

Court of King's Bench of Alberta

Citation: JBRO Holdings Inc v Dynasty Power Inc, 2025 ABKB 426

Date: 20250714
Docket: 1801 03952
Registry: Calgary

Between:

**JBRO Holdings Inc., Jason Brown, Jason Brown as trustee of the Brown Family Trust,
JBRO Investments Inc. and JDFA Holdings Inc.**

Plaintiffs

- and -

**Dynasty Power Inc., Dynasty North America Holdings Inc., Dynasty Energy California
Inc., Dynasty Property Holdings Inc., 1713845 Alberta Ltd., Allan Cho, 1691399 Alberta
Ltd., Nancy Cho, Quacho Holdings Ltd., Gaurav Sharma, Christopher Quilley, Andrew
Hoang, Kelly Elias and Todd McRae**

Defendants

**Reasons for Decision
of the
Honourable Justice C.D. Simard**

I. Introduction

[1] The Plaintiff Jason Brown was one of the founding directors and officers of the Dynasty companies. The other Plaintiffs are entities associated with Mr. Brown, who previously owned or currently own shares in the Dynasty companies. The Defendants are the Dynasty companies and all their other shareholders, directors and officers. This is a multi-faceted corporate/shareholder dispute.

[2] As I will explain below, the Plaintiffs and Defendants now all agree that the two groups cannot coexist together any longer, so that a “corporate divorce” is required, in which the Defendants will buy out all the Plaintiffs’ shares in the Dynasty companies.

[3] This litigation has a long procedural history, spread over a number of different actions. Rather than proceeding towards a single trial where all the issues would have been decided together, the parties have litigated the dispute in a piecemeal fashion, having some issues fully decided before other issues were advanced in any meaningful way. In a continuation of this serial method of litigation, I heard three discrete applications on June 11, 2025:

- (a) JBRO Holdings Inc.’s (**JBRO Holdings**) application for a declaration that the April 10, 2017 Buy/Sell Notice (the **2017 Buy/Sell Notice**) sent to JBRO Holdings by the other shareholders of Dynasty Power Inc. (the **Exercising Shareholders** and **Dynasty Power**) was invalid;
- (b) the Plaintiffs’ application to amend their Amended Statement of Claim; and
- (c) the Defendants’ application to strike certain portions of Mr. Brown’s May 6, 2024 affidavit (the **May 2024 Brown Affidavit**).

[4] Because parts of this dispute have already been litigated, this Court has already made findings of fact about the parties’ shared history. To avoid any possible inconsistency, I will simply reproduce the relevant portions of my colleague Justice Romaine’s summary of the uncontested background facts, from her June 14, 2021 decision in this action:¹

[3] [Dynasty Power] is an electricity trading company incorporated in 2011 under the *Business Corporations Act*, RSA 2000, c B-9 by, among others, the Defendant Allan Cho and the Plaintiff Jason Brown. The shareholders of Dynasty Power, including Mr. Cho, Mr. Brown, [JBRO Holdings], and the Defendants 1713845 Alberta Ltd., 1691399 Alberta Ltd., Nancy Cho, Quacho Holdings Ltd., Gaurav Sharma, Christopher Quilley, Andrew Hoang, Kelly Elias and Todd McRae, entered into an Unanimous Shareholders Agreement dated July 1, 2013 (the **USA**.)

[4] Mr. Brown provided capital to the new venture and held 275,000 shares in Dynasty Power, 10.38% of the share capital at the time it was formed. Through subsequent reorganizations, Mr. Brown's shares were converted, and then assigned to his holding company, JBRO Holdings.

[5] Mr. Brown served as a director and Chief Financial Officer of Dynasty Power. Dynasty Power expanded its trading operations through affiliates, the Defendants Dynasty North America Holdings Inc. (**Dynasty NA**) and Dynasty Energy California Inc. (**Dynasty California**). The shareholders of these companies are largely the same as those of Dynasty Power, and the directors and officers, being Mr. Cho, Mr. Sharma and Mr. Brown, were the same. All of these companies are incorporated under the ABCA. However, there are no unanimous shareholder agreements governing these affiliates.

¹ 2021 ABQB 463. In this quotation from Romaine J’s decision, I have added some definitions that I have already used, or will use, in this decision.

...

[6] On September 28, 2016, Mr. Brown's employment with Dynasty Power was terminated. The letter of termination states that termination was for cause, that Mr. Brown had failed to fulfill his responsibilities as CFO, had attempted to cover up, or failed to disclose, serious errors he had made, and failed to provide the company with critical financial information. Specifically, it states that Mr. Brown failed to submit 2015 financial statements on time, and failed to understand and anticipate certain tax implications that affected the company.

[7] The termination letter purports to remove Mr. Brown as a director of Dynasty Power. Mr. Brown commenced a wrongful dismissal action.

...

[11] Mr. Brown says that, in post-termination discussions with Mr. Cho, he was asked to execute a revised USA that would substantially impair his rights within the company, including the ability to nominate a director, and included certain revisions to the definition of Fair Market Value which were incorporated by reference in the Shotgun-Buy/Sell provisions of Dynasty Power's USA. He refused to do so.

[12] He also says that Mr. Cho advised him that he was not agreeable to Mr. Brown continuing as a director of Dynasty Power and the other members of the Dynasty group, despite the terms of the USA. However, on February 13, 2017, Mr. Brown provided notice to the shareholders of Dynasty Power of his nomination of himself as a director of the company for the following year.

...

[14] On April 10, 2017, [the Exercising Shareholders] issued [the 2017 Buy/Sell Notice] to Mr. Brown under which they proposed to acquire JBRO Holdings' shares for consideration of \$1,919,500. In accordance with the [2017 Buy/Sell Notice], JBRO Holdings had the corresponding opportunity to acquire the shares of the [Exercising Shareholders] for \$16,572,793.

[15] JBRO Holdings responded, objecting to the [2017 Buy/Sell Notice] on the basis that it did not comply with the terms of the USA and the requirement for a determination of Fair Market Value as set out in the USA. The JBRO group submits that material errors are contained in the valuation. The [Exercising Shareholders] initiated legal proceedings on May 11, 2017, seeking a declaration that the [2017 Buy/Sell Notice] had been properly issued and was binding upon JBRO Holdings in accordance with its terms [the **Exercising Shareholders' Originating Application**].

...

[23] ... in the course of the [Exercising Shareholders' Originating Application], Master Farrington issued an order dated December 7, 2017 directing that the [Exercising Shareholders] provide an extensive list of undertakings arising from the cross-examination of a Dynasty group officer on November 1, 2017. The order also provided that any further affidavits be filed and served by January 31,

2018, that questioning be completed by February 26, 2018, and that, after these steps had been completed, the parties were to contact Master Farrington to arrange a special application for the nearest available date.

[24] On December 20, 2017, however, the [Exercising Shareholders] discontinued [the Exercising Shareholders' Originating Application] and utilized a power of attorney contemplated by the USA for the purpose of completing the purchase of [JBRO Holdings]'s shares, despite JBRO Holdings' continued objections. They tendered the purchase price set out in the notice to Mr. Brown, purportedly adjusted in accordance with the USA, in the amount of \$2,033,979.39, plus a cheque for outstanding dividends declared by Dynasty Property in the amount of \$98,000. JBRO Holdings has not accepted the tendered purchase price, but has deposited the cheque in trust with its counsel. The funds were subsequently directed to be held in trust by Mr. Brown's counsel pursuant to an order granted by Master Robertson on June 19, 2018, including a direction that dividends from Dynasty Property be paid into trust with Mr. Brown's counsel and that enough pay taxes be released to Mr. Brown.

[28] On March 20, 2018, the Plaintiffs filed a statement of claim commencing this action.

II. Procedural Background

[5] I will now summarize some of the previous procedural steps in this case, to explain the context of this decision and also what will happen next in this litigation.

[6] In her June 14, 2021 decision, Justice Romaine granted partial summary judgment in favor of JBRO Holdings and JDFA Holdings Inc (**JDFA**), finding that:

- (a) Dynasty Power's issuance of a cash call was contrary to the terms of the USA and was oppressive; and
- (b) Dynasty California and its directors acted in bad faith in cancelling JDFA Holdings Inc's shares in Dynasty California.

[7] Romaine J did not decide whether the 2017 Buy/Sell Notice was valid or invalid. She ordered the following remedies:

- (a) that Dynasty Power, Dynasty California and their directors pay the Plaintiffs' solicitor-client costs;
- (b) that Dynasty Power reinstate Mr. Brown as a director and ensure that full and proper notice of all meetings, and disclosure of all appropriate corporate records, be provided;
- (c) that Dynasty California reinstate JDFA's shares to the date they were improperly voided (March 13, 2017), pay to JDFA all dividends that it should have received since that time, and provide full and proper disclosure of all appropriate corporate records; and
- (d) that Dynasty Power pay to JBRO Holdings all dividends that had been declared but held in trust.

[8] Justice Romaine directed the parties to apply for case management, to identify and discuss a process to resolve the numerous remaining disputed issues, including the validity of the 2017 Buy/Sell Notice, the appropriate date for the valuation of the JBRO Holdings' shares in the Dynasty companies, various disclosure and injunction issues, a conflict issue involving a lawyer who had acted for the Dynasty companies, the interpretation of the Dynasty Property USA, and resolving the Dynasty companies' buyout of the Plaintiffs' shareholdings.

[9] The Defendants appealed Justice Romaine's June 14, 2021 decision. On April 4, 2022, the Court of Appeal:

- (a) dismissed the appeal of the oppression findings and the partial summary judgment; but
- (b) allowed the appeal with respect to remedy, setting aside Justice Romaine's order that Dynasty California had to reinstate JDFA's shares retroactively;

(the **Court of Appeal Decision**).

[10] The Court of Appeal concluded that the parties had not put before Justice Romaine the necessary evidence that would have allowed her to understand the multiple ramifications of awarding a reinstatement of JDFA's shares, which included tax consequences, financial consequences, and potentially fixing a date for the buyout of Dynasty California shares (the parties agreed before the Court of Appeal that the issue of a buyout/valuation date was still live). The Court of Appeal therefore returned the issue of remedy to this Court.

[11] Numerous hearings in this Court followed. On February 23, 2023, the parties appeared before Justice Romaine to discuss the procedure for deciding the remedy issue that had been returned by the Court of Appeal. The parties informed Romaine J that they had reached agreement on the appropriate ultimate remedy in this dispute: what they described as a "corporate divorce" -- in other words, the Defendants buying out of all the Plaintiffs' shareholdings in the Dynasty companies. While they agreed on that overall remedy, they disagreed about the proper procedure to be followed next: the Plaintiffs proposed that the validity of the 2017 Buy/Sell Notice should be determined first, and only after that should the proper procedure be set to decide the valuation date or dates for the share buyout and the corporate divorce. The Defendants proposed instead that a valuation date or dates should be set for the corporate divorce, without the Court first deciding whether the 2017 Buy/Sell Notice was valid. Justice Romaine ordered that the Court would first decide validity of 2017 Buy/Sell Notice, including whether its use was oppressive, after which the parties and the Court would address the proper valuation date or dates for the buyout.

[12] The parties confirmed this arrangement to me during the June 11, 2025 appearance. Therefore, after I decide the validity of the 2017 Buy/Sell Notice, including whether its use was oppressive, the next step in this action will be to set a process to decide the valuation issues, which will facilitate the corporate buyout.

III. Issues

[13] The issues I must decide are:

- (a) should the Plaintiffs be permitted to amend their Amended Statement of Claim;
- (b) should portions of the May 2024 Brown Affidavit be struck; and

(c) was the 2017 Buy/Sell Notice valid, and if so, what is the proper remedy?

[14] It is logical for me to decide the issues in that order. The scope of the pleadings may impact the relevance and materiality of the evidence in the May 2024 Brown Affidavit. I must decide what portions of the May 2024 Brown Affidavit are admissible so that I consider only the relevant and material evidence in deciding the validity of the 2017 Buy/Sell Notice.

[15] For the reasons that follow, I find that:

- (a) the Plaintiffs' proposed amendments to their Amended Statement of Claim (the Requested Amendments) are permitted;
- (b) a few portions of the May 2024 Brown Affidavit should be struck; and
- (c) the 2017 Buy/Sell Notice was invalid, and the Exercising Shareholders' conduct in sending it and closing a transaction pursuant to it was oppressive.

[16] In their written and oral arguments, the Plaintiffs also asked to decide these additional issues:

- (a) a declaration that the Defendants acted in bad faith and breached their fiduciary duties in relation to the 2017 Buy/Sell Notice;
- (b) an order awarding interim costs of the action (not the costs of these three applications) to the Plaintiffs; and
- (c) an order releasing to the Plaintiffs out of trust the purported sale proceeds of the Exercising Shareholders' purchase of JBRO Holdings' shares in Dynasty Power.

[17] I am not deciding these additional issues at this time, primarily because none of this relief was requested in JBRO Holdings' applications. Also, I do not agree with the Plaintiffs that I can simply make findings about bad faith and breach of fiduciary duty as "pathways" to deciding the validity of the 2017 Buy/Sell Notice. While the Plaintiffs have pleaded that the Defendants breached a duty of good faith and they now ask for permission to plead that the Defendants breached a fiduciary duty, they have not made an application for partial summary judgment on those causes of action. It would not be inappropriate for me to decide the merits of those causes of action in these applications.

IV. Analysis

A. Should the Plaintiffs be Permitted to Amend their Amended Statement of Claim?

1. Introduction

[18] The Plaintiffs filed their Statement of Claim on March 20, 2018 and their Amended Statement of Claim on April 17, 2018. They now seek the Court's approval to make the following further amendments:

- allegations that the directors and shareholders of the Dynasty companies, including Mr. Cho and Mr. Sharma, owed fiduciary duties to the Plaintiffs, including the duty to act with honesty, in good faith, and with loyalty, full disclosure and due care;
- allegations that the Defendants breached these fiduciary duties, including by misappropriating the Plaintiffs' interests in the Dynasty companies for themselves,

resulting in intentional harm to the Plaintiffs, including the earning of profits from the companies; and

- asking for the remedy of disgorgement of profits received by the Defendants from the Plaintiffs' interests in the Dynasty companies, calculated from the date of the alleged wrongs to the date of trial;

(collectively, the **Requested Amendments**).

[19] For the reasons that follow, I permit the Plaintiffs to make the Requested Amendments.

2. The Applicable Law

[20] Because the pleadings are now closed, the Plaintiffs require the Court's permission to make the Requested Amendments. Requests to amend pleadings are usually allowed, no matter how late or careless, subject to four exceptions:²

- the amendment would cause serious prejudice to the opposing party, not compensable in costs;
- the requested amendment is hopeless;
- unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; or
- there is an element of bad faith associated with the failure to plead the amendment in the first instance.

[21] In opposing the Plaintiffs' application, the Defendants invoke only the hopelessness exception.

[22] A proposed amendment can be found to be "hopeless" if it does not disclose a cause of action, or if it is so inconsistent with the evidential record that there is no chance it can succeed on its merits: *Attila Dogan* at para 27. The Defendants do not deny that breach of fiduciary duty is a well-established cause of action. Rather, they say that the Requested Amendments are hopeless because there is no evidence whatsoever in the (voluminous) record, which could satisfy even the low evidential bar necessary to demonstrate that this allegation might have a chance of succeeding at trial.

[23] It is necessary to briefly review the law of fiduciary duties in Canada. The law enforces fiduciary duties that are owed in the context of well-established fiduciary relationships, such as trustee/beneficiary and agent/principal. However, fiduciary relationships can also arise on an *ad hoc* basis in other relationships, if:³

- an alleged fiduciary undertakes to act in the best interests of an alleged beneficiary or class of beneficiaries. This undertaking can be express or implied. It can arise as a result of exercising statutory powers, from an obligation under an agreement, or otherwise;
- a defined person or class of persons (the alleged beneficiary or beneficiaries) are vulnerable to the alleged fiduciary's control because:

² *Attila Dogan Construction & Installation Co v AMEC Americas Ltd*, 2014 ABCA 74 at para 25 (*Attila Dogan*).

³ *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 at paras 27 - 36

- the alleged fiduciary has scope for the exercise of some discretion or power;
 - the alleged fiduciary can unilaterally exercise that power or discretion so as to affect the alleged beneficiary's legal or practical interests; and
 - the alleged beneficiary is peculiarly vulnerable to or at the mercy of the alleged fiduciary holding the discretion or power; and
- a legal or substantial practical interest of the alleged beneficiary or beneficiaries stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

3. Applying the Law to the Facts

[24] The Plaintiffs argue that the low evidentiary threshold (to establish that the allegation of a breach of fiduciary duty could possibly succeed at trial) is met here, including because the Exercising Shareholders used a power of attorney pursuant to the USA to close the purchase and sale transaction of JBRO Holdings's shares contemplated in the 2017 Buy/Sell Notice. They say that the Exercising Shareholders acted as JBRO Holdings's agent in using that power of attorney, and a fiduciary duty might have arisen in that context. The Defendants say that there is no evidence whatsoever that the Exercising Shareholders ever undertook to act in JBRO Holdings's best interests, and in fact the exercise of a shotgun clause under a shareholders' agreement like the USA is the epitome of a party acting in its own self-interest under an agreement that gives it that right.

[25] I find that in the specific circumstances of this case, there is sufficient evidence to satisfy the low threshold necessary to allow the Requested Amendments, including the following evidence:

- (a) the power of attorney mechanism in the USA gave the Exercising Shareholders the scope to exercise discretionary power that could prejudice JBRO Holdings's interests by forcibly alienating its shares in Dynasty Power;
- (b) JBRO Holdings was vulnerable to the unilateral closing of the transaction by use of the power of attorney; and
- (c) it could possibly be inferred that the Exercising Shareholders gave an undertaking to act in the best interests of JBRO Holdings – either via their duties under the USA, the power of attorney, or the other circumstances of this case.

[26] I am also taking into account that the Requested Amendments do not seek to add new parties, nor raise new factual allegations. They merely allege that the acts that have already been complained of in this action give rise to an additional cause of action.

[27] The allegations of the existence of a fiduciary duty and a breach of that duty are not hopeless. But my finding goes no further than that. My decision on this issue amounts only to a conclusion that there is sufficient evidence to satisfy me at this stage that the Requested Amendments are not hopeless. I am not deciding in any way that the allegations of the existence of a fiduciary duty or its breach will or will not succeed on their merits, and my decision cannot be taken as any kind of statement about that ultimate question. While the parties have filed significant volumes of written evidence and conducted cross-examinations on that evidence, there has been no questioning for discovery, and obviously no live testimony in a trial setting.

B. Should Portions of the May 2024 Brown Affidavit be Struck?

1. The Applicable Law

[28] Rule 3.68(4) allows the Court to strike evidence that is “frivolous, irrelevant or improper”. The parties generally agree on the law that applies to applications under that Rule:

- affidavits should be confined to statements of fact that are within the personal knowledge of the affiant, or facts that they have been informed of and believe to be true;
- affidavits should only contain relevant and admissible evidence, and therefore should not include unqualified expert opinion, argument, speculation or conclusions of law; and
- the remedy of striking evidence is a discretionary one. I can choose to strike evidence, but I also have the authority to not strike the evidence but instead assign lower weight to evidence that may violate the foregoing principles.

2. The Parties’ Positions

[29] The May 2024 Brown Affidavit is lengthy. The Defendants argue that many portions of it are inadmissible because they violate the principles stated above. They also say that the contents of some exhibits, which contain detailed time entries from the Dynasty companies’ corporate counsel, are privileged.

[30] The Plaintiffs argue that the impugned evidence should not be struck because it is admissible and necessary, as part of the factual narrative of this case. With respect to the lawyer’s account statements, they argue that Mr. Brown was privy to the privilege as a director of the Dynasty companies, and also because the lawyer was jointly engaged by the company and its shareholders.

3. Applying the Law to the Facts

[31] I have carefully reviewed the contents of the May 2024 Brown Affidavit. I find that it is appropriate to strike the following portions, which are clearly inadmissible. I have grouped these extracts under their applicable categories.

i. Opinion

[32] The following portions of the May 2024 Brown Affidavit are struck because they constitute inadmissible legal opinions that Mr. Brown is unqualified to provide:

- the following words at the end of paragraph 9: “which is irrelevant to determining the validity of the Buy-Sell Notice.”;
- the following words in paragraph 27(c): “and those which are relevant to the validity of the Buy-Sell Notice (i.e. Article 11 and Section 13.B.01),”; and
- the second sentence in paragraph 32: “That was not even a transaction applicable to section 10.01 (b), which governs Dynasty Power’s ability to “*consolidate, amalgamate or merge with any person (as defined in the Act)*”.”

ii. Speculation

[33] The following portions of the May 2024 Brown Affidavit are struck because they constitute inadmissible speculation:

- the following words at the end of the second sentence in paragraph 12: “all employees commonly understood that”;
- the second sentence in paragraph 15: “Like the parties to this litigation, prospective purchasers of the Dynasty Group’s shares embrace volatility and seek out its potential benefits.”;
- the first sentence in subparagraph 36(a): “The Defendants considered the employee relationship to be separate from the shareholder relationship and that share transactions were not tied into the decisions concerning my employment.”;
- the last sentence in paragraph 37: “Had the Defendant Shareholders actually held the expectations asserted by Mr. Cho, they presumably would have proposed revisions to the 2013 USA and Article 21 in accordance with those expectations.”;
- the first sentence of paragraph 73: “The Defendant Shareholders were aware of my expectations regarding the Valuator Selection/Approval Principles which were made clear by the Offer.”;
- the following words in the first sentence of subparagraph 79(h): “which I presume was because the Defendant Shareholders were aware of the parties’ continuing disagreement on the Joint Exercise issue and had accepted my evidence, that I had understood that the Joint Exercise was not permitted”; and
- the following words in the first sentence of paragraph 94: “,but it is logical that they arose from Mr. Cho or Mr. Sharma in directing Hnatyshyn’s employment duties and instructing Bullas as our corporate counsel”.

iii. Privilege

[34] Exhibits “BB”, “DD” and “GG” are struck from the May 2024 Brown Affidavit because they contain privileged information, namely:

- (a) detailed account statements (including detailed time descriptions) rendered to Dynasty Power by its legal counsel; and
- (b) correspondence between Dynasty Power and its counsel, in which legal advice is sought, provided and discussed.

4. Conclusion

[35] The volume of evidence that I have struck from the May 2024 Brown Affidavit is quite small, compared to the total volume that the Defendants asked me to strike. I have declined to strike many portions that do contain potentially inadmissible evidence, including:

- (a) argument;
- (b) opinion;
- (c) commentary on the Defendants’ litigation strategy, argument and pleadings;

- (d) evidence of Mr. Brown’s subjective intention about the meaning of provisions in the USA; and
- (e) argumentative commentary on the Defendants’ evidence and their purported intentions.

[36] The reason I have decided not to strike this evidence is that the Defendants’ own evidence, notably the February 9, 2023 and September 11, 2023 affidavits of Mr. Cho, contain substantial quantities of the same types of potentially inadmissible evidence. In this dispute, both parties have pursued a strategy of filing lengthy and sometimes repetitive affidavits that contain information well outside the facts personally known by the affiants. Some of the repetition can probably be explained by the serial, piecemeal manner in which the parties have chosen to litigate this dispute. The practice of filing affidavits that contain large amounts of inadmissible evidence should not be encouraged. Both parties are guilty of that practice here. In the circumstances however, I have concluded that it is efficient and appropriate for me to simply review all the evidence the parties put before me (excluding the portions of the May 2024 Brown Affidavit that I have identified above), and simply give little or no weight to the evidence that is inadmissible.

C. Was the 2017 Buy/Sell Notice Valid?

1. The Parties’ Positions

[37] The Plaintiffs argue that the 2017 Buy/Sell Notice is invalid for a number of reasons:

- (a) it was exercised jointly by all the shareholders except JBRO Holdings, but article 13.B of the USA only permits a single shareholder to issue such a notice (the **Joint Exercise Issue**);
- (b) the Exercising Shareholders unilaterally engaged Trevor Kawka at Meyers Norris and Penny as valuator of Dynasty Power, without consulting JBRO Holdings, contrary to article 11.01 of the USA (the **Unilateral Selection Issue**);
- (c) Mr. Kawka’s valuation did not satisfy the requirements of article 11.01 of the USA;
- (d) the Exercising Shareholders failed to close the transaction purportedly triggered by the 2017 Buy/Sell Notice in accordance with the USA;
- (e) the Exercising Shareholders and/or Dynasty Power did not permit JBRO Holdings to effect tax planning in connection with the transaction, contrary to article 12.03 of the USA; and
- (f) the 2017 Buy/Sell Notice was oppressive.

[38] The Defendants deny that the 2017 Buy/Sell Notice contravened the USA. Their specific responses to the Plaintiffs’ complaints are:

- (a) properly interpreted, article 13.B of the USA permits a number of shareholders to issue a buy/sell notice jointly;
- (b) Mr. Brown had previously approved the selection of Mr. Kawka as the valuator, so the Exercising Shareholders did not “unilaterally” select him;

- (c) Mr. Kawka's valuation fully satisfied the requirements of article 11.01 of the USA;
- (d) the Exercising Shareholders closed the transaction triggered by the 2017 Buy/Sell Notice fully in accordance with the USA;
- (e) the Exercising Shareholders and/or Dynasty Power had no obligation under the USA to allow JBRO Holdings to effect tax planning in connection with the purchase of JBRO Holdings's shares; and
- (f) the 2017 Buy/Sell Notice was not oppressive.

[39] While the Plaintiffs' application seeking a declaration that the 2017 Buy/Sell Notice is invalid did not expressly raise oppression as a basis for the relief sought, I am satisfied that I have the jurisdiction to decide the issue of oppression, and it is appropriate for me to decide that issue. Both parties addressed it in their written submissions. When I asked them in oral argument whether I should be deciding that issue, both parties urged me to do so, and they agreed that oppression was one potential path that might lead to the invalidating of the 2017 Buy/Sell Notice. The Plaintiffs have pleaded oppression in their Amended Statement of Claim in this action, in a way that is broad enough to cover their allegations regarding the 2017 Buy/Sell Notice. Also, it is clear from the transcript of the parties' hearing before Romaine J on February 23, 2023 that they contemplated that oppression would be a live issue that would be decided in this application. It is also important for me to decide this issue, because if the 2017 Buy/Sell Notice was oppressive, the Plaintiffs take the position that such a finding might have potential consequences regarding the correct valuation date or dates that are used for the agreed corporate buyout.

[40] For the reasons set out below, I have decided the Joint Exercise Issue and the Unilateral Selection Issue in favor of the Plaintiffs. Therefore, I find that the 2017 Buy/Sell Notice did not comply with the USA. I also find that the Exercising Shareholders' conduct in sending the 2017 Buy/Sell Notice and in closing the transaction pursuant to it, was oppressive.

[41] It is therefore unnecessary for me to decide the other issues raised by the Plaintiffs (the valuation and tax planning issues). Because the next step in this litigation will be deciding on a process to value the Plaintiffs' shareholdings in the Dynasty companies to facilitate the agreed-upon buyout, it would also be premature and inappropriate for me to rule on those issues or comment on the extensive competing valuation evidence that the parties have filed.

2. The Applicable Law

[42] To decide whether the 2017 Buy/Sell Notice was valid, I must interpret the USA. The parties agree generally on the law that governs my interpretation of the USA. My colleague Price J summarized the applicable principles well in *Chemtrade Electrochem Inc v Superior Plus Corporation*, 2022 ABKB 858 at paras 53 – 56. I have reproduced below those of the principles that are most important to my decision in this case:

- The objective of contractual interpretation is to ascertain what the parties objectively intended by their bargain, at the time they made it. Primacy is given to the parties' words, particularly in a written contract, because it is presumed that the parties chose words that embodied their intentions;

- However, the objective remains the determination of the parties' intention, not the meaning of words in a document. Thus, I must also consider the "factual matrix" or "surrounding circumstances" to help determine the parties' contractual intention, as would be determined by a reasonable person. In other words, extra-textual evidence is used to help understand what the parties meant by the words they used;
- The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract;
- The surrounding circumstances must never be allowed to overwhelm the words of the agreement, to create a new contract;
- Surrounding circumstances will vary from case to case but should consist only of objective evidence of the background facts at the time of the execution of the contract, that is, facts that were or reasonably ought to have been within the knowledge of both parties at or before the date of contracting;
- The court must take a practical, common-sense approach to the interpretation of the contract, not dominated by technical rules of construction. In undertaking this interpretation, the entire contract is to be considered, not just its individual terms;
- Commercial contracts should be interpreted in line with sound commercial principles and good business sense. The interpretation must not be divorced from the economic reality in place at the time or the parties' duty to act honestly and in good faith. The result of the court's interpretation should not be an absurdity; and
- A consideration of the context does not include an inquiry into the subjective state of mind of the parties. Subjective intention evidence (evidence about what the parties believed the agreement to mean) is inadmissible because it is irrelevant.

3. Applying the Law to the Facts

i. The Joint Trigger Issue

[43] For the reasons that follow, I find that the USA did not permit the Exercising Shareholders to jointly issue the 2017 Buy/Sell Notice. The USA only permitted a single shareholder to send such a notice.

[44] Article 13.B.01 of the USA reads:

If any of the Shareholders desires to terminate his association with the others, a Buy-Sell Notice may be given by such Shareholder (hereinafter referred to as the "Offeror") to each of the other Shareholder or Shareholders (hereinafter referred to as the "Offerees"). For the purposes of this Section, a "Buy-Sell Notice" means a notice in writing by the Offeror containing both:

- a) an offer by the Offeror to purchase all, but not less than all, of the shares of all classes of shares in the capital of the Corporation beneficially owned by the Offerees (hereinafter referred to as the “Purchase Offer”); and
- b) an Offer to Sell all, but not less than all, of the Shares of all classes of shares in the capital of the Corporation beneficially owned by the Offeror (hereinafter referred to as the “Sale Offer”). Upon a Buy-Sell Notice being received by the Offerees and pending completion of the transactions contemplated therein, none of the Shareholders shall do or cause to be done or permit the Corporation to do anything except in the ordinary course of business of the Corporation.

[45] Giving the words used in this provision their ordinary grammatical meaning, it is apparent that the parties chose to identify the party who could trigger this provision and send a notice by using the singular word “Shareholder”. They also chose to identify the parties who would receive a notice by using both the singular and plural words “the other Shareholder or Shareholders”.

[46] The Defendants argue that the words “any of the Shareholders” in the opening clause of article 13.B.01 signifies an intention to permit the joint sending of a Buy-Sell Notice by a group of Shareholders. I disagree. That sentence must be read as a whole. The other portions of the sentence are structured as if the Offeror is an individual shareholder: the singular form of the verb “desires” (rather than the plural “desire”) and the singular form “his relationship” (rather than the plural form “their relationships”).

[47] The Defendants next point to Article 28.01 of the USA, and say that any use of the singular words “Offeror” and “Shareholder” in Article 13.B.01 should be read to include the plural forms “Offerors” and “Shareholders”. Article 28.01 reads:

In this Agreement unless there is something in the subject matter or context inconsistent therewith the singular shall include the plural and the plural shall include the singular, and the masculine shall include the feminine and neuter and vice versa.

[48] This provision is not applicable to Article 13.B.01. The entire context of Article 13.B.01 demonstrates a clear intention that only a single “Shareholder” could send a Buy-Sell Notice, as a single “Offeror”. To use Article 28.01 to read in the plural word “Shareholders” in place of the word chosen by the parties (“Shareholder”) would significantly change the meaning of Article 13.B.01. That the parties chose the words in this Article carefully is first apparent from the clause itself. As noted above, they chose the singular “Shareholder” when describing who could be an Offeror. However, they chose “Shareholder or Shareholders” when describing who could be Offerees. If they intended that more than one Shareholder could issue a joint Buy-Sell Notice, they could have used the same “Shareholder or Shareholders” formulation to describe who could be an Offeror, that they used to describe to whom the Buy-Sell Notice had to be sent. They chose not to do that.

[49] This careful and intentional drafting of Article 13.B.01 is also apparent in Article 13.B.04, which sets out the procedure to be followed upon acceptance of a Buy-Sell Notice:

Specific Acceptance Provisions

13.B.04. The following provisions shall apply to any acceptance or deemed acceptance of the Buy-Sell Notice:

- a) in the event all of the Offerees give or are deemed to have given an Acceptance within the time prescribed, each Offeree shall be obligated to sell all the shares of all classes of share in the capital of the Corporation beneficially owned by such Offeree to the Offeror and the Offeror shall be obligated to purchase such shares;
- b) in the event all of the Offerees give a Notification to the Offeror within the time prescribed, ***each Offeree shall purchase from the Offeror and the Offeror shall be obligated to sell to the Offerees, all the shares of all classes of shares in the capital of the Corporation beneficially owned by the Offeror pro rata, in the proportion which the number of common shares of the Corporation owned by each Offeree bears to the total number of common shares owned by all Offerees;***

[emphasis added]

[50] The *pro rata* language that I have emphasized in subarticle (b) is necessary because more than one Offeree might accept an Offeror's Sale Offer. If that happens, a *pro rata* mechanism is necessary, to figure out how many of the Offeror's shares each Offeree must buy. However, the lack of any equivalent *pro rata* language in subarticle (a) demonstrates that the parties intended that there would only be a single Offeror. If they had intended that more than one Offeror could jointly make a Buy-Sell Notice, *pro rata* language would have also been required in subarticle (a), to figure out how many of the Offeree's or Offerees' shares each Offeror must buy.

[51] The conclusion that the parties intended the singular words "Shareholder" and "Offeror" to refer to only a single party in article 13.B.01 is further reinforced when the USA is read as a whole. In Article 1.15, the parties demonstrated that if they intended a clause to apply to more than one Shareholder, they were capable of saying that expressly. Article 1.15 states:

"Guarantee Agreement" means an agreement by way of guarantee given or to be given, as the case may be, ***by one or more of the Shareholders*** or the Principal of a Shareholder or a related entity to a Shareholder for the repayment of any indebtedness to the Corporation or for the performance by the Corporation of any of its other obligations. [emphasis added]

[52] Had the parties intended that a Buy-Sell Notice could be sent by "one or more" Shareholder, as the Defendants argue, they could have said that. They chose not to.

[53] The Defendants also point to some extrinsic evidence to argue that their interpretation of Article 13.B is the one intended by the parties. This is evidence of statements made by various shareholders (including Mr. Brown) and by Dynasty Power's corporate lawyer, to the effect that Article 13.B was designed to be used or could be used to force a single shareholder out of the corporation. However, none of that evidence is admissible. It is all evidence of individuals' subjective beliefs or subjective intentions about how Article 13.B would work or was intended to work. Notably, all that evidence post-dates the signing of the USA by two years or more. None of that evidence qualifies as surrounding circumstances.

[54] The Defendants rely on *Sandiford v 21045887 Ontario Inc*, 2012 ONSC 5825, in which the court ruled that the singular word "Shareholder" in a shotgun clause should be interpreted to

allow the shotgun to be triggered by two shareholders acting together. However, that case is factually distinguishable from this case. There were two very distinct shareholder groups there: a corporation held 50% of the shares, and a husband and wife together owned the other 50%. The husband and wife had jointly triggered the shotgun. In those circumstances, the Court decided that it would not have been commercially reasonable to prevent the husband and wife group from triggering the shotgun collectively. The Court also found that the meaning of the word “Shareholder” in the shotgun clause was ambiguous, and that the agreement as a whole and the surrounding circumstances at the time the agreement was signed demonstrated that the parties had intended to allow for joint exercise. Here, when the USA was signed, Dynasty was not owned by two distinct groups each holding 50%. Also, I find no ambiguity in Article 13.B.01, and the entire agreement shows that the parties to the USA intended that only a single shareholder could trigger a buy-sell.

[55] In *840101 Alberta Ltd v EML Relocation Services Ltd*, 2007 ABQB 742, this Court applied an interpretation clause (like Article 28.01 in the USA) to infer that by using the singular word “shareholder” in a shotgun clause, the parties had intended to allow joint triggers by more than one shareholder. That case is also distinguishable from this one, because the clause there was worded very differently than Article 13.B, and the shareholders’ agreement had been amended multiple times, as the shareholdings in the corporation changed over time. Those factors played a significant role in the Court’s interpretation exercise. Nothing like those facts is present here.

[56] The decision in *Golfnorth Properties Inc v Rebel Land Holdings Inc*, 2019 ONSC 3479 cited by the Defendants is also not helpful. The issue there was whether a purchase offer under a limited partnership agreement by a single offeror had to be made individually to each offeree unit owner, or whether it could be made to all the offeree owners at the same time but on a “first come, first served” basis. That is a very different interpretation exercise than in this case and the conclusions in that case are not applicable to the issue here.

[57] This case is more like the situation that was considered by our Court of Appeal in *942925 Alberta Ltd v Thompson*, 2008 ABCA 81. There, the shareholders’ agreement expressly only permitted a single shareholder to trigger a shotgun, like the USA here. The Court of Appeal noted at para 21 that “a shareholder must strictly comply with the terms of a shotgun clause in order to obtain its benefit.” The Court rejected the argument that it should ignore the clear words of the agreement, and give the clause a liberal reading to facilitate a “divorce” of the feuding shareholders.

[58] The Defendants also argue that not allowing a group of shareholders to act as a single “Offeror” under Article 13.B.01 leads to commercial absurdity, because only one Buy-Sell Notice can be issued at a time under the USA, and other Buy-Sell Notices cannot be issued until an existing one is fully dealt with. The Defendants say this result follows from the final sentence in Article 13.01.B(b): “Upon a Buy-Sell Notice being received by the Offerees and pending completion of the transactions contemplated therein, none of the Shareholders shall do or cause to be done or permit the Corporation to do anything except in the ordinary course of business of the Corporation.”

[59] I disagree with the Defendants’ interpretation. That sentence speaks only to the ordinary course of business of Dynasty Power. Offers to sell or purchase shares as between the shareholders of Dynasty Power are the business of its shareholders, not the business of

Dynasty Power. There is nothing in Article 13.B.01 that prohibits multiple Buy-Sell Notices being outstanding at the same time. No commercial absurdity results from the parties' choice of specifying that only a single shareholder can be an Offeror under Article 13.B.

[60] The Defendants next argue that interpreting Article 13.B.01 to permit only a single shareholder to be an Offeror would not be in line with sound commercial principles and good business sense. They argue that the commercial purpose of shotgun clauses like Article 13.B.01 is to enable involuntary shareholder exits, and the Article must therefore be interpreted to accord with this economic reality – in other words, by permitting joint exercises designed to force out one targeted offeree shareholder. The Defendants argue that, because of this commercial imperative, the 2017 Buy/Sell Notice did not have to comply “perfectly” with the USA.

[61] The Defendants primarily base this argument, about imperfect compliance being sufficient, on the Ontario Court of Appeal's decision in *Western Larch Ltd et al v Di Poce Management Ltd*, 2013 ONCA 722. That case is factually distinguishable from this case. There, the offeror had triggered a shotgun clause by making an offer that contained two alternative offers. One alternative offer did not comply with the limited partnership agreement, but the other one did. The chambers judge had decided that the notice complied with the partnership agreement, because one of the two alternative offers was compliant. The Court of Appeal refused to set aside that finding. The offeror had closed the purchase and sale transaction in accordance with the non-compliant alternative, and the chambers judge had decided that damages was the proper remedy for that breach. The Court of Appeal also agreed with that conclusion. The 2017 Buy/Sell Notice contained only a single offer (that I have found to be non-compliant with the USA). It did not contain alternative offers, one of which was compliant and one of which was not.

[62] The Defendants also rely on *Blackmore Management v Carmanagh Management Corporation*, 2022 BCCA 117 for a similar proposition. The issue in that case was whether a shotgun offer could be revoked after it had been issued. The British Columbia Court of Appeal found that the ordinary and grammatical meaning of the words used in the contract evidenced the parties' intention that such offers would not be revocable. The Court then went on to consider the surrounding circumstances, stating at para 43:

The commercial purpose of a shotgun clause is to provide a mechanism for shareholders to terminate the shareholder relationship by forcing a sale of one shareholder's interest in the company ... An interpretation that would allow the shotgun process to be unilaterally stopped once triggered is inconsistent with this objective.

[63] While the general principles stated in *Western Larch* and *Blackmore* that I have cited above are sound, to utilize those general principles to interpret Article 13.B.01 in a way that allows joint exercises of Buy-Sell Notices under the USA would completely overwhelm the actual words the parties agreed upon in the USA, and create a new agreement. That would be contrary to the rules of contractual interpretation, and I decline to do that.

[64] The USA only permitted a single shareholder to issue a Buy-Sell Notice under Article 13.B. Therefore, the 2017 Buy/Sell Notice that was sent jointly by the Exercising Shareholders, as a purported single Offeror, contravened the USA.

ii. The Unilateral Selection Issue

[65] For the reasons that follow, I find that the Exercising Shareholders also breached the USA by unilaterally selecting Mr. Kawka as the valuator for the purpose of the 2017 Buy/Sell Notice.

[66] The evidence about how the Exercising Shareholders selected Mr. Kawka is not disputed. On October 5, 20106, Mr. Brown’s lawyer sent a letter expressly marked “without prejudice” to Dynasty Power’s lawyer (the **Privileged Letter**). This was about a month after Dynasty Power had terminated Mr. Brown’s employment. In the Privileged Letter, Mr. Brown made a comprehensive settlement offer, which included a proposal that Dynasty Power and some (but not all) of the other Dynasty companies would be valued, and then Mr. Brown’s or his affiliates’ shares would be purchased on the basis of that valuation. Mr. Brown proposed three valutors for this exercise, one of which was Mr. Kawka. The Privileged Letter set out a process by which this valuation would be completed, including that the parties would jointly retain the chosen valuator, and that they would both engage and meet with the valuator throughout the process. The process contemplated a very detailed and open exchange of information between the parties and the valuator. The settlement offer proposed a global resolution of all issues between the parties, including an exchange of releases.

[67] Dynasty Power did not accept the offer in the Privileged Letter, although the parties continued to hold settlement discussions in late 2016 and early 2017. In early 2017, the Exercising Shareholders, without any discussion with Mr. Brown, retained Mr. Kawka to value Dynasty Power for the purpose of sending the 2017 Buy/Sell Notice. At least part of their expressly stated motivation in choosing Mr. Kawka was their knowledge that Mr. Brown had named Mr. Kawka in the Privileged Letter as a valuator who would be acceptable to him (for the purposes described in the Privileged Letter).

[68] Article 13.B.02 of the USA stipulates that the price in a Buy-Sell Notice “shall be Fair Market Value as determined in accordance with the terms of this Agreement.” Article 11.01 of the USA sets out the process to determine Fair Market Value, as follows:

Determination of Fair Market Value

11.01 For the purposes of this Agreement, and specifically the provisions and clauses of this section, any determination of the Fair Market Value for Shares shall be done in the following manner unless specifically stated otherwise in this Agreement:

A qualified certified business valuator mutually acceptable to the parties shall determine the fair market value of the Corporation, employing generally accepted accounting principles, and upon this basis shall determine the fair market value for shares. In determining the share value, the fair market value of trading assets will be averaged between the date of the offer and the Closing date. Trading assets includes working capital available to the Corporation for trading in the form of cash, cash equivalents, investments, trading accounts, trading margin, collateral, derivative contracts and financial instruments related to the

Corporations trading activity. Expense of such valuation will be borne by the Corporation only if unanimously agreed by all directors. If there is no unanimous decision, the party requesting the valuation will be responsible for paying for the valuation, however the non-paying party has the right to approve the choice of a valuator, such approval not to be unreasonably withheld.

[69] The language at the start and the end of this provision is potentially contradictory. The statement at the start of the provision, that a valuator must be “mutually acceptable to the parties”, is clear and unambiguous. However, the final sentence potentially muddies this clarity: “If there is no unanimous decision, the party requesting the valuation will be responsible for paying for the valuation, however the non-paying party has the right to approve the choice of a valuator, such approval not to be unreasonably withheld.” The phrase “no unanimous decision” refers to the previous sentence, which says that Dynasty Power will bear the cost of the valuation only if “unanimously agreed” by all directors. However, the sentence then goes on to suggest that if the board does not unanimously approve the company paying, the party requesting the valuation shall pay but the non-paying party “has the right to approve the choice of valuator, such approval not to be unreasonably withheld”.

[70] There are different possible interpretations of how a valuator must be approved, based on reading this article as a whole:

- (a) one possible interpretation is that the requirement in the initial sentence, that a valuator must be “mutually acceptable” to the parties, applies in all cases and overrides the later sentences dealing with who is to pay the costs of the valuation. If this interpretation is correct, all parties must agree on the valuator, and if they do not, that valuator cannot be selected. There would be no requirement that a party’s agreement or non-agreement on the valuator has to “reasonable”; or
- (b) another possible interpretation is that the later sentences override or modify the initial requirement of mutual acceptability. If this is the case, there could be two different results, depending on the board’s decision about funding:
 - (i) if the board unanimously agrees that the company will pay for the valuation, the last sentence would not become operative, so the mutual acceptability condition in the first sentence remains operative; or
 - (ii) if the board does not unanimously agree that the company will pay for the valuation, the party requesting the valuation must pay for it, and the other party no longer has an unconditional right to approve the valuator. Instead, that non-paying party can only disapprove of a valuator if they do so reasonably.

[71] In the circumstances of this case, I find that it is not necessary for me to resolve this potential ambiguity. Regardless of which interpretation is correct, the result is the same. JBRO Holdings disapproved the appointment of Mr. Kawka, immediately objecting after the Exercising Shareholders sent the 2017 Buy/Sell Notice.

[72] I will assume that JBRO Holdings’ disapproval of Mr. Kawka had to be “reasonable” (the interpretation most favourable to the Defendants). To consider whether JBRO Holdings’

disapproval of Mr. Kawka was reasonable, it is necessary to consider the circumstances in which the Exercising Shareholders selected Mr. Kawka. As noted, they based his selection on Mr. Brown naming him in the Privileged Letter. Once those circumstances are considered, the clear result is that JBRO Holdings' disapproval of Mr. Kawka was reasonable.

[73] First, Mr. Brown's naming of Mr. Kawka as an acceptable valuator was extremely conditional. It was only one part of a comprehensive settlement offer with many other terms and conditions, none of which were accepted. This is obvious from the very specific conditions in the Privileged Letter surrounding Mr. Brown's proposal of Mr. Kawka and the other two individuals as acceptable valutors – he approved those valutors only in the context of a very specific and detailed valuation process that would have seen all the parties involved in every stage of the exercise: exchanging corporate data and information, meeting with the valuator, reviewing a draft report, etc. Mr. Brown did not approve Mr. Kawka as a valuator for all purposes and he certainly did not approve Mr. Kawka as the valuator for a non-compliant joint Buy-Sell Notice from the Exercising Shareholders.

[74] Further, Mr. Brown and JBRO Holdings are separate legal entities. Mr. Brown (through his counsel) wrote the Privileged Letter, not JBRO Holdings. While the settlement offer in the Privileged Letter, if accepted, would have resolved all the issues between JBRO Holdings and Dynasty Power, it cannot actually be said that JBRO Holdings itself ever agreed to the selection of Mr. Kawka. Mr. Brown did that.

[75] Additionally, and very importantly, the Exercising Shareholders' use of the information in the Privileged Letter was completely improper. The Privileged Letter was clearly covered by settlement privilege, because it satisfied all three legal requirements for that form of protection: when it was sent, a litigious dispute existed between Mr. Brown and Dynasty Power; it was sent with the express or implied intention that it would not be disclosed to the Court if settlement negotiations failed (as demonstrated by its express labelling as “without prejudice”); and its purpose was to attempt to bring about a settlement: *Fluor Enterprises Inc v Leder Investments Ltd*, 2025 ABKB 234 at paras 44 - 52.

[76] Settlement privilege belongs to both parties, and it cannot be unilaterally waived or overridden by one of the parties: *Bellatrix Exploration Ltd v Penn West Petroleum Ltd*, 2013 ABCA 10 at para 26. Here, it belonged to Mr. Brown and Dynasty Power. It did not belong to the Exercising Shareholders.

[77] The manner in which the Exercising Shareholders described their very casual use of the Privileged Letter in formulating the 2017 Buy/Sell Notice is shocking. In his May 5, 2017 affidavit, filed less than a month after the 2017 Buy/Sell Notice was sent, and in support of the Exercising Shareholders' Originating Application, Todd McRae swore that:

The director of the Offeree is Jason Brown. Until September 2016, Jason Brown was chief financial officer of the Corporation, but his employment has ended. In the context of discussions of a number of issues related to the end of his employment, Mr. Brown's counsel sent a without prejudice letter dated October 5, 2016, to counsel for the Corporation. In that letter, counsel for Mr. Brown advised that any one of three business valutors (Trevor Kawka, Lorne Siebert or Rob Doran) would be acceptable to the Offeree for determining the value of the Corporation for the purposes of the settlement proposal in the letter. As these three valutors were acceptable for that purpose, I concluded that the same set of

valuators would be acceptable for the purposes of the buy/sell provision. Accordingly, the Offeror engaged one of the three mutually acceptable certified business valuers, Trevor Kawka of MNP LLP, to provide a valuation of the Corporation for the purposes of the buy/sell provision. I attach a redacted version of the letter as **Exhibit "D"**.

[78] Mr. McRae was a shareholder of Dynasty Power, but not an officer or a director. This is a frank and brazen admission by Mr. McRae that the Exercising Shareholders used privileged information that they had no right to receive, in connection with their 2017 Buy/Sell Notice.

[79] Mr. Cho went even further, trying to suggest that Mr. Brown somehow authorized the use of the Privileged Letter and that this amounted to JBRO Holdings' approval of Mr. Kawka. Mr. Cho swore as follows in his September 9, 2011 affidavit:

JBRO's amenability to having Kawka prepare a valuation (as referenced in the Buy-Sell Notice) was conveyed by Brown's [lawyer] within a letter labelled "without prejudice", dated October 5, 2016 to Dynasty Power. Brown sent a separate copy of it directly to Hnatyshyn on the same day. Since Hnatyshyn was not a shareholder of Dynasty Power, it was sent presumably so that I and the other shareholders could see it. A redacted copy of the October 5, 2016 letter, together with the email to Hnatyshyn from Brown is attached as **Exhibit "R"** to this Affidavit. The October 5, 2016 letter listed 3 valuers which JBRO would agree to complete the valuation of Dynasty Power and Dynasty North America Holdings Inc. Among those named was Kawka of MNP. Lorne Siebert ("**Siebert**") is also named in this letter so it is not surprising that Brown chose Siebert subsequently in 2017 to respond to the MNP valuation done by Kawka.

[80] Mr. Hnatyshyn was the CEO or acting CEO of Dynasty Power when Mr. Brown sent him the Privileged Letter. There is nothing unusual about a lawyer for one party sending a settlement offer to the lawyer for a second party, while the sending party also sends the offer directly to the CEO of the receiving party. Nothing about that can reasonably give rise to an inference that the offeror was inviting the corporation to unilaterally override the privilege, by giving the information to third parties.

[81] The Exercising Shareholders received the Privileged Letter, or the information in it, as a result of Dynasty Power improperly and unilaterally overriding the privilege it shared with Mr. Brown. The Exercising Shareholders had no right to use this privileged information as a basis for purporting to decide that JBRO Holdings agreed to the selection of Mr. Kawka as the valuator in connection with the 2017 Buy/Sell Notice.

[82] The Defendants' argument that privileged and confidential information was treated in a "loosey-goosey" manner in this closely-held corporation, and that the Exercising Shareholders "had this information in their brains" are not satisfactory answers to this unilateral breach of privilege. Nor is the Defendants' argument that, later in the litigation, Mr. Brown was making factual assertions that contradicted the contents of the Privileged Letter. In this decision, I am not making any findings about the subsequent use of the Privileged Letter in the litigation, including whether the privilege was later waived or became subject to an exception that justified its disclosure. What is clear is that the privilege was intact in early 2017, that Dynasty Power improperly breached its privilege, and that the Exercising Shareholders had no right to use the information in the Privileged Letter.

[83] In the circumstances, the Exercising Shareholders had an obligation to consult with JBRO Holdings about the selection of a valuator for the purposes of the 2017 Buy/Sell Notice. Their failure to do so was contrary to Article 11.01 of the USA. JBRO Holdings' refusal to agree to Mr. Kawka as valuator was not unreasonable.

4. Conclusion on the Validity of the 2017 Buy/Sell Notice

[84] For the reasons set out above, I conclude that the Exercising Shareholders breached the USA when they sent the 2017 Buy/Sell Notice. It follows that when they unilaterally proceeded to effect their purchase of JBRO Holdings' shares in Dynasty Power pursuant to the 2017 Buy/Sell Notice, this act was also a breach of the USA. Any authority they would have had to effect that transaction under the USA was absent, because the 2017 Buy/Sell Notice was not effective.

5. Was the 2017 Buy/Sell Notice Oppressive?

[85] The statutory basis for oppression claims is section 242 of the *Business Corporations Act* (Alberta) (*ABCA*):

- 242(1) A complainant may apply to the Court for an order under this section.
- (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
- (a) any act or omission of the corporation or any of its affiliates effects a result,
 - (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
 - (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

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

[86] To simplify and paraphrase in the context of this case, the only types of conduct that can be capable of being the subject of an oppression claim are:

- under subsection 2(a), acts of **Dynasty Power**;
- under subsection 2(b), **the business or affairs of Dynasty Power**; or
- under subsection 2(c), acts of **the directors of Dynasty Power**.

[87] The acts that the Plaintiffs complain about in this application are the sending of the 2017 Buy/Sell Notice, and the purported closing of the share transaction pursuant to the 2017 Buy/Sell Notice. The Exercising Shareholders were the only parties who did these things, and they did so in their capacities as shareholders. These acts were not the conduct of Dynasty Power, nor of its directors. While Mr. Cho and Mr. Sharma, two of the Exercising Shareholders, were also directors of Dynasty Power, their participation in the impugned conduct did not involve any exercise of their duties as directors. There were no meetings of directors or directors' resolutions associated with the impugned conduct.

[88] Because the impugned conduct was the conduct of the Exercising Shareholders only, and not the conduct of Dynasty Power or its directors, it cannot qualify as oppressive conduct under subsection 242(2)(a) or (c) of the *ABCA*. It can only be potentially attacked as oppressive under subsection 242(2)(b). Therefore, the question is whether the sending of the 2017 Buy/Sell Notice and the closing of the transaction pursuant to the 2017 Buy/Sell Notice was conduct “in respect of ... the business or affairs of the corporation”. For the reasons that follow, I find that it was.

[89] The Supreme Court of Canada confirmed in *BCE v 1976 Debentureholders*, 2008 SCC 69 at para 65 (*BCE*) that the conduct of shareholders may give rise to an oppression claim. The Supreme Court cited *GATX Corp v Hawker Siddeley Canada Inc*, 1996 CanLII 8286 (ONSC) (*GATX*) in support of that proposition. In *GATX*, Blair J considered whether a complaint about the enforceability of a right of first refusal over the sale of shares in a shareholders’ agreement was conduct “in respect of ... business or affairs” of the corporation.⁴ He decided that it was, even though the complaint only involved conduct by a shareholder, and rights as between shareholders. He reached this conclusion on the basis that it would be incorrect to take a narrow and technical approach to the statutory oppression remedy: *GATX* at paras 137 – 143.

[90] Having concluded that the impugned conduct here potentially falls within section 242(2)(b) of the *ABCA*, I must next analyze whether that conduct was oppressive. In *BCE* at para 275, the Supreme Court set out a two-step inquiry to answer this question:

- does the evidence support the reasonable expectations asserted by the claimant?
- assuming that reasonable expectations exist, does the evidence establish that these expectations were violated by conduct that falls within the term "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[91] Considering all the circumstances of this case, I have no difficulty concluding that JBRO Holdings expected that the Exercising Shareholders would comply with the provisions of the USA in sending any Buy-Sell Notices, and that those expectations were reasonable. When determining the expectations of shareholders, courts may look to the terms of shareholder agreements: *Main v Delcan Group Inc*, 1999 CanLII 14946 (ONSC) at para 29, citing *218125 Alberta Ltd v Patel*, 1995 CanLII 9174 (ABQB) at para 37. Certainly, there can be no doubt that JBRO Holdings reasonably expected that Mr. Brown’s “without prejudice” settlement offer to Dynasty Power in the Privileged Letter would not be misused by the Exercising Shareholders as a basis for unilaterally selecting Mr. Kawka as valuator.

[92] The Exercising Shareholders’ joint exercise under Article 13.B, their unilateral selection of Mr. Kawka as valuator, and their closing of the transaction (especially when they had proactively commenced the Exercising Shareholders’ Originating Application to seek a ruling) violated JBRO Holdings’ reasonable expectations. The Supreme Court in *BCE* at paras 93 and

⁴ *GATX* involved an oppression claim under the *Canada Business Corporations Act (CBCA)*, so Blair J was interpreting section 241(2)(b) of the *CBCA*. However, that provision is worded identically to section 242(2)(b) of the *ABCA*. Blair J also relied in part on the wide definition of “affairs” in the *CBCA* (“affairs” means the relationships among a corporation, its affiliates and the shareholders, directors and officers of those bodies corporate, but does not include the business carried on by those bodies corporate). The *ABCA* contains the identical definition of “affairs”.

94 explained the difference between the three different types of violating conduct in section 242 as follows:

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as “burdensome, harsh and wrongful”, “a visible departure from standards of fair dealing”, and an “abuse of power” going to the probity of how the corporation’s affairs are being conducted ... It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

[93] The *CBCA* has added “unfair prejudice” and “unfair disregard” of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by “oppression” may fall within s. 241. “Unfair prejudice” is generally seen as involving conduct less offensive than “oppression”. Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a “poison pill” to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors’ fees higher than the industry norm ...

[94] “Unfair disregard” is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder’s dividend, or failing to deliver property belonging to the claimant ...

[93] I find that the Exercising Shareholders’ conduct in sending the 2017 Buy/Sell Notice in the manner they did, and also in carrying out the purchase and sale transaction pursuant thereto, constituted “oppression” of JBRO Holdings. The most egregious breach by the Exercising Shareholders was their knowing use privileged information that they had no right to possess. This is certainly a wrong “of the most serious sort”.

6. The Appropriate Remedy

a. Remedy for the Exercising Shareholders’ Breaches of the USA

[94] The Plaintiffs ask me to make a declaration that the 2017 Buy/Sell Notice was invalid, and to set aside the transaction that the Exercising Shareholders effected pursuant to it. They also ask that I reinstate JBRO’s ownership of its shares in Dynasty Holdings, or craft an equitable remedy that would notionally recognize JBRO’s continued ownership of its shares, and all the benefits to which it would have become entitled if it had continued to own the shares until now.

[95] I decline to award that remedy, for the same reasons noted in the Court of Appeal Decision. In these applications, I did not have before me the type of evidence that would allow me to understand the consequences that would flow from this remedy, including tax and other financial consequences.

[96] It is also unnecessary and it would be inappropriate for me to award that remedy, in the context of the parties’ agreement to effect a corporate divorce. Because of their breach of the USA, the Exercising Shareholders improperly took ownership of JBRO’s shares in Dynasty

Power in December 2017. However, the whole point of the corporate divorce will be for the Defendants to take ownership of the Plaintiffs' shares in the Dynasty companies, and to pay appropriate compensation for those shares.

[97] The customary monetary remedy for breach of contract is an award of damages, in an amount that will put the plaintiff in the position it would have occupied if the contract had been performed: *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 50. I find that JBRO Holdings is entitled to that remedy, and I need go no further that awarding that remedy at this time. The proper method of measuring JBRO Holdings' damages and the proper quantum of those damages can be decided at the next stage of these proceedings, on a full evidential record. I am not deciding any of those issues at this time.

[98] I am satisfied that awarding a damages remedy only at this time, with all the details to be decided later, does not prejudice any party. JBRO Holdings will be able to argue that it is entitled to disgorgement of profits or benefits to the date of judgment (a damages award for breach of contract can potentially include disgorgement of profits: *Extreme Venture Partners Fund I LP v Varma*, 2021 ONCA 853), and the Defendants will be able to contest that claim. The parties' rights to argue about what they say is the appropriate valuation date, and the proper valuation amount, are preserved.

b. Remedy for Oppression

[99] Courts should award remedies for oppression that are corrective, and go no further than is necessary to correct the injustice or unfairness between the parties. Remedies should intervene in as minimal a way as possible, balancing the competing interests of all the involved parties, including the corporation: Court of Appeal Decision at paras 60 and 61. In the circumstances of this case, including the agreed corporate buyout as the ultimate resolution, the appropriate remedy for the Exercising Shareholders' oppression is the same as for their breach of contract: an award of damages, to compensate JBRO Holdings for the losses it suffered as a result of the oppressive conduct.

V. Conclusion

[100] As agreed by the parties, the next step in this litigation will be to set a process for the Court to decide on the proper valuation dates for the Plaintiffs' interests in the Dynasty companies, and the value of those interests. As a result of this decision, that hearing will also need to include setting a process to determine the damages I have ordered in these applications. Given my familiarity with this case (and the recent retirement of Romaine J), I will seize myself with that next procedural step in this case, but not with any subsequent steps.

[101] I direct the parties to attempt to reach agreement prior to August 31, 2025 on a consent procedural order, setting out the manner in which the substantive damages and valuation issues will be decided by the Court. If they cannot agree on a procedural order, they have leave to schedule a half-day hearing before me during one of my Commercial List weeks in November or December, 2025. Each party can file one brief, not exceeding 30 pages, in advance of that procedural hearing. The parties may not file any additional evidence for that hearing, without first obtaining my leave. The evidence they have already filed in this case is voluminous. The record as to what has happened between these parties has already been put before the Court comprehensively.

[102] The Plaintiffs must file and serve their Amended Amended Statement of Claim including the Requested Amendments by August 1, 2025. The Defendants shall file and serve any Statement of Defence to that Amended Amended Statement of Claim by August 29, 2025.

[103] If the parties cannot agree on the costs of these applications, they can provide me with written submissions on costs, not to exceeding five pages, within 45 days of the date of this decision.

Heard on the 11th day of June, 2025.

Dated at the City of Calgary, Alberta this 14th day of July, 2025.

C.D. Simard
J.C.K.B.A.

Appearances:

Peter Osadetz
for the Plaintiffs

Lillian Pan, KC
Christy Lee
for the Defendants