

SUPREME COURT OF NOVA SCOTIA

Citation: *André Lavandier Inc. v. Pamela Malik*, 2023 NSSC 200

Date: 20230622

Docket: BW No. 515969

Registry: Bridgewater

Between:

André Lavandier Inc.

Applicant

v.

Pamela Malik, Pamela Malik Inc., Ideal Optical Company Limited

Respondents

Decision

Judge: The Honourable Justice Peter Rosinski

Heard: May 11, 2023, in Bridgewater, Nova Scotia

Counsel: Tracy Smith, for the Applicant
Michael Blades, for the Respondents

By the Court:

Introduction

[1] Ideal Optical Company Limited [“Ideal Optical”] was incorporated in Nova Scotia in 1984. Dr. Pamela Malik has practised optometry in association with Ideal Optical since that time. She is also the sole director and officer of Pamela Malik Inc. [“Malik Hold Co.”] which presently holds two thirds of Ideal Optical’s shares.

[2] Dr. André Lavandier has practised optometry since 1992 and worked with Dr. Malik as an employee of Ideal since 1996. In 2006 Dr. Lavandier, through André Lavandier Inc. [“Lavandier Hold Co.”] became a shareholder with Malik Hold Co., and it still presently holds one third of Ideal Optical’s shares.¹

[3] By early 2020, serious disagreements had arisen between Dr. Malik and Dr. Lavandier.

[4] Dr. Lavandier believed that the corporate accountant for Ideal Optical failed to provide appropriate and timely tax advice to Ideal Optical and Dr. Malik which adversely impacted Dr. Lavandier’s tax liability; and that the accountant had acted while in a conflict of interest by providing advice to Ideal Optical that advantaged Dr. Malik and others, at the expense of Dr. Lavandier.²

[5] By January 2021 Dr. Lavandier had left Ideal Optical and was practising optometry nearby.

[6] **On June 17, 2022, Lavandier Hold Co. filed a Notice of Action against Ideal Optical, Dr. Pamela Malik, and Malik Hold Co. claiming breach of**

¹ Dr. Lavandier’s counsel stipulated during submissions for the record that he shares ownership of this Hold Co. with his wife Siobhan Doyle. For convenience herein, I will sometimes refer to Malik Holdco as personified by “Dr. Malik” and likewise refer to Lavandier Hold Co. as “Dr. Lavandier”.

² Dr. Lavandier formally submitted a complaint on May 22, 2020, to the appropriate licensing body – Chartered Professional Accountants Nova Scotia (“CPANS”). This complaint [Exhibit 20 to the Malik affidavit] was wholly dismissed by the CPANS’s Investigation Panel on February 25, 2021 [Exhibit 21 to the Malik affidavit] Dr. Lavandier made no mention then of “audited” financial statements, nor did he in his March 11, 2021 email – Exhibit 19 Malik affidavit; or April 5, 2021 counsel letter Exhibit 22 Malik affidavit.

fiduciary duty, breach of contract and oppressive conduct. At paras. 55- 58, **Lavandier Hold Co. claims:**

The requirement for audited financial statements can be waived under section 118 of the *Companies Act* if there is unanimous consent from all shareholders.

Dr. Lavandier has not consented to forgoing audited financial statements for the years 2020 and 2021, yet Dr. Malik has refused to comply, and Ideal Optical has not provided audited financial statements.

Dr. Lavandier seeks audited financial statements to understand the full picture of Dr. Malik's mishandling of Ideal Optical's finances.

The Plaintiff has brought an Application [in Chambers] in this Court for an Order requiring Ideal Optical to prepare audited financial statements, as is required under the *Companies Act*.³

[7] On June 17, 2022, Lavandier Hold Co. filed this Notice of Application in Chambers requesting the following relief:

... an Order directing that:

Ideal Optical to appoint an auditor as required under section 117 (9) of the *Companies Act*.

If the parties cannot agree on an auditor within 20 days of the date of the order, the court shall appoint an auditor;

...

[further clauses regarding the carrying out of the audit are omitted]...

After the audit is complete, Ideal Optical shall produce these audited financial statements to the Applicant as required under section 119B of the *Companies Act* for years ending December 31, 2020 and December 31, 2021.⁴

³ The Defendants filed a Notice of Defence with Counterclaim and a Notice of Claim against Third Parties on November 7, 2022. A Notice of Defence to the counterclaim was filed on March 10, 2023.

⁴ Ideal Optical's fiscal year is the calendar year. An amended Notice of Application in Chambers was filed also requesting the records for 2022. Ideal Optical formally acknowledged on the record (and in its May 5, 2023, brief at para. 19) that it is prepared to have those records audited and made available. Dr. Lavandier was agreeable to this, and the matter was not further argued before me regarding the 2022 calendar year financial statements.

[8] At that hearing, affidavits were filed, only by Dr. Lavandier and Dr. Malik, and both were cross-examined.⁵

[9] In summary, I conclude that:

1. Ideal Optical effectively complied with s. 83 of the Nova Scotia *Companies Act*, RSNS 1989, c. 81 (the “*Act*”) and held its annual general meeting for 2020 (regarding the 2019 fiscal year) on February 28, 2020, and for 2021 (regarding the 2020 fiscal year) on or about April 13, 2021, and for 2022 (regarding the 2021 fiscal year) on or about April 22, 2022.
2. Although pursuant to s. 117(1) of the *Act* Ideal Optical was required to appoint auditors to audit the financial statements of the company at each of its annual general meetings, unless all shareholders consented not to do so, Lavandier Hold Co. impliedly consented for both fiscal years 2020 and 2021, and therefore Ideal Optical was not required to appoint auditors at the annual general meetings on February 28, 2020 and April 13, 2021.
3. A proper interpretation of ss. 117(9), 119B and 121 of the *Act* reveals that auditors appointed at an annual general meeting, are only statutorily required to audit the financial statements of a company prospectively. For example, if they are appointed at the April 13, 2021, annual general meeting, then they are only required to audit the

⁵ Generally, I found Dr. Lavandier and Dr. Malik both to be credible witnesses, however in relation to certain material matters where there are differences of recollection and evidentiary content, I accept Dr. Malik’s evidence over that of Dr. Lavandier’s. For example, Dr. Lavandier stated in cross-examination that there had been no “annual general meetings” held in the calendar years 2020, 2021 or 2022. It must be borne in mind that for Ideal Optical, given the circumstances and the arguments made in this application, only the following four parties are required to be present for an annual general meeting: the shareholders – Malik Hold Co. and Lavandier Hold Co.; and the Directors – Dr. Malik and Dr. Lavandier. At para. 9 and 27 of his affidavit, he stated: “On February 28, 2020 myself, Dr. Malik and [Ideal’s accountant] had a year-end meeting to discuss Ideal Optical’s financials for 2019...”. This reference is consistent with Dr. Malik’s evidence that historically the company held “year-end” reviews/meetings to review and discuss the financial statements for the preceding fiscal/calendar year. Dr. Lavandier agreed in cross-examination that the 2020 fiscal year financial statements were received by him on or about April 13, 2021, and the 2021 fiscal year financial statements were received by him on or about April 22, 2022 – see also Exhibit 24 to the Malik affidavit and paras. 35 and 36 of Dr. Lavandier’s affidavit. **I find that the reference to a year-end [review] meeting tended to happen by May of the following fiscal/calendar year, and this was Ideal Optical’s historical practice. Moreover, I conclude that this “year-end” meeting/review was treated by the shareholders and directors of Ideal Optical as the “annual general meeting”.** Consistent with that practice Dr. Lavandier received the March 24, 2022, dated financial statements for 2021 in April 2022 (Exhibit 8 Malik affidavit). It was not disputed by Dr. Lavandier that the first time he expressly demanded that the financial statements be audited, was in a March 25, 2022, counsel letter, and then next in June 2022 - see paras. 48 and 59 of Dr. Malik’s affidavit.

financial statements for the calendar year 2021 and present their findings at the annual general meeting for that fiscal year held in 2022.

4. Because no auditors were appointed at the February 28, 2020, annual general meeting, (the 2019 financial statements were available and dated February 27, 2020 - see Exhibit 7 Malik affidavit) there is no statutory requirement for audited financial statements for the fiscal year 2020, when such statements were presented at the 2021 annual general meeting, similarly at the April 13, 2021, annual general meeting for 2020 financial statements, audited 2021 financial statements were not required when they were presented at the April 22, 2022 annual general meeting.
5. Since Lavandier Hold Co. (impliedly) consented in February 2020 and April 2021, at the annual general meetings to waive the requirement for the appointment of auditors, as a matter of law, such consent cannot later be merely “revoked” by Lavandier Hold Co., as a shareholder – and, as a matter of fact I find there was no purported “revocation” of the February 28, 2020 and April 13, 2021 consents until November 23, 2021 when Lavandier Hold Co.’s counsel sent a letter to Ideal Optical.
6. Dr. Malik sincerely believed that: after the January 7, 2021, meeting with Dr. Lavandier (paras. 40 and 43 Affidavit) that Dr. Lavandier was definitely leaving Ideal Optical, and intended to sell the shares in Lavandier Hold Co. (which he co-owned with his wife Siobahn Doyle who was present at that meeting); Dr. Lavandier did start working with a nearby optometry business that same month (para. 45), and “ceased discharging his duties as a director of Ideal”.⁶

⁶ Dr. Lavandier stated in his Reply Affidavit (para. 10): “I specifically dispute the suggestion that I did not request any annual general meeting during either of these calendar years [2021 and 2022]. A request was specifically made on November 23, 2021, and February 3, 2022, through letter sent on my behalf by my legal counsel.” I am satisfied that Dr. Lavandier was well aware, based on the past history of the company that the year-end reviews took place by May of the following calendar year. He made no request for an “annual general meeting” until November 23, 2021, (1 month before the year-end of 2021). This late request tends to confirm that he impliedly consented to what he expected would be the continuation of Ideal Optical’s historical practice that there would be no audited financial statements. Surely if he were truly serious about having audited statements of the 2021 calendar/fiscal year he would’ve expressly said so before November 23, 2021. I observe here that by as early as April 5, 2021, he had already retained legal counsel to address these issues by letter - see Exhibit 22 Malik affidavit. Dr. Lavandier also still remained a nominal Director of the Company, since his formal resignation was not signed until November 16, 2021. Moreover, the request is so late, that no annual general meeting could have been held in any event because

[10] The core question before me is, whether pursuant to s. 117(9) of the *Act*, I should direct that Ideal Optical appoint an auditor who shall produce audited financial statements for the fiscal years ending December 31, 2020 and December 31, 2021.

[11] I am not satisfied that the requested Order, should be granted.

[12] Therefore, the Application is dismissed.

Background

[13] Corporations have shareholders [owners], directors [those responsible to account to the shareholders] and officers [those actively managing corporate operations].

[14] At all relevant times, the following circumstances prevailed:

1. shareholders – Malik Hold Co. two-thirds; Lavandier Hold Co. one-third;
2. directors – Dr. Malik and Dr. Lavandier.⁷

The Nova Scotia *Companies Act*

[15] Corporations incorporated under the *Act*, are subject to its provisions. Of significance here are the following sections:⁸

the last annual general meeting was February 28, 2020. The next general meeting must be held no later than 15 months thereafter (s. 83 *Act*) – May 28, 2021.

⁷ Small or closely held private corporations typically place importance on ensuring control and privacy of their operations and information. To this end, often they have the same individuals hold one or more, or all of, these roles. I note the Shareholders Agreement which prevailed is found at Exhibit 1 to the Malik affidavit. I am satisfied by the evidence that Dr. Lavandier perceived himself to be disenfranchised as a Director (and Shareholder) by Dr. Malik after the February 28, 2020 meeting; nevertheless he did remain as a Director in an official capacity until at least November 16, 2021 when he signed his resignation notice, which was communicated to Ideal Optical by his counsel's letter November 23, 2021 - Exhibit 25 Malik affidavit.

⁸ While s. 118 of the *Act* permits exemption from the requirement to file audited financial statements, it should be recalled that this is repeated in s. 192 of the *Management of the Company Limited by Shares Regulations* made under the *Companies Act*. In *H&N Enterprise Inc. v. Novacation Inc.*, 2022 NSSC 88, (“*Novacation*”) Justice Norton stated: “[33] Section 192 of the *Management of a Company Limited by Shares Regulations* made under the *Companies Act* further describes the exemption as follows: **192 (1)** If all of the members of the Company consent thereto, the provisions of these Articles and Sections 117 and 119 to 119B of the *Act* regarding the

MEETINGS AND PROCEEDINGS

Annual meeting

83 (1) A general meeting of every company shall be held once at the least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every director, manager, secretary and other officer of the company, who is knowingly a party to the default, shall be liable to a penalty not exceeding two hundred dollars.

(2) When default has been made in holding a meeting of the company in accordance with this Section, the court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.

...

Representative of body corporate

86 (1) A body corporate, whether a company within the meaning of this Act or not, may

(a) if it is a member of another body corporate, being a company within the meaning of this Act, by resolution of its directors or other governing body authorize such person as it thinks fit to act as its representative at any meeting of the company or at any meeting of any class of members of the company;

...

(2) A person authorized as aforesaid shall be entitled to exercise the same powers on behalf of the body corporate which he represents as that body corporate could exercise if it were an individual shareholder, creditor or holder of debentures of that other company. R.S., c. 81, s. 86; 2007, c. 34, s. 27.

...

Shareholder resolutions without meeting

92 (1) A resolution, including a special resolution, in writing and signed by every shareholder who would be entitled to vote on the resolution at a meeting is as valid as if it were passed by such shareholders at a meeting and satisfies all the requirements of this Act respecting meetings of shareholders.

appointment of auditors and duties of auditors do not apply with respect to the financial year in respect of which the consent is given.”

(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of proceedings of general meetings. R.S., c. 81, s. 92; 2007, c. 34, s. 33.

AUDITORS

Appointment, removal, remuneration and rights of auditor

117 (1) Every company shall, at each annual general meeting, appoint an auditor or auditors to hold office until the next annual general meeting.

(2) If an appointment of an auditor is not made at an annual meeting, the directors of the company shall appoint an auditor of the company to hold office until the next annual general meeting.

(3) The first auditor or auditors of the company may be appointed by the directors at any time before the first annual general meeting, and auditors so appointed shall hold office until that meeting.

(4) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(5) The remuneration of the auditor or auditors of a company shall be fixed by the company in general meeting, or by the directors pursuant to an authorization given by the shareholders at the annual meeting, except that the remuneration of an auditor appointed before the first annual general meeting or of an auditor appointed to fill a casual vacancy may be fixed by the directors, and that the remuneration of an auditor appointed by the Governor in Council may be fixed by the Governor in Council.

(6) The members may, except where the auditor has been appointed by order of the court pursuant to subsection (9), by resolution passed by a majority of the votes cast at a special meeting duly called for the purpose, remove an auditor before the expiration of the auditor's term of office and shall, by a majority of the votes cast at that meeting, appoint another auditor in his stead for the remainder of the term.

(7) Before calling a special meeting for the purpose specified in subsection (6) or an annual general or special meeting where the directors are not recommending the re-appointment of the incumbent auditor, the company shall, fifteen days or more before the mailing of the notice of the meeting, give to the auditor

(a) written notice of the intention to call the meeting, specifying therein the date on which the notice of the meeting is proposed to be mailed; and

(b) a copy of all material proposed to be sent to members in connection with the meeting.

(8) An auditor has the right to make to the company, three days or more before the mailing of the notice of the meeting, representations in writing concerning

- (a) the auditor's proposed removal as auditor;
- (b) the appointment or election of another person to fill the office of auditor; or
- (c) the auditor's resignation as auditor,
and the company, at its expense, shall forward with the notice of the meeting a copy of such representations to each member entitled to receive notice of the meeting.

(9) If a company does not have an auditor, the court may, upon the application of a member or the Registrar, appoint and fix the remuneration of an auditor to hold office until an auditor is appointed by the members.

(10) The company shall give notice in writing to an auditor of the auditor's appointment forthwith after the appointment is made.

(11) A resignation of an auditor becomes effective at the time the written resignation is sent to the company or at the time specified in the resignation, whichever is later. R.S., c. 81, s. 117; 1990, c. 15, s. 12.

Exemption from Sections 117 and 119 to 119B

118 In respect of a financial year of a company, the company is exempt from the requirements of Section 117 and Sections 119 to 119B regarding the appointment and duties of an auditor where

- (a) the company is not a reporting issuer or a reporting company;
- (b) all of the members consent thereto in respect of that year.

Examination of financial statements

119B (1) An auditor of a company shall make such examination of the financial statements required by this Act to be placed before members in a general meeting as is necessary for the auditor to report.

(2) The audit required by this Act and the report of the auditor referred to in this Act shall be conducted and prepared in accordance with the standards and report which are recommended from time to time in the CPA Canada Handbook.

...

(6) Upon the demand of an auditor of a company, the present or former directors, officers, employees or agents of the company shall furnish such

- (a) information and explanations; and
- (b) access to records, documents, books, accounts and vouchers of the company or any of its subsidiaries, as are, in the opinion of the auditor, necessary to enable the auditor to make the examination and report required pursuant to this Section and that the directors, officers, employees and agents are reasonably able to furnish.

(7) Upon the demand of the auditor of a company, the directors of a company shall

- (a) obtain from the present or former directors, officers, employees and agents of any subsidiary of the company the information and explanations that the present or former directors, officers, employees and agents are reasonably able to furnish and that are, in the opinion of the auditor, necessary to enable the auditor to make the examination and report required pursuant to this Section; and
- (b) furnish the information and explanations so obtained to the auditor.

(8) Any oral or written communication pursuant to this Section between the auditor or former auditor of a company and its present or former directors, officers, employees or agents or those of any subsidiary of the company has qualified privilege.

...

FINANCIAL STATEMENTS

Information for annual general meeting

121 (1) The directors of every company shall place before the company at each annual general meeting

- (a) in the case of a company that is not a reporting issuer, financial statements for the period that began on the date of incorporation of the company and ended not more than six months before the general meeting or, if the company has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the general meeting;

...

- (c) the report of the auditor, if any, to the members;
- (d) in the case of a company that is a reporting issuer, the report of the directors; and

(e) any further information respecting the financial position of the company and the results of its operations required by the articles of the company.⁹

(2) The financial statements and the report of the auditor, if any, thereon which are placed before a general meeting shall be open for inspection by the members entitled to be present.

(3) The directors of every company shall, not less than seven days, or such greater length of time provided for in the articles, before the date of a general meeting or before the signing of a resolution pursuant to Section 92 in lieu thereof, send to all members who hold voting securities of the company and all other members who are entitled to receive notice of a general meeting of the company, in the manner in which notices are required to be served by the articles of the company, the financial statements required to be placed before the general meeting and the report of the auditor, if any, thereon.

(4) The directors of every reporting issuer shall send to each member who holds voting securities of the reporting issuer every interim financial statement which the reporting issuer is required to file pursuant to Section 83 of the Securities Act concurrently with the filing thereof pursuant to that Section.

(5) Notwithstanding subsections (3) and (4), a company shall not be required to send financial statements to any person who has given notice to the company that that person does not wish to receive the financial statements and report of the auditor, if any, thereon to which that person would otherwise be entitled, provided that any such person may revoke such notice on seven days prior written notice given to the company.

(6) Any member of a company who does not hold voting securities and any holder of debentures of a company shall be entitled to be furnished, on demand and without charge, with the latest

(a) financial statements required to be sent to the holders of its voting securities pursuant to subsection (3), together with the report of the auditors, if any, thereon; and

(b) financial statements required to be sent to the holders of its voting securities pursuant to subsection (4). 1990, c. 15, s. 14.

Content and approval of financial statements

122 (1) The financial statements required to be placed before the annual meeting of the company shall include those prescribed by the regulations prepared for or as at the end of

⁹ The complete Articles of Association of Ideal Optical are not in evidence. An excerpt thereof was introduced into evidence in the Malik affidavit at para. 8. I take from this that all parties are satisfied that those not presented in evidence are not material to the present motion.

the applicable period and, where a recommendation has been made in the CPA Canada Handbook which is applicable in the circumstances, in accordance with the principles so recommended and the provisions of this Act and the regulations.

(2) The financial statements of a company shall be approved by the directors and the approval shall be evidenced by the signature at the foot of the balance sheet by two of the directors duly authorized to sign or by the director where there is only one, and the report of the auditor thereon, unless the company is exempt pursuant to Section 118, shall be attached to or accompany the financial statements and, where so exempt, a statement to that effect shall be attached to or accompany the financial statements.¹⁰

(3) A company shall not issue, publish or circulate copies of the financial statements referred to in Section 121 unless the financial statements are approved and signed in accordance with subsection (2);

(a) approved and signed in accordance with subsection (2); and

(b) accompanied by the report of the auditor thereon unless the company is exempt pursuant to Section 118, in which event a statement to that effect shall accompany the financial statements. 1990, c. 15, s. 14; 2007, c. 34, s. 37; 2015, c. 30, s. 145.

[My underlining and bolding throughout]

Why it is not appropriate to order an auditor to be appointed to review and audit the company's financial statements for the fiscal years, 2020 and 2021

[16] Let me start with some observations.

A - The “year-end” meetings functioned as “annual general” meetings, and Lavandier Hold Co. impliedly consented to their informal nature (including continuously impliedly consenting to Ideal Optical being exempted from appointing auditors)

¹⁰ I conclude it is unlikely that before Dr. Lavandier's November 16, 2021 written resignation, both Directors approved/signed, the 2020 fiscal year financial statements of Ideal Optical which were available to both in April 2021, and that it is likely Dr. Lavandier would have expected them to be available then based on his lengthy past experience with Ideal Optical. I accept Dr. Malik's evidence that: “I considered that I was the only acting Director of Ideal and therefore I was entitled to appoint Ideal's accountant” (para. 48); by April 13, 2021 Ideal had finalized its 2020 financial statements as ready for income tax filing, and these deadlines loomed; these financial statements were sent to Dr. Lavandier's counsel on or about April 13, 2021; but until November 23, 2021, Dr. Lavandier did not request a formal 2021 “annual general meeting”. By then, the maximum permissible 15 months since the last annual general meeting (February 28, 2020) had passed on May 28, 2021. Based on Ideal Optical's Articles of Association (referenced by Dr. Malik at para. 8 of her affidavit) as sole Director, Dr. Malik was entitled to sign the 2020 fiscal year financial statements before May 28, 2021.

[17] I am satisfied that Dr. Lavandier was content to take a more passive role in the operations of Ideal Optical and left the core of its management to Dr. Malik.¹¹

[18] More generally, I conclude that Ideal Optical's *laissez-faire* adherence to the strictures of the *Act*, was continuously (impliedly) consented-to at all material times by both shareholders, Malik Hold Co. and Lavandier Hold Co, and by Dr. Malik and Dr. Lavandier as Directors.¹²

[19] Section 117 requires that the “company shall, at each annual general meeting, appoint an auditor or auditors to hold office until the next annual general meeting.”

[20] Section 83(1) requires annual general meetings to “be held once at least in every calendar year and not more than 15 months after the holding of the last preceding general meeting”; and includes: “and, if not so held, the company and every director, manager, secretary. and other officer of the Company, who is knowingly a party to the default, shall be liable to a penalty not exceeding \$200.”

[21] Section 83(2) reads:

When default has been made in holding a meeting of the Company in accordance with this section, the court may, on application of any member of the Company, call or direct the calling of a general meeting of the company.

[22] Although the *Act* mandates a number of things that must be done, such as the holding of annual general meetings, for some closely held private companies, strict adherence to the provisions of the *Act* may not be “top of mind” for shareholders/directors’ and officers – formality may be an afterthought.

[23] That can be said of the corporate machinations of Ideal Optical in the relevant time periods here.

[24] I am satisfied that this lack of strict adherence was continuously impliedly consented-to by both Dr. Malik and Dr. Lavandier, over all relevant time periods here, and that was specifically the case in relation to the requirement for holding

¹¹ This may have been the case because he recognized that Dr. Malik was the majority shareholder, and they were each Directors, so that they had to agree on what to do, or else it may not get done.

¹² In cross-examination, Dr. Lavandier conceded that, although he is now criticizing Dr. Malik for, in his opinion, not having “annual general” meetings for the 2019 and 2020 fiscal years (in 2020 and 2021), he did not on a timely basis request them earlier.

“annual general meetings”,¹³ and formally waiving the requirement for the appointment of auditors at that time.

[25] Dr. Lavandier acknowledged in re-direct examination, that he believed it was the responsibility of the Directors of Ideal Optical to call an annual general meeting. He nominally remained a Director until November 16, 2021, however he did not attempt to, or actually purport to, exercise any of the authority he had as a Director of Ideal Optical after January 2021.¹⁴

[26] Until his counsel’s untimely letter of November 23, 2021, he had not once demanded the holding of an annual general meeting to review the 2020 fiscal year financial statements, which had been compiled as of April 6, 2021 – see Exhibit 7 to Dr. Malik’s affidavit; and which were received by him on or about April 13, 2021.

[27] His counsel’s November 23, 2021, letter (Exhibit 25 Malik affidavit) to Ideal Optical’s counsel, included the following:

Further to our conversations in late August, you inquired whether our client still considered himself to be a Director of the Company. As you can appreciate our client has not been privy to any financial information and has not only exercised no control over Ideal Optical he has been effectively cut out of any decisions related to Ideal Optical since late 2020. Our client has, in effect not acted as a Director in over a year... [noting that Dr. Lavandier’s resignation as a Director is attached] although my client is not a Director, ... Lavandier Hold Co. remains a shareholder. As such, [its] rights under the Act and the Shareholders Agreement continue. Reciprocally, the responsibilities of Pamela Malik and [Malik Hold Co.] remain in force. These obligations include, but are not limited to:

...

Ideal Optical must cause [2021] year-end audited financial statements to be prepared at its expense by an auditor approved by both shareholders; and both shareholders must sign off on the audited financial statements prior to the submission of income tax returns for Ideal Optical.

We note the referenced requirement for the financial statements to be subjected to audit. Prior to 2021 our client had been engaged in the operations of the business, since 2020 your client has not consulted Mr. Lavandier on any business decisions and has not

¹³ For example, I observe here that Dr. Lavandier refers to a February 28, 2020, meeting, as “a year-end meeting to discuss Ideal Optical’s financials for 2019”. (para. 9 affidavit).

¹⁴ He had already retained counsel in relation to his interests in Ideal Optical by April 5, 2021, when his counsel wrote to Ideal Optical’s counsel.

provided financial disclosure to him, other than in the form of unaudited year-end financial statements. In the context of my client's resignation as Director, it is important that an independent third-party assurance about the finances of Ideal Optical by [sic] obtained and our client will be enforcing that statutory right.

...

Annual General Meeting

Our clients look forward to receiving audited Financial Statements for 2021 and look forward to receiving notice of the Annual General Meeting.

[My underlining added]

[28] The evidence establishes that:

1. from 2006 onward Dr. Malik's Hold Co. and Dr. Lavandier's (and Ms. Doyle's) Lavandier Hold Co. were the only shareholders of Ideal Optical.
2. it was the "consistent historical practice, and the ordinary course of business, for Ideal Optical to commission its annual financial statements from an external accountant on a compilation level of assurance." (para. 16 Malik affidavit)
3. it was the "consistent historical practice, and ordinary course of business, for all shareholders and directors of Ideal Optical to impliedly consent to having Ideal Optical's annual financial statements prepared on a compilation, rather than audit, level of assurance." (para. 17 Malik affidavit)
4. "it has been the consistent historical practice, and ordinary course of business, for all shareholders and directors of Ideal Optical to, at or near the beginning of each fiscal year, make decisions regarding the preparation of the upcoming fiscal years financial statements. Such discussions would only focus upon who would be Ideal Optical's external accountant, because as noted above it was always implied and understood that the level of assurance for financial statement preparation would be compilation." (para. 18 Malik affidavit)

[29] I conclude that what were referred to as Ideal Optical's "year-end" meetings,¹⁵ including I infer, a similar one likely held on or about April 13, 2021, (for review of 2020 financial statements), were intended by all the parties to be the statutorily required "annual general meeting", *inter alia*, to review financial matters for the preceding year, and provided an opportunity to consider other business as well, including whether to waive the requirement for auditors for the present fiscal/calendar year.¹⁶

B - Lavandier Hold Co. as a shareholder, and Dr. Lavandier as a Director, did not in a timely manner give notice to Ideal Optical that (as they later claimed), they were not consenting to waiving the requirement for audited financial statements (as they had every year since 2006 when Lavandier Hold Co. became a shareholder) for the fiscal/calendar years 2020 and 2021; nor did they give any indication to Ideal Optical that they wanted to attend the 2021 and 2022 calendar year annual general meetings¹⁷

[30] I conclude that there were no verbal timely serious demands for audited statements, and that the written requests are the earliest requests for such statements.

¹⁵ Those "year-end" meetings, took place after the financial statements for the preceding calendar year had been compiled, and those statements were available at some point between January 31 and May 1 of each calendar year. For example, see previous years' "Minutes" of meetings (May 22, 2018; April 24, 2019; February 28, 2020) found at Exhibits 9, 10 and 11 to Dr. Malik's affidavit.

¹⁶ I am satisfied that: on or about April 13, 2021, (and April 22, 2022) Dr. Malik had a 2020 (2021) "year end"/annual general meeting with the corporate accountant and Ms. Rhonda Haines as she usually would have done in the past; there was no evidence that a representative from Lavandier Hold Co. made a timely request to attend, nor did one attend. Although he nominally remained a Director until November 16, 2021, I infer that Dr. Lavandier/Lavandier Hold Co. did not request to attend, nor did he/Lavandier Hold Co. attend-although they had received the 2020 and 2021 financial statements on or about April 13, 2021 and April 22, 2022 respectively.

¹⁷ I am satisfied that Dr. Lavandier received unaudited compilation level financial statements for 2020 and 2021 on or about April 13, 2021 and April 22, 2022. At para. 37 of his affidavit Dr. Lavandier stated "... Additionally, the financial statements are not audited, notwithstanding my repeated requests for audited statements,". He was asked during cross-examination: "where are such requests for audited 2020 statements?" He replied: "Not in writing, for sure." He was later asked whether the first written demand for the 2020 financial statements to be audited was when he filed his June 17, 2022 Application. He responded "it seems to be the case". As I noted elsewhere, his counsel's letter of March 25, 2022, did demand that an auditor be appointed to review the 2020 financial statements: "This rings true for the 2020 financials as well." He similarly confirmed in cross-examination that when it was put to him that the first request for audited statements of any year came as a result of his counsel's November 23, 2021 letter. To this he answered "yeah".

[31] In Lavandier Hold Co.'s counsel's letter dated May 8, 2023, their Reply position is stated as follows:¹⁸

The Ideal Optical Inc. fiscal year corresponds with the calendar year end. Therefore, financial statements cannot be completed (either in an audited form or notice to reader/compilation format) until the following fiscal year. **The financial statements appended to the affidavit of Dr. Malik confirm that financial statements have typically been completed by [the corporate accountant] in or around the end of March of the following calendar year.**

The evidence confirms that an express request for audited financial statements was made in [November 23 of] the 2021 calendar year... In the current proceeding the Applicant is not seeking audited financial statements going back a significant number of years. Rather, the Applicant is only requesting audited financial statements for those years when concerns with accounting and corporate finances were raised. Specifically, 2020, 2021 and 2022. ...

We equally note that the suggestions that there was a 'forward-looking practice' of making decisions about the accountant at the 'beginning' of the year [original footnote: "See Brief of the Respondents paragraph 13, 17(a) and 18(e) and (f)"] is not borne out in the evidence itself.... The issues around the identification of the corporate accountant was first raised in the last quarter of the 2020 fiscal year (meeting in October 2020), which is far from the 'beginning' of the year.

The requirement for audited financial statements in 2020, 2021 and 2022 were not implicitly waived by the Applicant's statements or conduct."¹⁹

[My bolding and underlining added]

[32] The "year-end review" meetings of the previous fiscal year were held in the first months of the next fiscal/calendar year, which was the time most suited to consider *inter alia*, the state of the company's finances, including other matters such as whether there would be unanimous consent by all shareholders for exemption from having audited financial statements, and that decision was always made at that time.

¹⁸ Firstly, I note here that who would be appointed as the "corporate accountant" is not necessarily the same question as whether there would be an auditing of Ideal Optical's financial statements and who would be appointed to do so – although each is to be determined at the "year-end review"/annual general meetings, since a Corporation could decide to engage both. I conclude that since 2015 the same corporate accountant has continuously been Ideal Optical's accountant for all purposes. He had Dr. Malik's confidence respecting his suitability throughout - and had Dr. Lavandier's confidence until at least May 2020 (according to Dr. Malik in cross-examination; and when Dr. Lavandier filed a formal complaint against the corporate accountant, with CPANS on May 22, 2020).

¹⁹ As noted elsewhere there is agreement that the 2022 fiscal year financial statements will be audited.

[33] The legislation does not require attendance at the meeting as a prerequisite to effectively consenting to exemption from having audited financial statements.

[34] Although I reference the “year-end review”/annual general meetings, as the time “most suited” to (and when they did) consider, whether to consent to exemption from audited financial statements, shareholders’ **expressed consent** to that effect could also be communicated to the proper persons to record same **before** the annual general meeting takes place.

[35] In Nova Scotia, “**implied consent**” is also a possible means of satisfying the legislation’s requirement that “all of the members consent thereto [i.e. exemption from having to have audited financial statements] in respect of that year” - see Justice Norton’s decision in *Novacation*.

[36] Whether a court can conclude that there is implied consent will depend on the presence of credible and reliable evidence proving this fact on a balance of probabilities.

[37] I find there is a constellation of facts here that forms a consistent picture – i.e. in spite of the disagreements between Dr. Lavandier and Dr. Malik, it is unlikely had he attended the annual general meeting in April 2021, that Dr. Lavandier/Lavandier Hold Co. would have not continued to implicitly consent to exemptions from having to have audited financial statements for 2021.

[38] Dr. Lavandier and Lavandier Hold Co. have consented (with Malik Hold Co.) to an exemption from the statutory requirement for audited financial statements for each fiscal year from 2006 onward until at least 2020 (e.g., see Exhibit 6 to Dr. Malik’s affidavit).²⁰

[39] I conclude that Dr. Lavandier/Lavandier Hold Co. found it was to their advantage to do so, and they were content to continuously consent to this exemption during those years.

[40] The credible and reliable evidence satisfies me that they implicitly consented in spite of their absence from the meeting – or otherwise stated: they would have

²⁰ The February 28, 2020 “year-end meeting” which Dr. Lavandier attended, was the annual general meeting for that year.

implicitly consented had they been present at the April 2021 annual general meetings.²¹

[41] I come to this conclusion based on the evidence and considering among other things, although Dr. Lavandier had left his optometry practice at Ideal Optical in January 2021:

1. he was well aware that the financial statements for 2020, and the following fiscal year 2021, would likely be compiled for income tax purposes by May of each of those years, and thus Lavandier Hold Co. was legally entitled somewhat contemporaneously to receive them (which they did receive in April 2021 and 2022 I find);
2. he was well aware that the annual general meeting would likely be taking place before May of each of those years (yet they either decided not to make timely inquiries regarding when the 2021 annual general meeting would be taking place, or if they were aware, they decided not to attend);
3. he and Lavandier Hold Co. had an ongoing significant financial interest in Ideal Optical in 2021 and 2022;
4. he and Lavandier Hold Co. wanted Dr. Malik/Malik Hold Co. (or another optometrist who might join the practice at Ideal Optical) to purchase their shares;
5. they recognized that Dr. Lavandier was personally at risk to be sued by Ideal Optical for a breach of a non-competition clause;
6. they did not demand audited financial statements until November 23, 2021, for the fiscal year 2021, and March/June 2022 for the fiscal year 2022;
7. although Dr. Lavandier remained a Director of Ideal Optical until November 16, 2021, and through Lavandier Hold Co. a shareholder, he/they did not demand the holding of an annual general meeting for 2021 until November 23, 2021 (which is far past the statutorily dictated deadline of May 28, 2021).

²¹ In Dr. Lavandier's initial affidavit (filed June 17, 2022) he stated that: "the request ["to seek an independent auditor ... or to pay dividends to Lavandier Hold Co.,"] was specifically asserted in letters from my counsel to Dr. Malik's counsel on November 23, 2021, February 22, 2022, and March 25, 2022." The November 23, 2021 letter is included in Dr. Malik's affidavit (filed April 14, 2023). That first letter made the following demands for: "audited [2021] financial statements" and confirms that Dr. Lavandier was present at the February 28, 2020 meeting when the auditors requirement was waived for the 2020 fiscal year.

[42] Expressed consent (to waive the requirement for audited financial statements) given **before** the actual general meeting takes place can be expressly revoked at²² or before the annual general meeting.

[43] On the other hand, contrary to Dr. Lavandier’s position herein, I conclude that consent given (whether expressed or impliedly), which is not expressly revoked by proper notice to the Company before the issue is conclusively dealt with at the annual general meeting, cannot be revoked **afterwards** by shareholders.²³

[44] The request by Lavandier Hold Co. for an order to compel audited financial statements for 2020 and 2021 is based only on s. 117 of the *Companies Act*. An incidental question also arises here. Once appointed, which fiscal years (i.e. past and present?) are the auditors statutorily required to audit as expressly set out or limited by the wording of s. 117 of the *Act*?:

(1) Every company shall, at each annual general meeting, appoint an auditor or auditors to hold office until the next annual general meeting.

[My bolding and underlining added]

[45] Section 119B of the *Act* reads, under the heading - “Rights of auditor”:

(1) An auditor of a company shall make such examination of the **financial statements required by this Act to be placed before members in a general meeting** as is necessary for the auditor to report.²⁴

[My bolding added]

²² That is, including up until the issue is conclusively dealt with at the meeting. I am satisfied that, similarly, implied consent can be inferred to have been given, with or without the shareholder doing so, being present at the meeting.

²³ Of course, a shareholder who does object may make timely application to the court for the sought-after relief.

²⁴ I conclude that the use of the wording: “to be placed before members”; rather than: “that have been placed before members”; signals that the mandatory appointment of auditors is intended to apply prospectively – that is, their statutory responsibility in relation to the financial statements is restricted to those that will be presented at the next annual general meeting, following their appointment.

[46] Reference to s. 121 of the *Act* [Information for annual general meeting] further informs the meaning of the wording in s. 119B:

(1) The directors of every company **shall place before the company at each annual general meeting**

(a) in the case of a company that is not a reporting issuer, **financial statements for the period that began on the date of incorporation of the company and ended not more than six months before the general meeting or, if the company has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the general meeting;**²⁵

...

(c) The report of the auditor, if any, to the members;²⁶

...

[My bolding added]

[47] Reading these sections, while keeping in mind the principles of statutory interpretation arising in the jurisprudence, reinforce my conclusions in the next several paragraphs²⁷ as does reference to the *Interpretation Act*, RSNS 1989, c. 235:

Interpretation of words and generally

9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

(2) “Now”, “next”, “heretofore” or “hereafter” in an enactment refer to the time when the enactment comes into force.

²⁵ For example, with a December 31, 2020 fiscal year-end, and April 13, 2021 year-end review/annual general meeting, auditors appointed at that annual general meeting, are not appointed to examine the 2020 financial statements, but rather the 2021 fiscal year statements.

²⁶ This report must necessarily be intended to relate to the immediately preceding fiscal year.

²⁷ See *Contours Ltd. v. I.H. Mathers & Son Ltd.*, 1993 NSCA 145, and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 117-118.

- (3) In an enactment, “shall” is imperative and “may” is permissive.
- (4) “Herein” used in a Section or provision of an enactment relates to the whole enactment and not to that Section or provision only.
- (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
- (a) the occasion and necessity for the enactment;
 - (b) the circumstances existing at the time it was passed;
 - (c) the mischief to be remedied;
 - (d) the object to be attained;
 - (e) the former law, including other enactments upon the same or similar subjects;
 - (f) the consequences of a particular interpretation; and
 - (g) the history of legislation on the subject.

[48] Had auditors, for the first time, been appointed at the April 2021 annual general meeting pursuant to s. 117 of the *Act*, given the reference in s. 119B to “financial statements required by this Act to be placed before members in a general meeting” (and considering s. 121 (1)), their statutory obligation could only apply prospectively-namely, to financial statements compiled for the annual general meeting in 2022, once the relevant fiscal year (2021) is concluded.

[49] Based on s. 117(9), Lavandier Hold Co. seeks the appointment of an auditor to examine the financial statements of the 2020 and 2021 fiscal years.²⁸

[50] Lavandier Hold Co. suggests that pursuant to s. 117(9) of the *Act*, the Court can order the appointment of auditors regarding any past financial years (i.e. 2020 and 2021), as Justice Norton appeared to do so in *Novacation* (paras. 40-42). I am sceptical that s. 117(9) itself was intended to reach back to effect such, except insofar as they can be required to audit financial statements for the fiscal year in

²⁸ See in particular paras. 16-19 of the Amended Notice of Application in Chambers.

which the Application is made (2022) and perhaps incidentally thereto the preceding fiscal year (2021).

[51] My authority is argued to arise from s. 117 of the *Act*, and is restricted thereby.²⁹

[52] Section 117(1) contemplates such appointments at each annual general meeting to be prospective:

to hold office until the next annual general meeting.

[53] Such auditors conceivably could be asked by the company, in addition to their statutory responsibilities, on “special request” terms to audit the previous year’s financial statements (e.g. 2020 fiscal year in present circumstances). However, based on the circumstances here, they would be statutorily required to audit only the financial statements to be submitted at the “next annual general meeting” - i.e. those for the fiscal year of their appointment.

[54] Notably in *Novacation*, the Order issued related to completed fiscal years, pursuant to a motion brought under ss. 117, 119, 121 and section 5 of the Third Schedule of the *Companies Act*. The facts are otherwise not distinguishable from those present here. Justice Norton concluded that:

...on the oppression argument, the Plaintiffs have provided no basis for me to conclude that the lack of financial disclosure amounts to oppression. (para. 39)

[My underlining added]

[55] In the case at Bar, on this Motion, Lavandier Hold Co. has not expressly argued that the lack of audited financial statements amounted to oppression as in *D’Aublin v. MacDonald*, 2021 NSCA 55, per Farrar JA. Lavandier does not

²⁹ This is confirmed on review of the claimed source of authority in the Amended Notice of Application in Chambers and the Applicant’s initial Brief (paras. 9 and 21) and Reply Brief. Section 117(9) reads: If a company does not have an auditor, the court may upon the application of a member or the Registrar, appoint and fix the remuneration of an auditor to hold office until an auditor is appointed by the members. [My underlining added] This provision seems to have a “stop gap” purpose – e.g. if a company is obligated by s. 117(1) to appoint auditors at its annual general meeting, yet neglects to do so or is unable to do so, and the directors are also unable to do so per s. 117(2), the company will be without auditors while legally obligated to have them. Similarly, s. 117(9) may be triggered when the auditors prematurely end their appointment. When “a company does not have an auditor”, a shareholder may apply to the court for the appointment of an interim auditor “until an auditor is appointed by the members”. This “stop gap” merely seeks to effect the appointment of auditors – whose statutory responsibility is limited to their prospective auditing of the financial statements starting with the fiscal year in which they are appointed.

expressly rely on s. 5 of the Third Schedule, but rather only relies on s. 117(9) of the *Act*. Had it intended to rely on s. 5 of the Third Schedule, I would have found this argument unpersuasive.³⁰

[56] I am inclined to the view that Lavandier Hold Co.’s request for the 2020 financial statements to be audited pursuant to s. 117(9) of the *Act* is misplaced. However, if “oppression” had been established, that remedy is available pursuant to s. 5(3) of the Third Schedule to the *Companies Act*, which permits an order to appoint auditors to audit past years financial statements. That did not happen here.

[57] Had Lavandier Hold Co. taken the matter of the 2020 (and 2021) financial statements seriously, even though it made no timely requests for audited 2020 and 2021 financial statements, it could have opted to make its Application to this Court seeking “oppression” remedies available in the Third Schedule to the *Act*.³¹

[58] As Justice Farrar stated in *D’Aubin v. MacDonald*, 2021 NSCA 55, (released July 9, 2021):

Issue 1: Did the application judge err in finding the failure to provide proper financial records constituted oppression?

22 The Third Schedule of the *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

³⁰ To the extent that Counsel was suggesting that Justice Norton’s reasons allow me, in the absence of “oppression”, to grant an order under s. 117 to require audited financial statements for past years, I must respectfully disagree. It may be that established “oppression” conduct per s. 5 of the Third Schedule provides the authority to do so. It appears the parties in *Novacation* did not ask themselves if s. 117(9) should be interpreted as I interpret it, and consequently the issue was not drawn to Justice Norton’s attention.

³¹ In cross-examination, Dr. Lavandier conceded that although he is now criticizing Dr. Malik for not having annual general meetings for the 2020 and 2021 fiscal years (in 2021 and 2022), on behalf of Lavandier Hold Co. he did not on a timely basis request them.

(c) the powers of the directors of the company 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.

23 The Third Schedule also sets out a non-exhaustive list of the remedies available under the oppression remedy:

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,

...

(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;

24 Wilson, supra, discussed the factors which can be considered by a trier of fact when considering an oppression remedy:

[23] The nature of the oppression remedy is well recognized in our jurisprudence. **Section 241 creates an equitable remedy that "seeks to ensure fairness — what is 'just and equitable'" (BCE Inc., at para. 58). It gives "a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (ibid.). Courts considering claims for oppression are therefore instructed to engage in fact-specific, contextual inquiries looking at "business realities, not merely narrow legalities" (ibid.).**

[24] **The two requirements of an oppression claim are equally well known. First, the complainant must "identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held" (BCE Inc., at para. 70). Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of "any security holder, creditor, director or officer," pursuant to s. 241(2). As stated above, the presence of these two elements is not at issue in this appeal.**

25 The application judge recognized the task before him:

[23] What is required is a highly fact specific analysis. It is important to bear in mind that what may be "oppression" in one set of circumstances may not amount to such in

another. The onus is upon the Applicant to show on a balance of probabilities that the conduct complained of was oppressive, and to justify the remedy(ies) sought.

...

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

[My bolding added]

[59] I will nonetheless proceed as if I have the authority to grant the relief sought by Dr. Lavandier.

[60] Dr. Lavandier quit his employment with Ideal Optical and left the business premises in early January 2021.

[61] His untimely request for auditing of the 2021 fiscal year financial statements was first made in November 2021.

[62] Lavandier Hold Co. argues that it did not consent to there being no auditors appointed for the fiscal year 2020 and 2021, and therefore Ideal Optical was statutorily required to appoint auditors for those two fiscal years.

[63] Firstly, I am satisfied more likely than not that Lavandier Hold Co., although absent from the April 13, 2021, “year-end review”/annual general meeting, impliedly consented to:

1. there being such a meeting in 2021 in its absence; and
2. no auditors being appointed for the fiscal year 2021.

[64] Lavandier Hold Co. had the benefit of counsel as early as April 5, 2021, and I infer it was, at least by then, and likely earlier, aware that:

1. as a shareholder it was entitled to receive in a timely manner, financial information, and specifically financial statements for 2020 and 2021;
2. it was entitled to be present at shareholder meetings, and specifically the annual general meetings of 2021 and 2022.³²

³² In Mr. Blades “April 6, 2020” [2021] letter to Dr. Lavandier’s counsel (Exhibit 23 Malik affidavit) he stated: “As a general comment, I am advised that your clients have been repeatedly told that they are free to visit the company’s clinic to access and review any company financial information they wish – which invitations have never been acted

[65] I infer that Lavandier Hold Co. was aware that the financial statements for 2020 fiscal year would likely be available by April 2021, (and likewise in April for the 2021 year). Moreover, those financial statements were sent to it in mid-April 2021 (and April 2022).

[66] Lavandier Hold Co. was aware from the consistent past practice of Ideal Optical that the next step was to have all matters addressed that would permit the 2020 (2021) fiscal year statements to be filed for income tax assessment.

[67] I infer that Lavandier Hold Co. had a financial interest in not holding up the tax filing of those documents, as late filing could result in penalties to Ideal Optical, which *inter alia*, could adversely affect Lavandier Hold Co.'s shareholdings value,³³ and interfere with sale of its shares (as communicated by Lavandier Hold Co., regarding the possible receipt of outstanding dividends payments - see for example Exhibit 26 Malik affidavit, second to last page of his counsel's letter dated February 3, 2022).

[68] There is no reliable basis in the evidence to conclude that, much before these proceedings began on June 17, 2022, Dr. Lavandier complained to Dr. Malik/ Ideal Optical, about the lack of, or insisted upon there being held, another "annual general meeting" in 2021, or one in 2022 (other than regarding 2021, in his untimely November 23, 2021 letter; and regarding 2022 fiscal year, the March 25, 2022 letter [Exhibit 27 Malik affidavit] which warned of the filing of the suit herein, which was filed on June 17, 2022).³⁴

upon for reasons unknown to my clients. Also, I am advised that, in the wake of your client's abandoning the company's operations, only such decisions which are in the normal course of business have been made by Dr. Malik.... Your clients, by their conduct, forced Dr. Malik into a situation of having to be solely responsible for 'steering the ship' day-to-day... I look forward to hearing from you at your earliest opportunity." Mr. Blades wrote again a week later to Lavandier Hold Co.'s then counsel and noted: "In the meantime, the company's accountant has finalized the 2020 year-end financial statements of the company. Those are enclosed herewith." (Exhibit 24 Malik affidavit). Notably, there is no evidence that Lavandier Hold Co. responded to these letters in writing, until November 23, 2021 – although in that letter Ms. Smith did state: "Further to our conversation in late August ...".

³³ Moreover, I infer that the shareholders of Lavandier Hold Co. had a specific time-sensitive interest, as they hoped to sell their shares as soon as reasonably possible to either Dr. Malik or a new optometrist who would join Ideal Optical's practice - see Dr. Lavandier's email to Dr. Malik January 19, 2021, Exhibit 17 Malik affidavit.

³⁴ In Dr. Lavandier's counsel's November 23, 2021, letter to Ideal Optical it disingenuously stated: "Our clients look forward to... receiving notice of the [2021] annual general meeting" – Exhibit 25 Malik affidavit. Dr. Lavandier last attended one of these "annual general meetings" on February 28, 2020. As I noted elsewhere, the statutory deadline to hold the 2021 annual general meeting was May 28, 2021. Moreover, **as Dr. Malik stated at para. 54: "Dr. Lavandier did not request an annual general meeting during the calendar year 2021, once 2020 financial statements had been prepared and were available... Dr. Lavandier had already abandoned and began**

[69] I am satisfied that:

1. Dr. Lavandier³⁵ knew that he (as a Director and shareholder of Lavandier Hold Co.) and Lavandier Hold Co. were entitled to have the financial statements for 2020 and 2021, and although he did not request them in April 2021 or April 2022, nevertheless he/they did receive them in a timely manner from Ideal Optical; and
2. that Dr. Lavandier and Lavandier Hold Co. expected that likely there would be a “year-end review”/annual general meeting in or about April 2021 and April 2022, and knew that he/they were entitled to attend the April 2021 and April 2022 annual general meetings of Ideal Optical, but that he/they decided he/they did not wish to be present.³⁶

[70] I infer that their lack of attention to and interest in, the annual general meeting arose throughout the relevant time periods, because the focus of Dr. Malik and Dr. Lavandier/Lavandier Hold Co. had been on financial matters, and much

practising optometry in direct competition against Ideal. If an annual general meeting [where Lavandier Hold Co. and Dr. Lavandier were in attendance] had occurred during the 2021 calendar year, I as majority shareholder of Ideal would have voted to appoint [the existing corporate accountant] as Ideal’s accountant.” I interpret Dr. Malik’s statement not as negating a possible finding that there effectively was an “annual general meeting” (in the absence of Lavandier Hold Co.) on or about April 13, 2021, (and similarly so regarding the April 22, 2022 annual general meeting finding - see below) as they had been held in the past, but rather that her statement is based on the possibility that the court would consider that meeting to not have been a valid annual general meeting due to the absence of notice to, and attendance by, Lavandier Hold Co. at those “annual general meetings”]; and **at para. 60:** “Dr. Lavandier did not request an annual general meeting during the calendar year 2022. If an annual general meeting had occurred during the 2022 calendar year, I as majority shareholder of Ideal would have voted to appoint [the existing corporate accountant] as Ideal’s accountant.” In response, Dr. Lavandier at para. 10 of his Reply affidavit states: “With respect to paragraph 54 and 60 of the affidavit of Dr. Pamela Malik, it is worth noting that Dr. Pamela Malik at no time scheduled or provided notice of any annual general meeting for either the calendar year 2021 or the calendar year 2022. I specifically dispute the suggestion that I did not request any annual general meeting during either of these calendar years. A request was specifically made on November 23, 2021, and February 3, 2022, through letter sent on my behalf by my legal counsel.” I reiterate that, Lavandier Hold Co.’s request was almost 6 months after the deadline to hold the 2021 annual general meeting – May 28, 2021. Dr. Lavandier’s counsel’s letter dated February 3, 2022, does end with: “We look forward to receiving the 2021 Financial Statements and the date of the next Annual General Meeting in due course.” [My underlining added]

³⁵ When I refer to Dr. Lavandier’s shareholder interests in relation to Lavandier Hold Co., I intend to include Ms. Doyle as well, as she is the other shareholder of that company, although she has not filed an affidavit.

³⁶ It could reasonably be inferred this was because their attendance would be very challenging given the ill-feelings between Dr. Malik and Dr. Lavandier/Ms. Doyle, as well as other reasons, including: because he/they had retained legal counsel and he/they determined with that advice that there was no particular advantage to them being present; and it became apparent to him/them that it was also to his/their advantage to not attend, and raise these issues in this litigation.

less so on procedural matters, such as ensuring there was strict compliance with the *Companies Act*.

[71] I am satisfied that throughout the relevant time periods, Dr. Lavandier was content to take a more passive role in the operations of Ideal Optical and left the core of its management to Dr. Malik.³⁷

[72] More generally, I conclude that at all relevant times, Ideal Optical's *laissez-faire* adherence to the strictures of the *Act* was continuously (impliedly) consented-to by both shareholders, Malik Hold Co. and Lavandier Hold Co., and by Dr. Malik and Dr. Lavandier as Directors.

[73] The parties have disagreed about who has the burden insofar as proof or disproof of whether "all of the members consent thereto in respect of that year" per s. 118(b) of the *Act*, which permits an exemption from the requirement for annually audited financial statements.

[74] Dr. Malik argues that the burden is on the Applicant to establish that not all members "consent[ed]", because the Applicant must prove all facts in support of its position that the court should grant the relief it seeks. Dr. Lavandier says otherwise.

[75] I observe that there is no *presumption of fact* that because there are no audited financial statements for 2020 and 2021, therefore "all of the members [must have] consent[ed] thereto in respect of that year".

[76] However, in appropriate circumstances, such an inference could be drawn from the evidence.

[77] The 2021 annual general meeting had to be held before May 28, 2021, and I find it was held on or about April 13, 2021, when those financial statements were first available from the corporate accountant.

[78] Dr. Lavandier had left Ideal Optical's premises for the last time in January 2021. He had gone to work for a nearby optometry business shortly thereafter.

[79] His position is that he had effectively ceased to be an acting Director of Ideal Optical (as of late 2020 – Exhibit 25 Malik affidavit per his counsel's

³⁷ This may have been the case because he recognized that Dr. Malik was the majority shareholder, and they were each Directors, so that they had to agree on what to do, or else it may not get done.

November 23, 2021, letter at p. 1). While Dr. Lavandier may have voluntarily “ceased acting as a Director”, I conclude that he remained a Director until his resignation of November 16, 2021 was communicated to Ideal Optical – namely November 23, 2021.

[80] I conclude that since Dr. Lavandier’s Hold Co. has the evidentiary and legal burden to establish its entitlement to the Order it seeks from the court, therefore it also specifically has the evidentiary burden to establish there has not been “consent” by all members during fiscal years 2020 and 2021, for Ideal Optical to be exempted from the requirement for audited financial statements.³⁸

[81] I find that Dr. Lavandier, in his capacity as a Director, and Lavandier Hold Co., impliedly consented as they had in every other fiscal year to date, to there being no auditors appointed for 2020 and 2021.

[82] Ideal Optical had its annual general meetings, when its members met after the end of the preceding calendar/fiscal year, to review the financial statements for that foregoing year. These “year-end review” meetings are readily identifiable, and I conclude they took place on or about April 13, 2021 and April 22, 2022.

[83] I am satisfied that each of the two members/shareholders treated these meetings as effectively a customized substitute for what would occur at a more formal annual general meeting.³⁹

[84] I am satisfied, based on my review of all the evidence presented, to draw the inference that all of the members consented and intended that the “year-end meetings” were a constitution of an annual general meeting “in respect of” the fiscal years 2020 and 2021.

[85] On the other hand, I recognize that generally speaking, not holding fulsome annual general meetings is not to be encouraged.

³⁸ I note here that, regardless which party is considered to have the evidentiary burden to positively or negatively establish this fact, I find that whether the Applicant (to establish “no consent”) or the Respondent (to establish “consent”) has the burden, “consent” by all members for the fiscal years 2021 and 2022 annual general meetings, has been established on a balance of probabilities.

³⁹ Ideal Optical’s non-compliance with the *Act*, was primarily *expressly argued* based on its failure to hold a formal annual general meeting. Its non-compliance could arguably include as well, failures to give formal notice of the annual general meeting and the more pedantic maintenance of up-to-date Minute Books (as required by s. 89 of the *Act*). The latter observation was not argued before me, and the only evidence presented was minimal - see para. 20 Dr. Lavandier’s affidavit.

[86] However, context is important, and the legislation itself provides sanctions or other relief: culpability could render the Directors subject to a regulatory fine; and upon court application the annual general meeting could be ordered to be held (ss. 83(1) and 83(2) of the *Act*).

[87] If Dr. Lavandier/André Lavandier Inc. was dissatisfied because they believed there were not sufficiently formal annual general meetings held or other strict compliance with the *Act*, in the circumstances of this closely held private corporation, particularly where the shares are held by sophisticated individuals, who I find had an ongoing opportunity to have readily received expert legal and accounting advice, it is incumbent upon those persons to, and expected that they would, in a timely manner, request a formal annual general meeting, and require adherence otherwise to the strictures of the *Act*. But no court applications were made by Dr. Lavandier in that regard.

[88] Had there been specific requests to have Ideal Optical adhere to the strict requirements of the *Act*, and there was an ensuing refusal to do so, then if it truly mattered to Lavandier Hold Co., one would have expected it to make a somewhat contemporaneous application to court to have such meeting directed to take place and/or take other suitable action.

[89] A simple reading of the provisions of the *Act* would inform one that audited financial statements are the rule, but that exceptionally such is not required where “all of the members consent thereto in respect of that year” - s. 118 of the *Act*.

[90] As I have said, the review by Ideal Optical’s members of the financial statements for the preceding fiscal year, functioned as an annual general meeting. These meetings always took place in the following fiscal/calendar year, and usually within the first months (February - May) of that following year.

[91] Thus, the 2020 financial statements would be created and then reviewed after December 31, 2020; and similarly so for the 2021 financial statements.⁴⁰

⁴⁰ I accept Dr. Malik’s evidence at paras. 27 and 34 that: “At every Ideal annual meeting up to and including 2020, the only discussion that would ever occur regarding the preparation of Ideal’s annual financial statements was to confirm who would be hired as Ideal’s accountant to prepare those statements for the upcoming fiscal year. There was never a discussion concerning what level of assurance Ideal’s annual financial statements would be prepared to... It was always implied and understood that Ideal’s annual financial statements for each upcoming fiscal year would be prepared to a compilation level of assurance.” ... “During the aforementioned February 28, 2020, annual meeting the changes to the rules concerning taxation of small businesses in Canada and [the corporate accountant’s] recommendations for how Ideal should respond to same were explicitly discussed. Both Dr. Lavandier and I

[92] I am satisfied that both Malik Hold Co. and Lavandier Hold Co. at all relevant times impliedly consented to there being no formal annual general meeting, because they were satisfied with their direct oversight of the company and the financial statements' reviews conducted after the end of the calendar year when the statements were compiled.

[93] This is but one example of Lavandier Hold Co.'s implied consent to not insist on the strict adherence to the provisions of the *Act*.

[94] Another instance of its implied consent and not insisting upon strict adherence to the provisions of the *Act*, relates to the requirement for audited financial statements.

[95] Now in hindsight, Lavandier Hold Co. suggests that it did not impliedly consent to such exemptions from the otherwise mandatory provisions of the *Act*.

[96] That assertion is not consistent with the evidence that I accept.

[97] In his affidavit under the heading "Demands for auditor" (para. 32) Dr. Lavandier stated:

Dr. Malik has consistently refused to seek an independent auditor for Ideal Optical's financials, or to pay dividends to [Lavandier Hold Co.], despite repeated demands. The request was specifically asserted in letters from my counsel to Dr. Malik's counsel on November 23, 2021, February 22, 2022, and March 25, 2022. (paras. 32 and 33)⁴¹

accepted [the corporate accountant's] recommendation and proposal. [The corporate accountant was in attendance] and helped facilitate that discussion. There was no discussion whatsoever in that meeting regarding changing Ideal's accountant or of financial statements level of assurance, and Dr. Lavandier made no such request or suggestion. I accordingly considered that it was implied and understood that [the company's accountant] would remain Ideal's accountant for the upcoming 2020 fiscal year and that Ideal's financial statements would be prepared to a compilation level of assurance."

⁴¹ Dr. Lavandier confirmed in his cross-examination that when he, in a **January 7, 2021** email, (para. 29 affidavit) proposed two alternative accountants that he would prefer in place of the existing corporate accountant for Ideal Optical, he did not suggest them as auditors for Ideal Optical's financial statements. He admitted that, at that time, he was unaware whether they were qualified to act as auditors. This tends to confirm that as of that date he was not concerned with having the 2020 financial statements audited. He stated in part: "I emailed Dr. Malik with recommendations for new accountants to take over the preparation of financial statements for the company... Attached hereto as Exhibit "G" which email read in part: "As I have suggested, these are the two accountants I propose take responsibility for the office since [the existing corporate accountant] was fired months ago [unilaterally by Dr. Lavandier]. Please confirm your preference and we can arrange a meeting with him to review." Notably Dr. Malik replied: "Since you are refusing to work at Ideal and no longer wish to be part of the business [Dr. Lavandier conceded in cross-examination that he began practising at another optometry business nearby on or about **January 25, 2021**, and that he began discussing joining that optometry business "possibly at the end of **December 2020**"], it

[98] To be clear, I find that Dr. Lavandier’s first serious request(s) for **audited** financial statements from Ideal Optical were not communicated to Dr. Malik/Ideal Optical until **2022** for the 2020 financial statements, and **November 23, 2021**, for the 2021 financial statements (“Our clients look forward to receiving audited financial statements for 2021 and look forward to receiving notice of the annual general meeting.” per the November 23, 2021, letter from Counsel for Dr. Lavandier at Exhibit 25 of Dr. Lavandier’s affidavit).⁴²

[99] I accept Dr. Malik’s evidence at paras. 16-18 of her affidavit:

It has been the consistent historical practice and ordinary course of business for Ideal to commission its annual financial statements from an external accountant on a compilation level of assurance. It has been the consistent historical practice and ordinary course of business for all shareholders and directors of Ideal to impliedly consent to having Ideal’s

would make more sense for me to choose the best accountant for Ideal Optical that I can work with long term, not just keep changing.” To which Dr. Lavandier responded on **January 11, 2021**: “**As discussed, until my interests in Ideal Optical are purchased, we will make all relevant business decisions together.** I have provided you with two prospective accountants. Are you now proposing someone else? Please advise.” Notably, **Dr. Lavandier only first referenced auditing of the 2021 unaudited financial statements on November 23, 2021** (which statements he received on April 22, 2022 - para. 36) **per para. 33 of his affidavit**; and **first referenced auditing the unaudited 2020 financial statements** (which he received on April 13, 2021) in his counsel’s **March 25, 2022** letter at para. 2. Similarly at para. 37, Dr. Lavandier stated: “Additionally, the financial statements [for 2020 and 2021] are not audited, notwithstanding my repeated requests for audited statements.” When he was asked in cross-examination where are such requests for audited 2020 statements, Dr. Lavandier answered: “not in writing, for sure”. He added that he had requested in writing audited statements for 2021, but acknowledged that the first such claim was made in writing on November 23, 2021.

⁴² Let me add here for the benefit of counsel, that in Dr. Lavandier’s affidavit Exhibit “H” (March 11, 2021, email to Dr. Malik) one finds the following handwritten comment in place of words that were present [“has been incompetent in providing accounting advice to Ideal and the two of us, and that as a direct result, we have unnecessarily suffered significant financial consequences”] in the original email sent: “redacted: irrelevant to Application”. This can be usefully compared with Dr. Malik’s affidavit Exhibit 19 which does not redact any portion of those emails. Although opposing counsel did not object, in my view it is inappropriate in such circumstances for counsel to redact portions of an email on the basis that the material is in their view “irrelevant” to the matter at hand. The writing in question should be presented in whole unless, for example, the redactions are based on a *bona fide* claimed “privilege”. In such cases, these are provisionally best decided by counsel given their special position vis-à-vis such matters. Redactions based on a claimed “irrelevant” nature of the evidence, if consented to by all counsel may be appropriate. However, the best practice is for counsel not to redact what in their view is “irrelevant”, because it is for the court to ultimately determine based on the evidence presented whether such aspects of a written document are in fact relevant - or beyond “relevance” *per se*, the words/information may provide useful context. Dr. Lavandier and his partner Siobhan Doyle were present at a January 7, 2021, meeting, which was not a “year-end review”/annual general meeting - no 2020 financial statements had been compiled yet (para. 41 Malik affidavit). The Minutes of that meeting (paras. 40-41 Malik affidavit) were contested by Dr. Lavandier as “inaccurate” without citing specific examples (para. 7 of his Reply affidavit). In his March 11, 2021, email to Dr. Malik, Dr. Lavandier requested the 2020 (unaudited) year-end financial statements (Exhibit “H” Malik affidavit). Dr. Malik had sent him a January 28, 2021, email wherein she stated: “As is usual, [the 2020 year-end financials] are rarely completed by the end of January. Last year was not a usual year... We don’t suspect the drafts will be completed until the end of February, likely not reviewed and finalized until later in March.”

annual financial statements prepared on a compilation, rather than audit, level of assurance. I say “impliedly” because prior to November 2021 (as will be noted below) there has never been any discussion whatsoever, nor suggestion or request, for any financial statements of Ideal to ever be audited or prepared to any level of assurance other than compilation. It has been the consistent historical practice and ordinary course of business for all shareholders and directors of Ideal to, at or near the beginning of each fiscal year, make decisions regarding the preparation of the upcoming fiscal years financial statements. Such discussions would only focus upon who would be Ideal’s external accountant, because as noted above it was always implied and understood that the level of assurance for financial statement preparation would be compilation.

[My underlining added]

[100] Since January 25, 2021, Dr. Lavandier had been working for another nearby optometry business. Only by resignation dated November 16, 2021, had Dr. Lavandier resigned as a Director of Ideal Optical.

[101] By April 5, 2021, at the latest, Dr. Lavandier/Lavandier Hold Co. had retained legal counsel, which was one week before they received the 2020 financial statements from Ideal Optical.

[102] Dr. Lavandier/Lavandier Hold Co. had the means and opportunity to consult legal counsel even earlier, and I infer that he would have done so no later than sometime in January 2021 - for example see Exhibit 15 Malik affidavit Minutes of meeting (which Dr. Lavandier does not approve of, at para. 7 of his Reply affidavit).⁴³

[103] Lavandier Hold Co. (as a shareholder of Ideal Optical), says it expressly did *not* consent to an exemption from audited financial statements for the fiscal year 2021 - by way of counsel’s November 23, 2021, letter.

[104] According to the evidence I accept from Dr. Malik, those decisions were taken based on the historical and consistent practice of Ideal Optical - in the early months of 2021/2022 - which is consistent with when the financial statements of the preceding fiscal years were reviewed, and which I have found amounted to an annual general meeting.

⁴³ In those Minutes, while I appreciate that they are contested, we find the following notations: “Dr. Lavandier and his spouse Siobhan Doyle arrived at 8:07 AM.... Seeking clarification, Dr. Malik asked whether Dr. Lavandier wanted to sell his shares. He confirmed he wanted to sell his shares. Siobhan [Doyle] interjected at several points and Dr. Malik requested clarification of her presence, whether it was in the capacity of a lawyer or something else.” I infer that Ms. Doyle is a lawyer.

[105] I am satisfied that Dr. Lavandier was not personally present in 2021 or 2022, on behalf of Lavandier Hold Co. to review the 2020 and 2021 financial statements in the early months of 2021 and 2022, and therefore was not present as a Shareholder representative for Lavandier Hold Co. to speak to whether Ideal Optical was exempted from producing audited financial statements for the fiscal year 2020 and 2021.

[106] Herein, I have repeatedly referred to “implied consent”.

[107] In a somewhat similar situation, “implied consent” has been recognized as a proper consideration, presuming the necessary supporting evidence, and that it can effectively overcome legitimate countervailing concerns that might arise as a result of the failure to strictly adhere to the provisions of the *Act*.

[108] In *Novacation, supra*, Justice Norton stated, first setting out the facts:

11 At no point in Novacation's history has its shareholders appointed an auditor at any of the company's annual general meetings. Further, except for the 2016 financial year, the shareholders have never provided their unanimous consent at any annual general meeting to dispense with the requirement to appoint an auditor. The directors of Novacation have never appointed an auditor of the company to hold office until the next annual general meeting. The directors have never placed audited annual financial statements or auditor reports before the shareholders of the company at annual general meetings, or otherwise.

12 Grant Thornton LLP produced an unaudited Notice to Reader Statement for Novacation's financial year ending December 31, 2016. BDO Canada LLC ("BDO") produced unaudited Notice to Reader Statements for Novacation's financial years 2017, 2018, 2019, and 2020. As of yet, there are no Notice to Reader Statements for the financial year 2021.

13 Novacation prepared an "income statement" and "balance sheet" for the financial year ending December 31, 2021.

14 None of the Notice to Reader Reports are signed by any of the directors of Novacation. None of the Notice to Reader Statements contain a statement that the shareholders of Novacation unanimously waived the requirement of an auditor.

15 On February 1, 2021, H&N, a minority shareholder, through legal counsel, demanded that the directors of Novacation appoint an auditor pursuant to subsections 117(2) and 117(5) of the Companies Act. On the same date, H&N, through legal counsel, demanded disclosure of audited financial statements of Novacation containing all information mandated by the Regulations made under

the *Companies Act* for 2017 through 2019, and production of Novacation's financial statements for 2020 once available.

...

20 To date, Novacation has not complied with the demands of Mr. Hering and H&N to appoint an auditor to prepare audited financial statements of Novacation.

21 Prior to February 2021, neither Mr. Hering nor H&N asked for an auditor to be appointed.

22 Since 2017, Novacation has prepared and issued detailed operating budgets to its shareholders in accordance with section 4.3(a) of the Second Restated Articles of Association. Except for the budget for 2020, each of the budgets from 2017 to 2021 were reviewed by the Board of Directors at a Board of Directors' meeting.

23 On May 12, 2017, Mr. Hering, through H&N as the majority shareholder of Novacation, unanimously waived the audit requirements of Section 117 and Sections 119-119B of the *Companies Act* for the 2016 year. On the same date the Board of Directors (Hering, Kern and Kirz) reviewed and approved the capital budget for 2017.

24 The budgets for 2017 through 2020 contained a line item for "accounting" (with the exception of 2017 wherein "accounting and legal" were combined in a single line item). The amount budgeted for accounting expense is either \$3,000 or \$3,500. **Mr. Hering and the other directors met, reviewed, and approved the budget in each of these years with no objection to the lack of audited financial statements.**

25 Mr. Smith prepared unaudited financial statements for Novacation in respect of the 2017-2019 fiscal years without any objection from Mr. Hering or H&N to the absence of an audit.

26 The first time Mr. Hering or N&N raised the objection that Novacation's statements be audited was after this litigation had been commenced.

...

32 Unlike other corporate statutes in Canada, the Nova Scotia Companies Act does not require that the right to audited financial statements be exempted in writing or by formal resolution. Section 118 of the *Companies Act* states as follows:

Exemption from Sections 117 and 119 to 119B

118 In respect of a financial year of a company, the company is exempt from the requirements of Section 117 and Sections 119 to 119B regarding the appointment and duties of an auditor where

(a) the company is not a reporting issuer or a reporting company; and

(b) all of the members consent thereto in respect of that year.

[Emphasis added]

33 **Section 192 of the *Management of a Company Limited by Shares Regulations*** made under the *Companies Act* further describes the exemption as follows:

192 (1) If all of the members of the Company consent thereto, the provisions of these Articles and Sections 117 and 119 to 119B of the Act regarding the appointment of auditors and duties of auditors do not apply with respect to the financial year in respect of which the consent is given.

(2) Sub-article (1) shall not apply if the Company is a reporting issuer or a reporting company.

[Emphasis added]

34 In contrast, for example, the Ontario Corporations Act, RSO 1990 c.38, s.96.1, and the British Columbia Business Corporations Act, SBC 2002 c57, s.203(2), each require that "all of the shareholders consent, in writing" to a waiver of the audit requirement. The Canada Business Corporations Act, RSC 1985 C-44, s.163(3) and the Saskatchewan Business Corporations Act, RRS 1978 b10, s.157(1) require that the shareholders waive the requirement by formal resolution.

35 **I agree with Novacation that the absence of the particular requirement that an exemption from audit by consent be "in writing", or by formal resolution, ought to be interpreted as a reflection of the Nova Scotia legislature's intent to allow the consent to be implied.** In *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at para. 42, the Supreme Court of Canada stated:

...

36 **The conduct of H&N and Mr. Hering prior to this litigation commencing provides, in my view, clear indication of their satisfaction and consent that no auditor was appointed, and no audited financial statements were prepared.**

...

38 In the matter before me, aside from the contested audit requirement, there has been no issue with Novacation's financial record keeping and disclosure. **The evidence before me does not establish that Mr. Hering or H&N had a reasonable expectation of audited financial statements.**

[My bolding added]

[109] I agree with Justice Norton’s legal pronouncements, that the Nova Scotia *Companies Act* “ought to be interpreted as a reflection of the Nova Scotia legislature’s intent to allow the consent to be implied”.

[110] Each case must obviously be determined on its own facts to see if “implied consent” can be persuasively demonstrated.

[111] There was no express consent here, however I am satisfied more likely than not there was “implied consent”.

[112] Dr. Lavandier’s initial concerns in relation to Ideal Optical arose in early 2020.

[113] The evidence indicates they were oriented around having the corporate accountant replaced - not having audited financial statements produced.

[114] I find that Dr. Lavandier’s concerns with the corporate accountant’s professional conduct, first alluded to in “early 2020” gave way to his much later expressed dissatisfaction with there not being audited financial statements for 2020 and 2021.⁴⁴

[115] However, Dr. Lavandier’s earlier concerns about the corporate accountant do not undermine a finding by this Court (as I do) of his/ Lavandier Hold Co.’s likely continued implied consent (certainly on or about February 28, 2020, April 13, 2021 and) until on or about November 23, 2021 (and as late as March/June 2022 regarding the 2020 fiscal year), to have unaudited financial statements prepared for the 2021 fiscal year.

[116] Dr. Lavandier agreed that he did not:

1. make a request for the year 2021 audited financial statements until a written November 23, 2021 letter, followed up on February 3 and March 25, 2022 - para. 33 Malik affidavit; and

⁴⁴ See in Dr. Lavandier’s affidavit (para. 7) and Dr Malik’s affidavit (paras. 31 and 34-7). I also note here that in cross-examination Dr. Lavandier conceded that of the two names he proposed as alternative corporate accountants, on or about January 7, 2021, he did not know if either of them was qualified to audit financial statements.

2. make a request for the year 2020 audited financial statements until (albeit initially in the March 25, 2022 letter, which anticipated) the Application in Chambers herein, which was filed (concurrently with his Notice of Action) on June 17, 2022.

[117] Not making a request for the audited financial statements does not necessarily lead to a positive finding that there was “consent” to have Ideal Optical be exempted from having to prepare audited financial statements.

[118] However, not making such requests in a timely manner is a relevant factor.

[119] Dr. Lavandier/Lavandier Hold Co. definitely had the benefit of legal advice by no later than April 5, 2021, and it is likely he consulted legal counsel before (or at the latest upon his leaving Ideal Optical in) January 2021.

[120] I am satisfied that the evidence I accept, including the lack of express requests for audited financial statements, is a reliable indication that Lavandier Hold Co./Dr. Lavandier did not have any expectation (much less a reasonable expectation) or intended, that there would be audited financial statements prepared for the years 2021 and 2020, much before November 2021 and March 2022 respectively.

Conclusion

[121] I dismiss the Application.

[122] The parties shall make their “costs” written submissions of no more than 5 pages by 20 days after release of this decision.

Rosinski, J.