

Citation: ***Louis Bertrand et al. v Paul Bertrand et al.***, 2025 NBKB 031

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

FC-60-2024

BETWEEN:

LOUIS BERTRAND and 610286 N.B. INC.,

Plaintiffs/Applicants

– and –

**PAUL BERTRAND, 610287 N.B. INC., 666917 N.B. INC.,
and TCI MANUFACTURING INC.**

Defendants/Respondents

DECISION

Before: Chief Justice Tracey K. DeWare

At: Moncton, New Brunswick

Date of hearing: January 29, 2025

Date of decision: March 11, 2025

Appearances: **Hugh Cameron** and **Evan McKnight**, for the Plaintiffs/Applicants
Robert Basque, for the Defendants/Respondents

DEWARE, J.

INTRODUCTION

[1] This decision responds to two questions; a preliminary question on the defendants' request to cross-examine the plaintiff and the main question as to whether a monitor should be appointed over all real and personal property of and to administer, manage, and govern the affairs of the corporate defendants, TCI Manufacturing Inc. and 666917 N.B. Inc., pursuant to the **Business Corporations Act, SNB 1981, c B-9.1**, the **Judicature Act, RSNB 1973, c J-2**, and the New Brunswick **Rules of Court**.

FACTS

[2] The Plaintiff, Louis Bertrand ("Louis"), is the brother of the defendant, Paul Bertrand ("Paul"). Louis and Paul are 50/50 owners and shareholders in the corporate defendants, TCI Manufacturing Inc. ("TCI") and 666917 N.B. Inc. The Plaintiff company, 610286 N.B. Inc., is Louis' holding company while the Defendant company, 610287 N.B. Inc., is Paul's holding company.

[3] The brothers have been equal shareholders in the companies (TCI and 666917 N.B. Inc.) and co-presidents since 2005. TCI was incorporated in 1993. At that time, Louis owned 33%, Paul owned 33%, and another partner, Wayne Player, owned the remaining 33%. When Wayne Player retired, Louis and Paul purchased his shares. Louis and Paul each paid \$60,000 for their portion of Mr. Player's shares through their holding companies. The brothers each worked full time at TCI from the early 2000's until the summer of 2019.

[4] In the summer of 2019, Louis was required to take a medical leave from the business as a result of stress on his doctor's recommendation. In August of 2020, Louis was diagnosed with throat cancer and underwent chemotherapy and radiation treatment from October to December.

- [5] Louis remained on medical leave and away from the regular operations of the company from the summer of 2019 until the spring of 2023. During this time, Louis was working on an automation project for the business from his home garage.
- [6] Prior to Louis' illness in the summer of 2019, Louis and Paul had shared the management of their jointly owned companies. They were each responsible for different aspects of the management of the business. Following Louis' departure in the summer of 2019, Paul assumed all the management responsibilities for the jointly owned companies.
- [7] Prior to the summer of 2019, Louis and Paul drew the same salary and financial benefits from the companies. This practice continued after Louis' absence. Louis and Paul, as well as their spouses and children, received the same benefits from the companies.
- [8] Paul made changes to how Louis and Paul withdrew funds from the companies on the advice of their accountant. In addition, Paul eliminated both his own vehicle allowance as well as Louis' vehicle allowance on the advice of their accountants that it was no longer a reasonable expense. All the changes of this nature made to Louis' remuneration were exactly the same as the changes made to Paul's remuneration. Paul did not consult Louis before proceeding with these changes.
- [9] Louis had a corporate credit card with a limit of \$5,000 which he continued to use during the period he was absent from the business. Louis did not provide receipts for the charges made to the corporate credit card. In 2023, Paul reduced the limit of Louis' corporate credit card to \$1,000. Paul did not advise Louis of the reduction in the limit on his credit card. Louis was only alerted to the credit card limit change when his credit card was declined.

POSITION OF THE PARTIES

- [10] Louis asserts he built these companies and, despite his illness, has always been involved in the operation of the companies. Louis submits Paul has arbitrarily made decisions for the company and Louis which negatively impacted both himself and his family. Louis maintains Paul has now blocked his access to the corporate offices and requires all requests for information to go through Paul. Louis suggests he is no longer able to access financial information from his own companies. Louis argues the only tenable solution to the current impasse between the two owners of these companies is for the appointment of a Monitor until such time as an agreement can be reached on the terms of sale of the companies. Louis submits Paul's actions toward him constitute oppression.
- [11] Paul submits he alone has shouldered the responsibility for the operation and management of the companies since the summer of 2019. Paul points out that despite the fact he has been the only one managing the companies, Louis has continued to receive exactly the same compensation. Paul maintains any changes to the manner of remuneration for the owners and their families' has been further to the recommendations of the companies' accountants and has affected the two owners in exactly the same manner. Paul denies that Louis has not had access to the companies' financial records and suggests Louis had no quarrel as to how things were going until the spring of 2023 when Paul suggested it was time to address Louis' absence. Paul maintains Louis was prevented from entering the corporate offices as staff were afraid of him following a physical altercation which occurred between the two in May of 2023. Paul denies there is any evidence of oppression in these circumstances but to the contrary argues he has gone above and beyond to accommodate Louis during his illness.

ISSUES

- [12] The issues for the Court to resolve in this matter are the following:
- (i) Is this an appropriate case to order cross-examination of the parties pursuant to Rule 39.03 of the New Brunswick **Rules of Court**?

- (ii) Is this an appropriate case to order the appointment of a Monitor?

LAW AND ANALYSIS

Issue 1

[13] The defendants have requested cross-examination of the Plaintiff, Louis Bertrand, on his affidavits filed in support of his Motion requesting the appointment of a Monitor. The defendants point to the exceptional nature of the request to appoint a Monitor and the requirement that a strong *prima facie* case must be made to satisfy the Court that the appointment of a Monitor is necessary. The defendants note the significant dispute of facts in the affidavit evidence of Paul and Louis which requires cross-examination to ensure the Court may adequately consider the issues before it.

[14] The Court's power to allow cross-examination under Rule 39.03 is discretionary. Rule 39.03 states as follows:

39.03 Cross-Examination on Affidavit

On the application of any party, the court may order the attendance for cross-examination of any person making an affidavit for use upon a motion or application.

[15] The Court's discretion under Rule 39.03 is to be exercised sparingly and only after the party requesting cross-examination has shown special circumstances. The defendants point to the discrepancies in the evidence and the exceptional nature of the relief sought in support of the request for cross-examination. Justice LeBlanc, while a Justice of the New Brunswick Court of Queen's Bench, in ***Royal Bank of Canada v Sibley and Naeem***, 2022 NBQB 131, confirmed that cross-examination is the exception, not the rule and it is not sufficient that a party disagrees with the facts set out in an affidavit. In this matter, there are disputes of fact. However, there is also significant evidence which is not in dispute such as the nature of the ownership of the companies, the date of Louis' absence from the companies, the health of the companies as set out in the financial information and the amount of payments made to the parties from the companies.

[16] In *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell)*, 2013 NBQB 317, Justice Glennie discussed the discretionary nature of an order pursuant to Rule 39.03 at paragraph 21 as follows:

21 It is my view that the following principles are applicable to cross-examination pursuant to Rule 39.03:

1. The Court's power under Rule 39.03 to allow cross-examination on an affidavit **is discretionary in nature and is only to be used sparingly** and only after the party requesting cross-examination has shown special circumstances or sufficient reason calling for cross-examination;
2. Various criteria have been cited by the courts to determine whether cross-examination is appropriate, such as ambiguities or inconsistencies within the affidavit in question;
3. It is not sufficient that a party disagrees with the facts contained in an affidavit;
4. New Brunswick case law establishes that cross-examination on an affidavit made for use on a motion is not routinely granted;
5. Cross-examination is the exception rather than the norm, and **the onus rests on the party seeking to cross-examine to establish that the situation is so exceptional as to justify cross-examination;**
6. Cross-examination under Rule 39.03 should not become an examination for discovery; and
7. The party seeking cross-examination must present evidence which seriously disputes the contents of the affidavit in question or **demonstrates that the matter is simply too complex to proceed by way of affidavit evidence.**

[Emphasis mine]

[17] In my view, neither the discrepancies in the evidence nor the rare nature of the relief sought is in and of itself sufficient to account for special circumstances. The discrepancies in the affidavit evidence centers around details which do not go to the heart of the issues currently before the Court. The defendants have not explained why the situation requires cross-examination beyond setting out the clear dispute of facts in the affidavit evidence. Further, the request in this case is

straightforward and not something where cross-examination is necessary to ensure all parties can adequately argue their positions on the motion.

- [18] The Court must exercise its gatekeeping function and restrict the allowance of cross-examination of affidavit evidence pursuant to Rule 39.03 to those situations that are truly exceptional. The defendants have not met the burden that cross-examination in this case is necessary. As noted by Justice Glennie in *McCorkill*, cross-examination under Rule 39.03 is not to replace an examination for discovery. The defendants' request to cross-examine Louis on his affidavit evidence is denied.

Issue 2

- [19] At paragraph 2.1 of the Amended Notice of Motion, Louis sets out the relief sought for the appointment of a Monitor as follows:

2.1 In the alternative, in the form of the draft Order attached hereto as Schedule "B" (the "Draft Monitor Order") appointing MNP as Monitor over all real and personal property of and to administer, manage and govern the affairs of TCI and 666917, without security, including but not limited to, pursuant to the Business Corporations Act, Rules of Court and the Judicature Act, with power to do such acts and deeds set out in the Draft Monitor Order including without limiting the generality of the foregoing, the following:

- (a) Take such action as the Monitor deems appropriate to preserve and protect the assets of TCI and 666917;
- (b) Review the books and records of TCI and 666917 and report on the financial state of TCI and 666917;
- (c) Conduct, or obtain from a third party, a valuation of the assets of TCI and 666917;
- (d) Conduct a Share Valuation;
- (e) Assess and determine whether:
 - (i) Louis Bertrand and/or 610286 N.B. Inc. are in a position to enter into an agreement with 610287 N.B. Inc., within a period of thirty (30) days of the receipt of the Share Valuation, to purchase the shares of TCI and 666917

owned by 610287 N.B. Inc. at the fair market value as determined by the Share Valuation or at a price otherwise unanimously agreed upon between Louis Bertrand, Paul Bertrand, 610286 N.B. Inc., and 610287 N.B. Inc., and that said purchase of the shares of TCI and 666917 owned by 620187 N.B. Inc. be affected and completed within thirty (30) days thereafter; or

- (ii) Paul Bertrand and/or 610287 N.B. Inc. are in a position to enter into an agreement with 610286 N.B. Inc., within a period of thirty (30) days of the receipt of the Share Valuation, to purchase the shares of TCI and 666917 owned by 610286 N.B. Inc. at the fair market value as determined by the Share Valuation or at a price otherwise unanimously agreed upon between Paul Bertrand, Louis Bertrand, 610287 N.B. Inc. and 610286 N.B. Inc. and that said purchase of the shares of TCI and 666917 owned by 610286 N.B. Inc. be effected and completed within thirty (30) days thereafter.
- (f) In the event that the Monitor determines that a purchase of the shares of TCI owned by either 610287 N.B. Inc. or 610286 N.B. Inc. will not be concluded in a manner and in a timeframe as contemplated above, and in the best interest of TCI and 666917, the Monitor shall take all necessary steps to liquidate the assets of TCI and 666917 and, with approval of the Court, cause;
- (i) TCI and 666917 to be dissolved as quickly as possible, and
 - (ii) The net assets of TCI and 666917 following said liquidation and dissolution to be distributed, forthwith, to the shareholders of TCI and 666917 on a pro rata basis;

[20] Paul argues that no consideration of the appointment of a Monitor can be made until the Court determines there has been oppression. Both parties referred the Court to Justice Morrison’s decision in *Chippin, et al v. Chippin, et al*, 2016 NBQB 226. In particular, the Court was directed to paragraphs 10, 17 and 18 as follows:

[10] **In determining an oppression claim the Court must determine (1) the reasonable expectation of the claimant; and (2) whether that reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest.** The reasonable expectation is to be judged by considering the context of, and with regard to, the specific business relationship at issue.

General commercial practice, the nature of the corporation, the relationship between the parties and agreements reached are among the factors to be considered (*BCE Inc., Re*, 2008 SCC 69 (CanLII), [2008] 3 S.C.R. 560; see also *Doucet v. Spielo Manufacturing Inc.* 2011 NBCA 44 at paras. 41-42).

[...]

[17] The applicant seeks the appointment of a receiver-manager with very broad powers. In Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, Second Edition (looseleaf) (Markham: LexisNexis, 2013) it states at 17.175:

Under the CBCA version of the oppression remedy, upon a finding of oppressive conduct a court may make “an order appointing a receiver or receiver-manager.” In the context of the oppression remedy, this is one of the most extreme interventions in the affairs of a corporation. **Accordingly, such an order should only be used where the interests of corporate stakeholders have been so grossly abused that the very presence of existing management inexorably leads to abuse.** If existing management has demonstrated that it is capable of operating the business effectively, there may be greater risk in appointing a relatively less experienced receiver-manager. The general legal principles governing the appointment of a receiver or receiver-manager are discussed elsewhere. (emphasis added)

[18] **The appointment of a receiver-manager is an invasive remedy which should be reserved for situations where the shareholder abuse is extreme. In my view, there must be unequivocal evidence of significant and substantial oppressive conduct before the court appoints a receiver-manager with the very broad and invasive mandate requested by the applicant in this case.** While I am satisfied that the conduct of Larry and Robert is oppressive, it does not rise to the level of gross abuse warranting the appointment of a receiver-manager. In *Shareholder Remedies in Canada*, supra, at paragraph 17.180 it states:

An alternative to the appointment of a receiver-manager which is less intrusive but still gives protection to the interested parties is the appointment of a monitor. **The monitor would only be appointed where there is a strong prima facie case of oppression, as otherwise there could be an undue interference in corporate**

affairs. Monitors have been appointed in the following circumstances:

- A monitor was appointed to oversee management while the shareholders negotiated fair value on a buy-out. The court did not believe it was appropriate to take management away from the managing shareholder, but certain limits were placed on corporate activity and payments to the management shareholder.
- A monitor was ordered during proceedings regarding what might have been the oppressive use of a shotgun buy-sell clause. The monitor was restricted to providing follow-up information on files which were previously reviewed.
- The parties had agreed to a purchase and sale of securities, and a monitor was appointed to safeguard against the wasting of corporate assets during the valuation process only. (emphasis added)

[Emphasis mine]

[21] In the present matter, a monitor should be appointed only if the Court is satisfied there is a *prima facie* case of oppression. Louis sets out the following facts in support of his position that there is a clear *prima facie* case of oppression in this case:

- (a) Louis has been shut out and has no input in the operational and management decisions of TCI and 666917 N.B. Inc.;
- (b) Paul is unilaterally making all operational decisions for TCI and 666917 N.B. Inc.;
- (c) Louis was not involved in the implementation of the new enterprise resource planning system;
- (d) Louis was not consulted before the companies paid bail for a TCI employee;

- (e) Louis was not consulted when Paul decided to make significant charitable donations from TCI;
- (f) Louis was not consulted before the limit on his credit card was reduced;
- (g) Louis no longer has direct access to the employees and financial information but must request information via Paul; and
- (h) Paul's son, Patrick's salary has increased significantly without any prior consultation with Louis.

[22] Paul suggests this case is definitely not one of oppression. Paul points to the following factors in support of his position all actions he has taken have been in the best interest of both Louis and the companies:

- (a) Paul did not prevent Louis from attending the corporate offices for the first 44 months of Louis' absence and only did so after the physical altercation between the brothers in May of 2023;
- (b) Paul undertook all of the management and operational decisions for the companies because Louis was absent and the companies required leadership and the ability for someone to make day to day decisions;
- (c) Louis communicated in text messages his agreement with the new system implemented and never raised any concerns until these proceedings were commenced;
- (d) Patrick's salary included a bonus component and as the sale of the companies have increased significantly so has Patrick's salary accordingly;

- (e) Paul's decisions to eliminate the car allowance and limit the credit card were done at the recommendation of the companies' accountants;
- (f) Louis has never provided any receipts for his use of the corporate credit card;
- (g) Paul managed the companies through the pandemic;
- (h) The net profits of TCI increased from \$592,353 in 2019 when Louis went out on medical leave to \$1,355,718 in 2023;
- (i) All of the liens and mortgages previously held against the companies including the personal guarantees of Paul and Louis have been discharged as of 2024; and
- (j) Paul and Louis have drawn identical amounts in salaries and financial benefits from the companies since Louis' illness in 2019.

[23] In all of the circumstances I am unable to conclude Louis has established a *prima facie* case of oppression. While Louis' access to the corporate offices was limited in May 2023 and there is a challenge for Louis to obtain the financial information of the companies, otherwise I cannot conclude that Paul's actions could be considered unfair or abusive. The companies have fared very well under Paul's stewardship. There is no reason to believe there is any risk to the companies or to Louis. Further, Paul has continued to respect all of Louis' remuneration as identical to his own despite the fact that Paul alone has shouldered the responsibility for the operations and management of the companies. Paul's actions do not fall within the realm of oppression when considering all of the circumstances holistically.

[24] The parties are in agreement that the current impasse cannot continue. Louis suggests the appointment of a Monitor in these circumstances to keep an eye on

the companies until their sale is entirely appropriate and in line with available jurisprudence.

[25] Paul asserts there is no reason to appoint a Monitor in this case just as there was no reason in *McMurtry v. McMurtry*, 2013 ONSC 7259, where the Court noted at paragraph 6 the following:

[6] After considering all of the material filed by counsel, including the affidavits and the transcripts of the cross-examinations on the affidavits, I come to the conclusion that this is not an appropriate case for the appointment of a receiver-manager and for the following reasons:

- John McMurtry and Brenda McMurtry have been running the company for 30 years. Regardless of whether or not they have mismanaged the company, or extracted payments from the company inappropriately, the company has a conservative value of over \$6 million and liabilities of perhaps \$1.5 million.
- There is nothing in the evidence to support the proposition that any mismanagement, whether real or imaginary, could not be rectified after a trial by a payment to the aggrieved party out of the assets of the company.
- There was virtually no evidence of irreparable harm that could befall the moving party in this case. The only evidence presented was speculative evidence relating to the potential tax liabilities of MicMac. No actual liabilities were put forward, nor was there any tangible evidence that disclosed a real liability in the future, only the prospect of the liability.
- The cost of a receiver-manager is an expense the company does not need. The only substantial contentious issue that has arisen here concerns the sale of one specific piece of property namely the Stoke Lacey property valued at \$4,050,000.00.
- MicMac is first and foremost a landholding company. Stoke Lacey is its biggest asset. The balance of the day-to-day operations consists of the management of commercial properties that are currently being leased. The biggest complaint in that regard is that the municipal taxes on these properties are in arrears and should be paid directly from monthly rental revenues.

[26] Louis refers the Court to *Osborne v Bucci*, 1998 CarswellOnt 3616 (Ont CJ), where there was an agreement for one shareholder to purchase the other and a

monitor was appointed in the interim. In deciding to appoint an interim monitor, the judge stated at paragraph 14 as follows:

14 Mr. Osborne asks for an order appointing Spergel and Associates Inc. as interim receiver/manager of Digital Pix. I do not think it appropriate to take the management of the company away from Mr. Bucci at this time. Spergel and Associates Inc. will be appointed as monitor to oversee and report on the management of the company with leave to either party to apply to change Spergel and Associates' role.

[27] Louis suggests the Nova Scotia Superior Court's observation in ***Chisholm v. Antigonish Construction Ltd.***, 2008 NSSC 12, is also instructive on the appropriateness of the appointment of a monitor in this case. In particular, the Court is directed to paragraph 45 of the decision as follows:

[45] Further, with respect to the valuation of any of the companies' assets, i.e., its equipment, it would not be appropriate for John to conduct such a valuation. In that regard, a monitor, as an independent third party, could oversee the proper valuation of the assets of the companies and any subsequent sale of the assets of the companies would require approval by the Court. This would recognize John's legitimate interest that the remaining assets in these companies not be wasted and also protect both gentlemen with respect to the valuation and sale of assets. The choice of both the litigation guardian and the monitor, in the absence of agreement by counsel would be a decision made by the Court. These protections will in my view be fair to both John and Duncan and facilitate the resolution of this dispute that could otherwise linger in the courts for many more years, while the value in the companies continue to be depleted. I will rely on counsel to agree to the form of the order that:

1. Confirms John and Trevor as directors of the companies and validates the meeting of June 20, 2006.
2. Provides that upon agreement of counsel, a litigation guardian will be appointed to evaluate the claims the companies have against John and ACL and instruct legal counsel accordingly and failing agreement the litigation guardian will be appointed by the Court.
3. Provides that upon agreement of counsel, a monitor will be appointed to oversee the affairs of the companies and the valuation of assets and failing agreement the monitor will be appointed by the Court.

[28] Reviewing all of the evidence, the Court is left with the impression that Paul did everything to accommodate and support Louis for nearly four years from the summer of 2019 to the spring of 2023. Louis voiced no disagreement with Paul's

management of the company nor concern for the fact he wasn't assisting Paul in the management of the companies until Paul raised the issue. Paul understandably wanted to discuss future plans as the two 50% shareholders of the companies were no longer sharing the work or the management of the companies and had not been for a significant period of time. Louis' apparent expectation that the status quo could continue indefinitely was not reasonable.

- [29] In the present matter, it is clear the companies must be valued and then a sale must take place. The parties have agreed upon an experienced business evaluator who will be in a position to fully set out the financial situation of the companies and, in time, the appropriate amount to be considered for their purchase or sale. The current concerns stem mostly from Paul's change in approach following the altercation between the brothers in May. While Louis has been frustrated by the changes of the locks and the suggestion that he communicate with Paul as opposed to the employees, there is no evidence that the health or functioning of the businesses have been impacted by these measures. The brothers can clearly no longer get along and despite the fact it remains unclear as to who is to blame for the physical altercation it is clear that such behaviours cannot occur in the workplace. In the short term, Louis' limited access is necessary to maintain the peace and not expose the employees to the turmoil. There is no evidence that in limiting Louis' access, Paul has negatively impacted the value of Louis' shares or interest in the companies.
- [30] Paul's move to address the problems which then triggered the altercation between the brothers cannot be considered as oppression.
- [31] This is not a case where the appointment of a monitor is necessary. The appointment of the business valuator will resolve the majority of the disputes between the parties. In addition, Louis should have direct access to the financial records of the companies and my understanding is that this can be accomplished by setting up Louis with VPN access to the companies' records. This should be

done immediately, and the necessary equipment and instruction provided to Louis so he can access this information as he sees fit.

[32] In all of the circumstances, I am not of the view the appointment of a Monitor is appropriate in this case.

Costs

[33] The parties were able to come to an agreement on the appointment of a valuator for the business, Paul Bradley, at the outset of the hearing of the Motion. This is an important step forward and likely would not have occurred in the absence of the Motion. Further, the parties were able to reach certain agreements to move this matter forward in a collaborative fashion. While Louis has not been successful on his Motion, in all of the circumstances, there shall be no order as to costs. This is a dispute between shareholders where everyone is clear on the problems and have charted a path forward to resolution. It is anticipated by the Court that the costs for both parties in these proceedings will be part of the consideration in the resolution of the aforementioned issues.

CONCLUSION AND DISPOSITION

[34] The Plaintiff's Motion seeking the appointment of a Monitor is dismissed with no order as to costs.

DATED at Moncton, New Brunswick, this 11th day of March 2025.

Tracey K. DeWare
Chief Justice of the Court of King's Bench
of New Brunswick