord Hoffman stated, a "box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction".

The list of factors which the courts have developed -- relative strength of the case, irreparable harm and balance of convenience -- should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.

[32] *Tri-mac Holdings Inc. v. Olstrom*, 2018 NSSC 177, dealt with an interim injunction application in an oppression action. I find the summary of the law as set out by the court to be helpful and instructive:

> **Governing Principles – Oppression Claims**
>
> [14] Section 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.

[15] The oppression remedy relief set out in the Third Schedule finds its counterpart in corporate legislation in other provisions, as well as in section 241 of the *Canadian Business Corporation Act (CBCA).*

[16] The Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 ("BCE") considered the oppression remedy as established by s. 241 of the CBCA and set out a two-step approach to determine if oppressive conduct has occurred, at paras. 56 and 68:

> **(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" or "unfair prejudice" of a relevant interest?**

[17] In BCE, the Court referred to the relevant underlying jurisprudence:

> [58] **First, oppression 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**: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, *Koehmen*, at pp. 78 – 79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.
>
> [59] **Second, like 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.**

[18] The Supreme Court stated that "reasonable expectations" include the following factors:

> (1) Commercial practice – where a departure from normal business practices will generally give rise to a remedy;
>
> (2) The nature of the corporation – where more latitude may be afforded to the directors of a small, closely held company;
>
> (3) Relationships – where relationships between shareholders based on ties of friendship may be governed by different standards than a widely held company;

> (4) Past practice – where past practice among shareholders of a closely held company may create a reasonable expectation relating to participation in the company's profits and governance;
>
> (5) Preventive steps – where a shareholder could have taken steps to protect itself against the prejudice;
>
> (6) Representations and agreements – where shareholder agreements can be viewed as reflecting reasonable expectations; and
>
> (7) Fair resolution of conflicting interests – where the oppression remedy confirms that the duty of directions includes a duty to treat individual stakeholders equitably and fairly. (BCE, at paras. 71 – 83)

[19] In *Jeffrie v. Hendriksen* 2013 NSSC 50 (reversed on other grounds 2015 NSCA 49), Wood J. of this court summarized the two-step approach to oppression claims as follows:

> [132] **The burden is on the complainant to identify the expectations alleged to be violated and establish that these expectations were reasonably held. This will be a fact specific determination.**
>
> [133] Once the claimant establishes the existence of reasonable expectations, they must prove conduct which is oppressive.

Wood J. noted that one of the important limitations on the scope of an oppression remedy is the requirement for a connection to the company and its affairs. At para. 135 Wood J. stated:

> …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.

[20] Wood J. referred to the decision of Warner J. in *Merks Poultry Farms Limited v. Wittenberg,* 2010 NSSC 278 at paras. 293 and 294 where Justice Warner found that some of the alleged breaches of the claimant's reasonable expectations were established, but he refused to grant a remedy due to the absence of any significant harm.

[21] Wood J. noted that personal disputes between shareholders or disagreements over management decisions and corporate policies alone are not sufficient to justify judicial interference through an oppression remedy. (para. 136)

[22] Further, Wood J. stated that 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 thecourt 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 added)

[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 added)

[24] **If a claimant establishes the existence of reasonable expectations, he must still prove conduct which is oppressive.** The Supreme Court in *BCE* describes what is required at the second stage of inquiry as follows:

> [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.

[25] Section 5(2) of the Third Schedule of the *Companies Act*, like s. 241 of the *CBCA*, encompasses actions that are "unfairly prejudicial to" or "unfairly disregard" the interests of the stakeholders. In *BCE* the Supreme Court described the scope of these concepts as follows:

> [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: see *Koehnen*, at pp. 82-83.
>
> [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: see *Koehnen*, at pp. 83-84.
>
> [Bold emphasis added]

Analysis

A serious question to be tried or a strong prima facie case?

[33] The Plaintiffs assert that this is typical injunction case where they only seek to maintain *status quo*, and that accordingly, the lower threshold of a "serious issue to be tried" is appropriate.

[34] Novacation disagrees. It says that the Court should look beyond the specific act that the Plaintiffs are seeking to enjoin (the forfeiture notice) and consider the "knock-on" effect of granting the injunction. Should the injunction be granted, Novacation says the effect is to give the Plaintiffs a license to not pay its share of the shareholders assessments, with the result of that being that the other shareholders will be forced pick up this financial slack so that Novacation can pay its bills. This

means that this injunction is not simply about preserving the *status quo*. It is about forcing the other shareholders to finance the Plaintiffs' share of operating deficit of Novacation. This introduces a significant "mandatory" component to this case, as Novacation will have to seek out other financing in order to survive. Given this, it is submitted that the Plaintiffs should be required to meet the higher threshold of "a strong *prima facie* case", as, contrary to what is suggested by the Plaintiffs in their memorandum, what is being sought is not "minimally intrusive".

[35] I do not agree that the potential requirement on the remaining shareholders to pick up the financial slack resulting from the Plaintiffs' failure to pay changes the nature of the injunction from prohibitory to mandatory. At this stage, if the interim injunction is to issue it will only have effect until the application for an interlocutory injunction can be made with diligence and dispatch and on a more complete factual record. Accordingly, in my view the appropriate test as indicated by the authorities is whether there is a serious question to be tried.

Has the threshold been met?

[36] The Supreme Court in *R.J.R., supra,* described the "serious question to be tried" test as having a low threshold requiring only a preliminary assessment of the merits of the case. In *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120, the Saskatchewan Court of Appeal described the first part of the test as follows (para. 113):

> (a) the judge should normally begin with preliminary consideration of the strength of the plaintiff's case. The general rule in this regard is that the plaintiff must demonstrate a serious issue to be tried, i.e. the plaintiff, must have a claim which is not frivolous or vexatious. If the plaintiff raises a serious issue to be tried, it is necessary for the judge to turn to the matters of irreparable harm and balance of convenience.

[37] The first part of the test is a low threshold but a threshold nonetheless. In the context of an oppression claim, the question is whether the Plaintiffs have demonstrated that there is a serious issue to be tried in respect of the required elements of the claim:

> (a) Is there evidence of the reasonable expectations asserted by the shareholder; and

(b) Does the evidence establish that the reasonable expectation was violated by conduct coming within the terms "oppression" or "unfair prejudice" of a relevant interest.

[38] The Plaintiffs in their submissions say (paras. 87 and 88):

> As set out above, it is clear that Novacation's demand on the Plaintiffs that they pay US$97,000 or risk forfeiting their shares meets the threshold that there is a serious question to be tried of whether this act constitutes oppression.
>
> The Plaintiffs submit this is especially clear in light of the history of Novacation's conduct, and the fact that the Plaintiffs specifically advised Novacation it could no longer meet these cash infusions.

[39] The Plaintiffs did not tender any evidence of the history of Novacation's conduct. The only evidence offered by the Plaintiffs is the forfeiture notice. On its face, this is evidence of Novacation acting within its power set out in the Articles. This evidence, by itself, does not permit the court to infer what reasonable expectations are asserted by the Plaintiffs, nor whether the conduct amounts to oppression or unfair prejudice of a relevant interest. It is not sufficient to refer to the allegations in the Statement of Claim and ask the court to assume their truth. As stated above, pleadings of fact, unless admitted in a defence, are simply allegations. As a result, the Plaintiffs' evidence does not meet the low threshold of "a serious issue to be tried".

Is there Irreparable Harm?

[40] In *Injunctions and Specific Performance* (Toronto: Canada Law Book, looseleaf), Sharpe J. provides the following introduction to this issue (at para 2.390, citations excluded):

> An essential factor in determining the appropriateness of an interlocutory injunction is "irreparable harm", a phrase familiar in equity jurisprudence. The remedies of Chancery were traditionally withheld, unless the plaintiff could show that the ordinary legal remedy in damages would be inappropriate or inadequate. **In the context of preliminary injunctive relief, the phrase is given a more specific meaning, namely, that the plaintiff, before the trial, must show an immediate risk of harm that will occur before the case reaches trial and that cannot be compensated or remedied other than through the granting of an interlocutory injunction. The rationale for requiring the plaintiff to show irreparable harm is readily understood. If damages after trial will provide adequate compensation, and the defendant is in a position to pay them, then ordinarily**

> **there will be no justification in running the risk of an injunction pending the trial.**
>
> In *American Cyanamid*, Lord Diplock restated the need for the plaintiff to show irreparable harm as the second step in his formula. The question to be asked, said Lord Diplock, was the following. Assuming that the plaintiff succeeds in the end in establishing a right to a permanent injunction, will damages be adequate compensation for the loss sustained between the time of the application and the trial? "If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage." If damages are an adequate remedy, running the risk of restraining the defendant unjustifiably pending the trial is simply not warranted.
>
> While it is easy to see why the plaintiff should have to show irreparable harm, it is difficult to define exactly what the phrase means.
>
> [Emphasis added]

[41] In *R.J.R., supra*, the Supreme Court of Canada provided guidance as to what constitutes "irreparable harm" at para. 64:

> "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 […]

[42] Referring again to the decision in *Potash, supra*, when evaluating the appropriate standard to be met by a moving party seeking interim relief, the Saskatchewan Court of Appeal held (para. 113):

> ... The general rule here is that the plaintiff must establish at least a meaningful doubt as to whether the loss he or she might suffer before trial if an injunction is not granted can be compensated for, or adequately compensated for, in damages. Put another way, the plaintiff must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.

[43] The Plaintiffs argue in their submissions (paras. 93-98):

> Unlike in a largely held corporation, where share value is readily determinable and a minority shareholder is only entitled to receive the benefit of the increased value of their shares, or any corresponding dividends, Novacation's Articles provide its

> shareholders with a direct seat on the corporation's Board of Directors. [Giles Affidavit, Exhibit "E", Article 2.1(a)]
>
> Accordingly, the Plaintiffs' shareholding in Novacation provides the Plaintiffs with a direct degree of control and oversight over the affairs and operation of the corporation.
>
> In the event this interim relief is not granted, and the Plaintiffs are required to wait until the end of these proceedings to try to claw back their shares from Novacation, any number of irreparable changes could have occurred to Novacation in the interim.
>
> Simply by way of example, the Shareholder Defendants could wind-up Novacation and distribute the proceeds to each other, effectively ending Novacation's existence, and therefore any ability for the Plaintiffs to recover the shares they state were improperly forfeited.
>
> Alternatively, the Shareholder Defendants could simply sell off Novacation's current assets, and completely change the asset holdings and direction of the corporation, all without any input or oversight of the Plaintiffs.
>
> Moreover, even absent such drastic changes, it is clear that there is no monetary compensation that can adequately remedy a party that has been forced to forfeit their right to have input and oversight of a corporation that was established to oversee and formalize that parties' investments.

[44] Novacation replies that whatever irreparable harm the Plaintiffs may suffer, it is entirely within their control to avoid that harm by paying the assessment. There is no evidence that the Plaintiffs cannot pay the amount of the assessment and, in the absence of such evidence, the Plaintiffs cannot argue that the consequences of their decision not to pay results in irreparable harm.

[45] Further, Novacation says that it is trite law that irreparable harm is not established if the damage is capable of being compensated in money. See *Kuksis v. Physical Planning Technologies Inc*., [2004] O.J. No. 4598 (Ont. SC) – paras 28-32; *Kushevsky v. Tulman*, 2014 ONSC 1734 – para 30; *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722 – para 42.

[46] Novacation questions whether irreparable harm can be made out by the loss of a minority position on the board of directors with little ability to impact the course and direction of the company.

[47] I agree with the Respondent that having tendered no evidence of an inability to pay the assessment, the Plaintiffs cannot use the forfeiture consequence to ground an argument of irreparable harm. In addition, the Plaintiffs have not persuaded me

that any damage caused to them as may be established at the trial of this matter cannot be compensated in money damages.

[48] I find that the Plaintiffs have failed to establish irreparable harm.

Balance of Convenience

[49] Where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, the question of balance of convenience arises. Having found that there is no evidence of irreparable harm, there is no necessity to undertake the balance of convenience.

Conclusion

[50] Interim injunction motions involve serious consequences and should not be granted in the absence of **any evidence** of wrongdoing and irreparable harm. The Plaintiffs have failed to meet the burden upon them.

[51] The motion is dismissed with costs. The parties agree that costs should be in the cause. I set the amount of costs at $1,000 pursuant to Tariff C inclusive of disbursements.

[52] Order accordingly.

Norton, J.