SUPREME COURT OF NOVA SCOTIA

Citation: *International Royalty Corporation v. Newmont Canada Corporation*, 2022 NSSC 280

Date: 20221017
Docket: Hfx No. 508374
Registry: Halifax

Between:

International Royalty Corporation, a body corporate

Plaintiff

v.

Newmont Canada Corporation, a body corporate,
Newmont Corporation, a body corporate,
Newmont Canada FN Holdings ULC, a body corporate,
St. Andrew Goldfields Ltd., a body corporate,
Kirkland Lake Gold Ltd., a body corporate, and
Kirkland Lake Gold Inc., a body corporate

Defendants

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 22 and 23, 2022, in Halifax, Nova Scotia
Written Decision:	October 17, 2022
Counsel:	Michelle Awad, K.C., for the Plaintiff Nasha Nijhawan, for the Defendants – Newmont Canada Corporation, Newmont Corporation, and Newmont Canada FN Holdings ULC W. Harry Thurlow, Chelsea Barkhouse, Lara Jackson, and Stephanie Voudouris for the Defendants – Kirkland Lake Gold Inc., Kirkland Lake Gold Ltd., and St. Andrew Goldfields Ltd.

By the Court:

Introduction

[1] This is a motion by the Defendants Kirkland Lake Gold Ltd. ("Kirkland Ontario"), Kirkland Lake Gold Inc. ("Kirkland Canada"), and St. Andrew Goldfields Ltd. ("St. Andrew") (collectively, the "Kirkland Defendants") to: (1) strike the plaintiff's claim against them on the basis that it is clearly unsustainable; or (2) dismiss or stay the action on the basis that the court has no subject-matter jurisdiction, territorial jurisdiction, and/or that Ontario is the more convenient forum. The motion is brought under Civil Procedure Rule 13.03, which governs summary judgment on the pleadings, and Rule 4.07(1), which deals with dismissal for want of jurisdiction.

[2] The Plaintiff, International Royalty Corporation ("IRC"), opposes the motion. The Defendants Newmont Canada Corporation ("Newmont NS"), Newmont Corporation ("Newmont US"), and Newmont Canada FN Holdings ULC ("Newmont BC") (collectively, the "Newmont Defendants") take no position on the motion.

Background

[3] IRC alleges oppressive conduct by the Kirkland Defendants and the Newmont Defendants in relation to the operation of the Holt-McDermott mine located in Ontario (the "Holt Mine") which is owned and operated by St. Andrew, an Ontario corporation organized under the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA").

[4] Until recently, St. Andrew was a subsidiary of Kirkland Canada, a corporation organized under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA"), which was in turn a subsidiary of Kirkland Ontario, a corporation organized under the OBCA. On February 4, 2022, as part of a larger transaction resulting in the merger of Kirkland Ontario with an unrelated company called Agnico Eagle Mines, Kirkland Canada was discontinued as a CBCA corporation and amalgamated with Kirkland Ontario.

[5] The Holt Mine is the subject of a 2004 royalty agreement (the "Royalty Agreement") under which Newmont NS owes certain royalty obligations to IRC. The operation of the Holt Mine has been suspended since April 2020.

[6] In August 2020, Kirkland Ontario, St. Andrew, and Newmont BC, a British Columbia Limited Liability Company, entered a "Strategic Alliance Agreement" with respect to exploration and development opportunities around the Holt Mine and other Ontario properties. The parties agreed that, at such time as the Holt Mine became operational again, either (a) Newmont BC would acquire the mine (with Newmont NS retaining the royalty obligation), or (b) Kirkland Ontario or an affiliate would retain the mine and St. Andrew would assume the royalty obligation. The Holt Mine has remained shuttered since the Strategic Alliance Agreement was executed.

[7] IRC alleges that the Strategic Alliance Agreement was intended to induce the Kirkland Defendants to shutter the Holt Mine permanently, for the sole purpose of depriving IRC of further royalty payments under the Royalty Agreement. IRC says the conduct of the Kirkland Defendants and the Newmont Defendants was oppressive, unfairly prejudicial, and unfairly disregarded the interests of IRC. As a result, IRC says, it is entitled to remedies for oppression under s. 241 of the CBCA and/or s. 5 of the Nova Scotia *Companies Act*, R.S.N.S. 1989, c. 81 (the "NSCA"). In terms of remedy, IRC seeks a damage award of $350 million to compensate it for the loss of future Royalty payments.

The Parties

[8] The plaintiff IRC is a Toronto-based investor in mineral royalties. IRC is a wholly owned subsidiary of Royal Gold Inc. and is the successor by amalgamation to RG Exchangeco and RGLD Gold Canada, Inc., among others. Royal Gold is one of the world's largest mineral royalty and streaming companies, with offices in Toronto, Ontario; Vancouver, British Columbia; Denver, Colorado; and Luzern, Switzerland.

[9] The Defendant Newmont US, incorporated under the laws of Delaware, is the world's largest gold company, operating through a global network of subsidiaries and affiliates. Its Canadian subsidiary, Newmont NS, is incorporated pursuant to the NSCA. Newmont BC, another Newmont entity, is the signatory to the Strategic Alliance Agreement.

[10] Kirkland Ontario is an Ontario-based mining company incorporated under the OBCA. The Kirkland Defendants have their registered and head office in Toronto,

Ontario, with regional offices located in various parts of Ontario and Australia. None of the Kirkland Defendants have any business operations or offices in Nova Scotia.

The Holt Mine and the Royalty Agreement

[11] The following facts are derived entirely from IRC's Amended Statement of Claim.

[12] The Holt Mine was developed in the 1980s by Barrick Gold Corporation ("Barrick"). Since commencing its operations, the Holt Mine, mill, and related facilities (collectively, the "Holt Complex") has produced significant amounts of gold and other precious metals.

[13] In 2004, Barrick shut down its operations and sold the Holt Complex to Newmont NS, then known as Newmont Canada Limited. In connection with the 2004 sale, Newmont NS and Barrick entered into a Royalty Agreement, under which Newmont NS agreed to pay Barrick (or its assigns) a royalty (the "Royalty") on the "net smelter return" from all valuable minerals, including gold, produced from the area of the surface and mineral rights comprising the Holt Mine.

[14] The Royalty Agreement provides that the Royalty, as applied to gold, is calculated quarterly by multiplying the net smelter return for gold: (i) by a 'royalty factor' of 0.00013; and (ii) further by the quarterly average London market price for an ounce of gold. The Royalty, as so calculated, increases and decreases with changes in the London market price for an ounce of gold. In the industry, this type of royalty is known as a "sliding scale" royalty.

[15] Under s. D(9)(a) of the Royalty Agreement, if Newmont NS sold its interest in the surface and mineral rights comprising the Holt Mine, it was required to do so subject to an assumption by the purchaser of its obligations to Barrick under the Royalty Agreement in a form Barrick approved; otherwise, Newmont NS would retain those obligations.

[16] Although the formula for calculating the Royalty was clear, Newmont NS misread the provisions and erroneously believed that the net smelter return royalty for gold was a flat rate of 0.013%.

[17] Following its acquisition from Barrick, Newmont NS consolidated the Holt Complex with its adjacent Holloway mine to create the "Holloway-Holt Gold Camp". In November 2006, Newmont NS sold its interests in the Holloway-Holt

Gold Camp (including its interest in the surface and mineral rights comprising the Holt Mine) to St. Andrew. As part of the sale to St. Andrew, Newmont NS created and retained additional royalties over various areas of the Holloway-Holt Gold Camp, including over the Holt Mine, which were separate from and in addition to the Royalty.

[18] In connection with the sale, Newmont NS did not produce a copy of the Royalty Agreement to St. Andrew. Instead, Newmont NS represented to St. Andrew that the Royalty was a 0.013% royalty on the net smelter returns, which (had it been accurate) would have constituted an immaterial and insignificant burden on the Holt Mine.

[19] In 2007, following the sale to St. Andrew, Newmont NS transferred its royalty holdings (including the additional royalties over the Holloway-Holt Gold Camp that were created in the 2006 sale transaction) to Franco-Nevada Corporation ("Franco Nevada"). Franco Nevada is now the world's largest royalty and streaming company and is a direct competitor to Royal Gold, IRC's parent company.

[20] At some point in 2008, Franco Nevada (then led by former Newmont executives) considered purchasing the Royalty Agreement from Barrick. It was during those considerations that Franco Nevada executives discovered, belatedly, that they had completely misapprehended the proper terms of the Royalty while they were employees of Newmont NS.

[21] In fall 2008, Barrick gave notice to Newmont NS (and Newmont NS subsequently notified St. Andrew) that Barrick intended to sell and assign its interests under the Royalty Agreement to IRC. The sale closed on October 1, 2008.

[22] After learning of the intended sale of Barrick's interests under the Royalty Agreement, Newmont NS asserted for the first time that the Royalty Agreement was ambiguous and unenforceable, and alternatively (or in any event) that St. Andrew had assumed all of Newmont NS's obligations under the Royalty Agreement in connection with the 2006 sale by Newmont NS of its interest in the Holloway-Holt Gold Camp to St. Andrew.

[23] St. Andrew thereafter commenced a court proceeding to determine the parties' respective rights and obligations under the Royalty Agreement.

[24] On July 23, 2009, Roberts J. (as she then was) released her decision in *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd.*, [2009] O.J. No. 3266 (Ont. Sup. Ct. J.) (the "Roberts Decision"). She made the following factual findings:

(a) When the Royalty Agreement was created in 2004, Newmont NS erroneously believed that the Royalty for gold was a flat rate of 0.013% multiplied by the net smelter return for gold;

(b) In actual fact, the Royalty was to be calculated on a sliding-scale, determined by multiplying a factor of 0.013%: (i) by the net smelter return; and (ii) further by the quarterly average London market gold price, resulting in a materially larger obligation;

(c) In selling the Holloway-Holt Gold Camp to St. Andrew, Newmont NS represented to St. Andrew that its erroneous understanding of the Royalty was correct;

(d) Newmont NS did not seek Barrick's approval of St. Andrew's assumption of Newmont NS's obligations as explicitly required under s. D(9)(a) of the Royalty Agreement;

(e) Newmont NS understood that if it did not obtain Barrick's approval, Newmont NS would remain obligated to Barrick under the Royalty Agreement; and

(f) As a consequence of its decisions, Newmont NS retained all obligations to Barrick under the Royalty Agreement, including the obligation to pay the Royalty as correctly calculated.

[25] Justice Roberts stated:

> The [Royalty Agreement] provisions are clear and unambiguous. Barrick is not responsible for Newmont's error. There is no basis for relieving Newmont of its obligations to Barrick or its assigns under the [Royalty Agreement]. Newmont has no one to blame but itself and must bear full responsibility for its own mistakes.

[26] The Roberts Decision was upheld on appeal.

[27] The practical consequence of Newmont NS's conduct in connection with the November 2006 sale transaction and the Roberts Decision is that Newmont NS retains the obligation to pay the Royalty as properly calculated under the Royalty

Agreement, despite having sold the Holt Complex to St. Andrew. In other words, Newmont NS is required to pay the Royalty despite no longer having operational control over the Holt Mine or any interest in net smelter return revenues from which it might pay the Royalty. Instead, because of its own conduct, Newmont NS must pay the Royalty from its general treasury. St. Andrew, as owner of the Holt Complex, is entitled to operate the Holt Mine without regard to the payments due under the Royalty Agreement, which are instead to be paid by Newmont NS.

[28] Following Newmont NS's unsuccessful appeal of the Roberts Decision, Newmont NS, Royal Gold, and St. Andrew entered into an Audit Protocol Agreement dated August 12, 2013 (the "2013 Audit Agreement") so that Newmont NS could obtain the necessary information from St. Andrew to calculate the Royalty to be paid to Royal Gold.

[29] St. Andrew commenced mining operations at the Holt Complex in April 2011. In January 2016, Kirkland Canada acquired St. Andrew, and with it, the Holt Complex.

[30] The Holt Mine operations continued under Kirkland Canada's ownership until April 2020, when Kirkland Canada announced a temporary suspension of operations due to the COVID-19 pandemic.

[31] From April 2011 to April 2020, Newmont NS made Royalty payments totalling US $117 million. Newmont NS also recognized its future obligations under the Royalty Agreement as a liability recorded in its publicly filed financial statements. As of March 2020, Newmont NS's own estimation of its liability for future Royalty payments was US $350 million.

[32] As of December 31, 2019, according to Kirkland Canada's public filings, the Holt Mine contained 90,732 ounces of gold in proven and probable reserves, and a further 394,657 ounces in other resources.

[33] On August 7, 2020, gold prices set an all-time high of $2,067.15 per ounce. Ten days later, Kirkland Ontario and Newmont US issued coordinated press releases announcing that they had entered into the Strategic Alliance Agreement under which Newmont BC would pay Kirkland Canada US $75 million for the option to acquire the mineral rights comprising the Holt Mine that are subject to the Royalty Agreement.

[34] IRC outlines the "true purpose" of the Strategic Alliance Agreement at paras. 43-45 of the Amended Statement of Claim:

> 43. The true purpose of the Strategic Alliance Agreement is confirmed in the defendants' press release, which state that if Kirkland Lake intends to restart operations at the Holt Mine, Newmont is entitled to either take control of the Holt Mine or to transfer the significant obligations it owes to Royal Gold under the Royalty Agreement to Kirkland Lake. **In either case, the Strategic Alliance Agreement ensures (for practical purposes) that mine operations will never restart. In short, the purpose and effect of the Strategic Alliance Agreement is to terminate Newmont's payment obligations to Royal Gold under the Royalty Agreement.**
>
> 44. In its own release, Newmont confirmed that purpose, noting that the Strategic Alliance Agreement would allow Newmont to remove the approximately US $350,000,000 liability for the Royalty from its financial statements, and instead record a gain of approximately US $275,000,000. Newmont subsequently paid the US $75,000,000 sum to Kirkland Lake and recorded the indicated changes to its financial statements.
>
> 45. In its public findings, Newmont has stated the following: "If exercised, the Holt [O]ption will allow [Newmont] to prevent [Kirkland Lake Gold] from mining minerals subject to [the Royalty Agreement]."
>
> (Emphasis added)

Positions of the Parties – Summary Judgment on the Pleadings

[35] IRC says its pleading discloses an established cause of action against all the defendants. IRC submits that the basis for its oppression claim is that its reasonable expectations were frustrated by the joint decision of the Kirkland Defendants and the Newmont Defendants to condemn the Holt Mine, an operating, profitable gold mine with hundreds of millions of dollars in proven and probable reserves. IRC outlines its reasonable expectations in its Amended Statement of Claim at paras. 49 – 50, and 52:

> 49. Net smelter return royalties provide the royalty holder with a percentage interest in the output of a mine. These agreements generally, and the Royalty Agreement in particular, are premised on the expectation that the mine owner will conduct an assessment of a mine's economic viability, including any applicable royalty burden, and determine whether it can be operated on a viable basis. If it can be so operated, the royalty holder expects that the mine will be operated and that

> royalties will flow. This is the fundamental basis on which net smelter return royalties are agreed-upon executed and binding agreements.
>
> 50. As the holder of the Royalty, [IRC] reasonably expected that the owner of the Holt Complex would operate and make decisions in a manner consistent with the foregoing paragraph.
>
> …
>
> 52. As the result of Newmont's conduct, as set out in the 2009 Decision, the owner of the Holt Mine is not liable for the Royalty to be paid under the Royalty Agreement. [IRC's] reasonably held expectations therefore also include that:
>
> (a) Kirkland Lake would make decisions about the economic viability of the mine based on ordinary and expected economic factors, such as capital costs, sustaining costs, any other royalties to the extent payable by Kirkland Lake, and the prevailing price of minerals being produced at the Holt Complex, and without regard to the Royalty burden being borne by Newmont;
>
> (b) Kirkland Lake would not condemn the economically viable and still resource-rich Holt Mine as it did by way of the Strategic Alliance Agreement; and
>
> (c) Newmont would not induce Kirkland Lake to engage in the aforementioned conduct, which effectively eliminates the Royalty Agreement's value on a go-forward basis and harms the owner of the Royalty Agreement.

[36] IRC submits that it has standing as a "proper person" under the CBCA and the NSCA to commence oppression proceedings against the Newmont Defendants and the Kirkland Defendants.

[37] The Kirkland Defendants say IRC's oppression remedy claim against them is unsustainable because: (1) IRC is not a "complainant", as defined by s. 241 of the CBCA and/or s. 5 of the NSCA; and (2) the conduct complained of does not relate to IRC's interest as a "securityholder, director, officer, or creditor" vis-à-vis the Kirkland Defendants.

[38] The Kirkland Defendants submit that IRC has not pleaded any relationship with, obligation to, benefit from, or interest in any of the Kirkland Defendants sufficient to ground a claim for an oppression remedy. They point out that IRC's own pleadings recognize that St. Andrew, as owner of the Holt Mine, "is not liable for the Royalty to be paid under the Royalty Agreement", and "is entitled to operate the Holt Mine without regard to the payments due under the Royalty Agreement, which are instead to be paid by Newmont." The Kirkland Defendants submit that IRC's claim against them should be struck as it is plain and obvious that it discloses

no reasonable cause of action and is clearly unsustainable. They say that if IRC has a valid legal claim against anyone, it is against the Newmont Defendants for breach of the Royalty Agreement.

The Law of Summary Judgment on the Pleadings

[39] The requirements for pleadings are contained in Civil Procedure Rules 38.02 and 38.03:

> **38.02 General principles of pleading**
>
> (1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.
>
> (4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.
>
> **38.03 Pleading a claim or defence in an action**
>
> (1) A claim or defence in an action, and a claim or defence in a counterclaim, crossclaim, or third party claim, must be made by a statement of claim that conforms with Rules 4.02(4) and 4.03(5), of Rule 4 - Action, or a statement of defence that conforms with Rule 4.05(4) of Rule 4.
>
> (2) The following additional rules of pleading apply to all pleadings in an action:
>
> (a) a description of a person in pleadings must not contain more personal information than is necessary to identify the person and show the person's relationship to a claim or defence;
>
> (b) claims or defences may be pleaded in the alternative, but the facts supporting an alternative claim or defence must be pleaded distinctly;
>
> (c) a pleading that refers to a material document, such as a contract, written communication, or deed must identify the document and concisely describe its effect without quoting the text, unless the exact words of the text are themselves material;

(d) a pleading that alleges notice is given must state when the notice was given, identify the person notified, and concisely describe its content without quoting the text, unless the exact words of the text are themselves material.

(3) A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice.

[40] Rule 13.03 governs summary judgment on the pleadings. It reads:

Summary judgment on pleadings

13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

(a) it discloses no cause of action or basis for a defence or contest;

(b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;

(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) judgment for the party making a claim, when the statement of defence is set aside wholly;

(b) dismissal of the proceeding, when the statement of claim is set aside wholly;

(c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;

(d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:

(a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;

> (b) the outcome of the motion depends entirely on the answer to the question.

[41] In *Canada (A.G.) v. Walsh*, 2016 NSCA 60, the Court of Appeal summarized the principles on a motion to strike pleadings:

> [17] The parties share common ground that:
>
> 1. The test for summary judgment on pleadings requires the Court to assume that the facts pleaded by the plaintiffs are true;
> 2. The motion can only succeed if the claims disclose "no cause of action", and are "clearly unsustainable", (Civil Procedure Rule 13.03(1), *Eisener v. Cragg*, 2012 NSCA 101 at ¶ 9).
>
> [18] These principles are too well known to warrant extensive recapitulation. A recent example in the negligence context is *R. v. Imperial Tobacco Canada*, 2011 SCC 42, where Chief Justice McLachlin discussed the principles applicable to striking out claims on pleadings. They can be summarized:
>
> • Claims should only be struck if it is "plain and obvious" that they cannot succeed.
>
> • The power to strike out claims is "a valuable housekeeping measure which weeds out hopeless claims". This power promotes efficiency in the conduct of litigation and correct results, both serving the interests of litigants and the administration of justice.
>
> • The power to strike should be used with care. The law evolves. The court should be generous and err on the side of permitting novel, but arguable, claims to proceed.
>
> • The pleadings are assumed to be true, and no evidence is admissible on the motion. Claimants cannot rely on the possibility that new facts may turn up. They must plead facts material to the causes of action they assert.

[42] In *Wright v. Ratcliffe*, 2022 NSSC 128, Campbell J. described the purpose of summary judgment on the pleadings:

> [22] The purpose of summary judgment on pleadings is to remove cases that clearly have no chance of succeeding at trial. If an action is certain to fail because it contains a radical defect it should be struck. A claim will be struck if, assuming the facts stated in the pleadings can be proven, it is still plain and obvious that the pleadings cannot succeed.
>
> [23] The power to strike must be used with the acknowledgment that the law evolves. Courts should of course permit novel but arguable cases to proceed. But there is no reason to allow a case to slowly creep toward an inevitable but distant and costly conclusion.

> [24] That seems to be the fundamental distinction. There is a difference between a case that is destined to fail because it is barred by statute or does not actually make a claim based in any law or makes claim based on a misunderstanding of the law, and a case that may appear from the pleadings to be a bit of a long shot. Sometimes long shots change the law. Summary judgment on pleadings culls from the court docket cases that should never be allowed to see the inside of a courtroom. A summary judgment on pleadings motion is not a standard first step in defending litigation and it is not a way to prejudge the merits of arguable cases.

[43] While facts contained in the pleadings are taken to be true on a motion to strike, bald allegations in the nature of bad faith, malice, and abuse of power must be particularized. In *Kasheke v. Canada (Attorney General)*, 2017 NSSC 61, aff'd 2018 NSCA 2, Leblanc J. stated:

> [27] The requirement to assume the truth of facts pleaded is not unqualified. The Supreme Court of Canada noted in *Imperial Tobacco* that "[a] motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven": para. 22. Further, it has been held that bald allegations in the nature of bad faith, malice, and abuse of power do not constitute material facts for pleading purposes unless they are particularized: see, for instance, *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184, [2010] F.C.J. No. 898, at paras. 34-38; *Adventure Tours Inc. v. St. John's Port Authority*, 2011 FCA 198, [2011] F.C.J. No. 875, at paras. 25-26 and 63. This principle is also recognized in Civil Procedure Rule 38.03(3), which provides that "[a] pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice."

[44] These are the principles I must apply in determining whether it is plain and obvious that the plaintiff's claim against the Kirkland Defendants cannot succeed.

The Oppression Remedy

[45] Sections 241(1) and 241(2) of the CBCA provide:

> **Application to court re oppression**
>
> 241 (1) A complainant may apply to a court for an order under this section.
>
> **Grounds**
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation 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 corporation or any of its affiliates are or have been exercised in a manner

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.

[46] Section 238 contains the following definition of "complainant":

complainant means

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

[47] Section 241(3) sets out the court's broad remedial powers:

Powers of court

241(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 corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(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 corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

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

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 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 corporation under section 243;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and

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

[48] The Nova Scotia counterpart to s. 241 of the CBCA is s. 5 of the Third Schedule to the NSCA:

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.

[49] A "complainant" for the purpose of s. 5 is defined at s. 7(5)(b) as follows:

"complainant" means

(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.

[50] Like the CBCA, the NSCA gives the court broad powers to rectify oppressive conduct:

> 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.

[51] In *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, the Supreme Court of Canada, *per curiam*, noted that the oppression remedy "focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a

corporation or its directors. This remedy is available to a wide range of stakeholders - security holders, creditors, directors and officers" (para. 45).

[52] To determine whether a complainant has a valid claim for oppression, the court must conduct two related inquiries:

> (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?
>
> (*BCE*, at para. 68)

[53] Before discussing each of the "twin prongs" of the oppression inquiry, the court in *BCE* made two important observations:

> [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, Koehnen, 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.

[54] The Supreme Court of Canada described the first prong of the inquiry as follows:

> [60] Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:
>
> > The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and

> obligations inter se which are not necessarily submerged in the company structure.
>
> [61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the CBCA. **It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.**
>
> [62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> [63] Particular circumstances give rise to particular expectations. **Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context**: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.
>
> [64] Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. **The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".**
>
> (Emphasis added)

[55] Factors 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 (*BCE*, at para. 72).

[56] As to the second prong of the oppression inquiry, the court stated:

> [67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[57] The Supreme Court of Canada revisited the oppression remedy in *Wilson v. Alharayeri*, [2017] 1 S.C.R. 1037. In that case, Côté J., for the court, set out the principles governing remedial orders under s. 241(3) of the CBCA, including:

> **[A]ny order made under s. 241(3) may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders** (*Naneff*, at para. 27; *Smith v. Ritchie*, 2009 ABCA 373, at para. 20 (CanLII)). The oppression remedy recognizes that, behind a corporation, there are individuals with "rights, expectations and obligations inter se which are not necessarily submerged in the company structure" (*Ebrahimi*, at p. 379; see also *BCE*, at para. 60). **But it protects only those expectations derived from an individual's status as a security holder, creditor, director or officer. Accordingly, remedial orders under s. 241(3) may respond only to those expectations.** …
>
> (para. 54)

[58] Considerable time was spent by the parties on whether IRC falls within the definition of a "complainant" under the CBCA and the NSCA. In its Amended Statement of Claim, IRC pleads that it has standing as a "proper person" pursuant to both pieces of legislation. IRC submits that this statement "is enough to clear this threshold on a Rule 13.03 summary judgment motion on pleadings, where the pleaded facts are assumed to be true" (IRC brief, para. 77). IRC further says the Kirkland Defendants are "asking this Court to *exercise* its discretion to make the substantive, factual finding that IRC is not a 'proper person'", which is "entirely inappropriate on a pleadings motion" (IRC brief, para. 78). The Kirkland Defendants argue that whether IRC has standing under the CBCA or the NSCA is a legal question which the court is entitled to determine under Rule 13.03(5). They say IRC cannot avoid summary judgment by merely pleading that it is a proper person where the material facts do not support that conclusion.

[59] In my view, the decisive issue on this motion is not whether IRC is a "proper person" under the legislation, but whether IRC's expectations derived from its status as a security holder, creditor, director, or officer of any of the Kirkland Defendants. If not, they are not protected by the oppression remedy. In David S. Morritt, Sonia L. Bjorkquist & Allan D. Coleman, *The Oppression Remedy* (Toronto: Thomson Reuters Canada, Looseleaf, (12/2020)), the authors note in relation to standing under the CBCA:

> Under s. 241 of the *Canada Business Corporations Act* ("CBCA"), a "complainant" can seek an order granting relief from oppression. Section 238 of the CBCA contains the following standard definition of "complainant" ….
>
> Because s. 238(d) gives the court broad discretion to determine who is a proper person to make an application regarding oppression, the CBCA does not limit the range of individuals who can obtain relief. However, s. 238(d) must be read along with the latter part of s. 241(2) of the CBCA, which identifies the individuals who have interests the court will protect, namely, "any security holder, creditor, director or officer". **This, more than the definition of complainant, will effectively limit the range of parties who have an interest sufficient to obtain standing to seek relief.**
>
> (Emphasis added)

[60] IRC says its interest is that of a direct or indirect creditor of the Kirkland Defendants. IRC states in its brief:

> 82. The term "creditor" is not defined in the CBCA. However, its ordinary dictionary meaning is "one to whom a debt is owing". In the circumstances outlined in its claim, IRC is a direct contractual counterparty to, and either a direct or indirect creditor of, the [Kirkland] Defendants.
>
> 83. But for the execution of the Strategic Alliance Agreement, IRC pleads that the [Kirkland] Defendants would continue to operate the Holt Mine as and when economically appropriate to do so, and that IRC would be owed Royalty payments when due. **St. Andrew – the wholly owned subsidiary and direct affiliate of [Kirkland Canada] – is responsible for paying a portion of the Royalty to Newmont Nova Scotia, which then pays the Combined Royalty to IRC.** Moreover, St. Andrew's obligations – both to pay a portion of the Royalty, and to provide the ongoing financial disclosure necessary for the calculation of the entire Royalty – are codified in the 2013 Audit Agreement, to which IRC is a contractual counterparty. The parties to the Audit Agreement are all parties to this litigation, either directly or through their affiliates.
>
> (Emphasis added)

[61] The Kirkland Defendants submit, and I agree, that the bolded statement is inaccurate. As IRC's own pleadings make clear, Newmont NS alone is liable to IRC for the Royalty payments. There is no support in IRC's pleadings or in the Roberts Decision for the notion that St. Andrew has any obligation to pay a portion of the Royalty payment to IRC, whether directly or through Newmont NS as intermediary. Put differently, the facts as pleaded are incompatible with the existence of a creditor-debtor relationship – direct or indirect – between IRC and St. Andrew.

[62] IRC also relies on *Radford v. MacMillan*, 2018 BCCA 335, which it says makes clear that indirect creditors can avail themselves of the oppression remedy. In that case, MacMillan served as the sole director, president, and officer of Purcell Basin Minerals Inc., a mining company which had been formed through a restructuring process. Two Purcell shareholders, Radford and Lacey, alleged that MacMillan had engaged in oppressive or unfairly prejudicial conduct which had harmed their interests. Their complaint focused on a series of transactions through which MacMillan caused Purcell to issue shares to himself or companies he controlled, thereby effectively giving him control of the company to safeguard against an anticipated attempt by shareholders to remove him from his position. MacMillan also used that control to grant himself a favourable compensation package he failed to disclose to shareholders, and to extend secured loans from Purcell to his private companies. MacMillan took the position that his conduct was consistent with Purcell's best interests. The trial judge found that MacMillan's conduct constituted oppression and granted a series of remedies that effectively set aside the impugned transactions.

[63] At trial and on appeal, MacMillan argued that the oppression remedy was not available because the petitioners had not suffered loss or damage that was separate and distinct from the indirect harm suffered by all Purcell shareholders. The petitioners argued that it was not necessary to show a harm specific to them separate and distinct from other shareholders, only that it was a direct harm to them and not simply indirect harm from a wrong to the corporation. In any event, the petitioners said their harm *was* distinct from that of other Purcell shareholders because: (1) they were minority shareholders, as opposed to MacMillan and his companies who, because of MacMillan's actions, became majority shareholders; and (2) they were also creditors through their interests in CuVeras, a company which had made substantial loans to Purcell. The Court of Appeal, *per* Harris J.A., summarized the trial judge's conclusion on whether separate and distinct harm had been established:

> [43] Ultimately, the judge determined that the petitioners had shown separate and distinct harm. First, the Share Issuance to Mr. MacMillan altered control and influence among the shareholders. Mr. Lacey, while still a minority shareholder, had previously held the most shares and the influence that came from that position. Though Mr. Radford had fewer shares, his position relative to Mr. MacMillan was also affected. Mr. MacMillan's actions resulted in him becoming the largest shareholder, with 45% of the issued shares, even after the adjustment outlined in the Moretti Agreements. Including the shares held by Mr. MacMillan indirectly through HPP and Highlands, he held 48.87% of the issued shares, granting him effective control of Purcell and diminishing the influence of the petitioners.
>
> [44] Second, the petitioners were separately affected through their involvement with CuVeras, which had initially held a first priority promissory note. **As contributors to CuVeras, the petitioners have a unique interest in the repayment of that amount, making them indirect creditors of Purcell.** Mr. MacMillan's actions had caused the priority of CuVeras' notes to be subordinated to entities controlled by him and had delayed the obligation to repay CuVeras. **The CuVeras Note required Purcell to inform CuVeras if the priority of its note was at risk and to do everything possible to protect it. This obligation was unfulfilled and led to harm to the petitioners.**
>
> [45] Third, Purcell's failure to disclose financial information and hold meetings caused particular harm to the petitioners, given their relationships with CuVeras.
>
> (Emphasis added)

[64] The Court of Appeal affirmed the trial judge's finding that the petitioners had suffered separate and distinct harm through the dilution of their shareholding interest, contrary to their reasonable expectations. Harris J.A. acknowledged that shareholders generally do not have a right or expectation not to be diluted. In this case, however, the trial judge concluded that the impugned transactions went beyond indirectly affecting the position of all shareholders. Instead, the dilution was part of a deliberate plan to diminish the influence of the petitioners, not in the interests or Purcell, but in the interests of Mr. MacMillan. The Court of Appeal disagreed, however, with the trial judge's finding that the petitioners suffered separate and distinct harm sufficient to ground an oppression claim through their involvement in CuVeras:

> 71 The judge founded his conclusion of separate and distinct harm on a second consideration. He concluded the petitioners suffered distinct harm as stakeholders in CuVeras because of the impact on its priority position and the consequences for CuVeras of the compensation arrangements: see para. 114.
>
> 72 In respect of this issue, I incline to the view that the judge erred in principle in his analysis. **In my view, it is not evident that the interest the petitioners had in**

> **CuVeras gave them a direct interest in their capacity as shareholders in Purcell sufficient to ground an oppression claim.** I am prepared to accept that one or both petitioners had an interest in CuVeras, which in turn had an economic interest in the affairs of Purcell as a creditor. **At best then, any interest the petitioners had in Purcell through CuVeras was indirect or derivative and was not an interest in their capacity as shareholders of Purcell. CuVeras is not a party to the petition and it is unclear whether it could invoke an oppression remedy in its own name. To put the matter another way, I am not persuaded that the petitioners' status as stakeholders in CuVeras confers on them, as shareholders in Purcell, the right to invoke an oppression remedy arising from alleged wrongs to CuVeras that prejudiced CuVeras' interests.** However, it is not necessary definitively to decide this issue, which I would leave to another day, because any error is not material to the ultimate result.
>
> (Emphasis added]

[65] The *Radford* decision is not helpful to IRC. It does not establish that indirect creditors who are not shareholders of the debtor corporation can avail themselves of the oppression remedy. Moreover, while not definitively deciding the issue, the Court of Appeal was "not persuaded" that indirect creditors who *are* shareholders in the debtor corporation have the right to invoke an oppression remedy.

[66] I am conscious that the power to strike a claim must be used with care, and that novel but arguable cases should be permitted to proceed. At the same time, hopeless claims must not be allowed to "slowly creep toward an inevitable but distant and costly conclusion" (*Wright*, *supra*). In my view, it is plain and obvious that IRC's oppression claim against the Kirkland Defendants cannot succeed.

[67] The oppression remedy "protects only those expectations derived from an individual's status as a security holder, creditor, director or officer" of a corporation (*Wilson*, *supra*). Remedial orders under the CBCA and the NSCA may respond *only* to those expectations (*Wilson*, *supra*). In this case, IRC is not a security holder, creditor, director, or officer of any of the Kirkland Defendants. Nor is IRC in an arguably analogous position to any of these persons, such as a potential shareholder, a warrantholder, or a beneficial owner of shares. IRC has no direct financial interest in how any of the Kirkland Defendants are being managed. St. Andrew has no monetary obligation to IRC under the Royalty Agreement or any other agreement. Its only contractual obligation vis-à-vis IRC is to provide the information necessary to calculate the Royalty to be paid by Newmont NS to IRC. While IRC might have had certain expectations, based on its experience with net smelter return royalties, as to how St. Andrew, as owner of the Holt Mine, would operate that asset, those

expectations are not protected by the oppression remedy. If IRC has a valid legal claim against any of the Kirkland Defendants, it is not for an oppression remedy.

[68] The motion for summary judgment on the pleadings is granted. Those portions of the Amended Statement of Claim that pertain to the claim against the Kirkland Defendants are set aside and the claim is dismissed.

[69] Having so concluded, it is not necessary for me to consider the Kirkland Defendants' alternative grounds for dismissal of the claim.

Conclusion

[70] The motion for summary judgment on the pleadings is granted.

[71] If the parties are unable to agree on costs, I will accept written submissions within 30 days of the release of this decision.

McDougall, J.