KING'S BENCH FOR SASKATCHEWAN

Citation: **2026 SKKB 64**

Date: **2026 03 19**
Docket: KBG-SA-00016-2024
Judicial Centre: Saskatoon

BETWEEN:

KENNETH HAMILTON, MEAGAN HAMILTON, MONALEE STEINHILBER, and 101259044 SASKATCHEWAN LTD.

APPLICANTS

- and -

HCC GROUP OF COMPANIES LTD.

RESPONDENT

Counsel:

Jay D. Watson. K.C. — for the applicants
Douglas C. Hodson, K.C. — for the respondent

FIAT — CLACKSON J.
March 19, 2026

INTRODUCTION

[1] Kenneth Hamilton, Meagan Hamilton, Monalee Steinhilber, and 101259044 Saskatchewan Ltd., [Hamilton Parties] are shareholders in HCC Group of Companies Ltd. [HCC]. In November of 2023, they opposed a shareholder resolution

to sell HCC's shareholdings in its subsidiary corporations to another entity. They voiced their opposition through a formal Notice of Dissent pursuant to s. 14-21 of *The Business Corporations Act, 2021*, SS 2021, c 6 [*BCA*]. The Hamilton Parties then launched an application under the oppression provisions of the *BCA* seeking:

a. a declaration that HCC conducted its affairs in a manner that is oppressive to the interests of the Hamilton Parties;

b. an order setting aside the impugned share transaction;

c. in the alternative, an order directing HCC to purchase the shares of the Hamilton Parties at a value to be determined by the court; and

d. an order requiring HCC to produce audited financial statements for the fiscal years 2019 to and including 2023.

[2] In accordance with the process set out in s. 14-21, HCC offered to purchase the shares of the Hamilton Parties. The offer was rejected. HCC now applies pursuant s. 14-21(19) for an order fixing the value of the Hamilton Parties' shares.

[3] At this juncture the parties seek a judicial determination only with respect to whether the Hamilton Parties are entitled to seek relief for oppression given that they have exercised their right to dissent pursuant to s. 14-21. If that question is answered affirmatively, the parties also then seek the court's ruling with respect to the oppression application. Should oppression be found the question of remedy will be addressed in a subsequent hearing.

ISSUES

[4] There are therefore two issues currently before the court:

a. Are the Hamilton Parties precluded from bringing an oppression

application having also exercised their right to dissent under s. 14-21 of the *BCA*?

b. If not, have the Hamilton Parties demonstrated oppression of their interests?

[5] I conclude that the Hamilton Parties are entitled to bring an action for oppression under s. 18-4 of the *BCA* notwithstanding having exercised the right to dissent under s. 14-21 of the *BCA*.

[6] I further conclude that the affidavit evidence is insufficient to permit the court to determine the oppression action without hearing from the witnesses and direct the parties to a *viva voce* hearing with respect to that issue.

[7] These are my reasons.

Are the Hamilton Parties precluded from bringing an oppression application having also exercised their right to dissent under s. 14-21 of the *BCA*?

Background

[8] At a special meeting of shareholders on November 24, 2023, the shareholders of HCC, other than the Hamilton Parties, resolved to consider and approve, if appropriate, the sale of all issued and outstanding shares owned by HCC in each of its subsidiary corporations to 102179947 Saskatchewan Ltd. or its nominee [NewCo]. HCC is a holding company and owns 100% of all the common shares issued by each of its subsidiaries [Subsidiary Shares].

[9] Ken Hamilton owns 183,333 Class “H” preferred, non-voting shares in HCC. Meagan Hamilton owns 161,383 Class “H” shares, Monalee Steinhilber owns 183,333 Class “H” shares, and 101259044 Saskatchewan Ltd. [Ken Holdco] owns 30

Class “A” common, voting shares and one Class “H” share. Ken Hamilton is the sole director, officer, and shareholder of Ken Holdco.

[10] In his affidavit sworn December 24, 2023, Ken Hamilton states that the proposed transaction would result in HCC exchanging the Subsidiary Shares for 3,495,000 preferred, non-voting shares in NewCo, at a price of $1.00 per share [Share Sale]. The closing date for the transaction was to be November 30, 2023. After the Share Sale is completed, HCC anticipates that the directors of NewCo will be the directors of HCC, excluding Ken Hamilton. The common shareholders of NewCo are the common shareholders of HCC, excluding Ken Holdco. How NewCo’s common shareholders acquired their shares is not in evidence.

[11] In his affidavit sworn on February 27, 2024, Rylan Colwell, the current President and CEO of HCC, states that the value of the preferred shares issued by Newco is $3,895,000 and that the purpose of the Share Sale is to eliminate Mr. Hamilton’s ability to vote his common shares in HCC in a manner that “could affect the operations of the HCC Subsidiaries”.

[12] The evidence does not disclose whether the Share Sale is completed, although Mr. Colwell’s affidavit warns of the difficulty of unwinding that transaction.

[13] On November 16, 2023, HCC informed the Hamilton Parties of their right to dissent to the proposed transaction. The Hamilton Parties responded the next day with a formal Notice of Dissent. The Notice of Dissent advises HCC that the Hamilton Parties object to the proposed transaction and states that they intend to invoke their rights under s. 14-21 of the *BCA* should the transaction be approved. Thereafter, the Hamilton Parties through legal counsel casted their votes against the proposed resolution.

[14] The resolution approving the Share Sale was passed on November 24, 2023. Seventy percent of the common shareholders of HCC and eighty-eight percent of the preferred shareholders voted in favour of the transaction. The Hamilton Parties were the only objectors.

[15] On December 4, 2023, HCC served the Hamilton Parties with notice pursuant to ss. 14-21(7) and (8) of the *BCA*, stating that the resolution had been adopted at the special meeting and outlining the rights of the Hamilton Parties to dissent and the procedure to be followed to exercise those rights.

[16] On January 4, 2024, the Hamilton Parties launched the oppression application currently before the court. The application is accompanied by Mr. Hamilton's affidavit sworn December 24, 2024 in which he states at paragraph 34:

> 34. My co-applicants and I intend to pursue the statutory dissent process simultaneously with the present application, as an alternative form of relief. However, the primary relief we seek is to prevent or set aside (as the case may be) the Proposed Transaction, due to: (i) the unfairness of being specifically targeted and deprived of the future growth of HCC's subsidiaries; and (ii) the serious concerns we have regarding HCC's ability to pay under the statutory dissent process.

[17] HCC's legal counsel accepted service of the application on January 9, 2024.

[18] By written notice dated January 3, 2024, but sent to HCC on January 16, 2024, the Hamilton Parties provided the information required by s. 14-21(9) of the *BCA*.

[19] By written offer dated January 25, 2024, HCC offered to purchase the shares of each of the Hamilton Parties for a stated price in purported compliance with s. 14-21(16) of the *BCA*. In the accompanying correspondence HCC's legal counsel warned that the offers would automatically lapse if not accepted within 30 days. A

request to extend that deadline was denied and the Hamilton Parties communicated their rejection of the offer on February 28, 2024 stating, "… so it looks like we will move on to the court-supervised valuation process."

[20] On May 9, 2024 counsel for the Hamilton Parties sent the following e-mail communication to counsel for HCC:

> I'm reaching out about the valuation process for our clients' HCC shares. I note that HCC did not apply for a valuation within the 50-day window set out in s. 14-21(19), so our clients now have a right to apply for the same relief under s. 14-21(20) "within a further period of 20 days or any further period that the court may allow."
>
> Given that there is active oppression application that is scheduled to be heard next month, we are proposing to hold off on the dissent valuation for the time being, to be brought at a later date pending the outcome of the oppression application. Is your client agreeable to that course of action?

[21] What, if any, response was made to this communication is not in evidence. However, on May 17, 2024, HCC launched the application for valuation of the Hamilton Parties' shares that is currently before the court.

Statutory Provisions

[22] The right to apply to the court to rectify oppressive conduct is found in Part 18 of the *BCA*. Section 18-4 provides as follows:

> **18-4**(1) A complainant may apply to a court for an order pursuant to this section.
>
> (2) On an application pursuant to subsection (1), a court may make an order to rectify the matters complained of if the court is satisfied that, respecting a corporation or its affiliates, its business or affairs have been carried on or conducted in a manner, its directors have exercised their power in a manner, or its actions or omissions have effected a result, that:

> (a) is oppressive or unfairly prejudicial to the interests of any security holder, creditor, director or officer; or
>
> (b) unfairly disregards the interests of any security holder, creditor, director or officer.

[23] The status of the Hamilton Parties to apply pursuant to s. 18-4 is not disputed. All are "complainants" as defined by the *BCA*.

[24] A shareholder's right to dissent from a decision of the corporation is set out in s. 14-21(1). As it relates to the matters in issue in these applications, s. 14-21(1) provides as follows:

> **14-21**(1) Subject to sections 14-22 and 18-4, a holder of shares of any class of a corporation may dissent if the corporation … resolves to:
>
> …
>
> (e) sell, lease or exchange all or substantially all its property … [other than in the ordinary course of business].

[25] Section 14-21(4) establishes a dissenting shareholder's right to be paid the fair value of his shares by the corporation and subsections (6) through (20) set out the process by which the shareholder receives that value. The relevant portions of those provisions are as follows:

> **14-21** …
>
> (6) A dissenting shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution mentioned in subsection (1) … is to be voted on, a written objection to the resolution ….
>
> (7) The corporation shall, within 10 days after the shareholders adopt the resolution, send to each shareholder who has filed the objection mentioned in subsection (6) notice that the resolution has been adopted, ….

(8) A notice sent pursuant to subsection (7) must set out the rights of the dissenting shareholder and the procedures to be followed to exercise those rights.

(9) A dissenting shareholder shall, within 20 days after the shareholder receives a notice pursuant to subsection (7) …, send to the corporation a written notice containing:

(a) the shareholder's name and address;

(b) the number and class of shares with respect to which the shareholder dissents; and

(c) a demand for payment of the fair value of such shares.

…

(13) On sending a notice in accordance with subsection (9), a dissenting shareholder ceases to have any rights as a shareholder other than the right to be paid the fair value of the dissenting shareholder's shares as determined pursuant to this section except if:

(a) the dissenting shareholder withdraws the dissenting shareholder's notice before the corporation makes an offer in accordance with subsection (16);

(b) the corporation fails to make an offer in accordance with subsection (16) and the dissenting shareholder withdraws the dissenting shareholder's notice;

or

(c) the directors revoke a resolution to amend the articles pursuant to subsection 14-3(2) or 14-4(5), terminate an amalgamation agreement pursuant to subsection 14-12(6) or abandon an application for continuance pursuant to subsection 14-19(7), or abandon a sale, lease or exchange in accordance with subsection 14-20(9).

…

(16) A corporation shall, not later than 7 days after the later of the day on which the action approved by the resolution is effective and the day the corporation received the notice

> mentioned in subsection (9), send to each dissenting shareholder who has sent that notice:
>
> > (a) a written offer to pay for the dissenting shareholder's shares in an amount considered by the directors of the corporation to be the fair value of the shares, accompanied by a statement showing how the fair value was determined;
>
> ….
>
> (17) Every offer made pursuant to subsection (16) for shares of the same class or series must be on the same terms.
>
> (18) Subject to subsection (30), a corporation shall pay for the shares of a dissenting shareholder within 10 days after an offer made pursuant to subsection (16) has been accepted, but any such offer lapses if the corporation does not receive an acceptance of the offer within 30 days after the offer has been made.
>
> (19) If … a dissenting shareholder fails to accept an offer, the corporation may, within 50 days after the action approved by the resolution is effective or within any further period that a court may allow, apply to a court to fix a fair value for the shares of any dissenting shareholder.
>
> (20) If a corporation fails to apply to a court pursuant to subsection (19), a dissenting shareholder may apply to a court for the same purpose within a further period of 20 days or within any further period that the court may allow.
>
> …

The Parties' Positions

[26] HCC contends that having exercised the right to dissent pursuant to s. 14-21, the Hamilton Parties are now bound to see that process through to conclusion, particularly so given that HCC has made an offer to purchase their shares for what HCC regards as fair value.

[27] The Hamilton Parties argue just the opposite – contending that they are free to pursue either or both remedies without restriction.

Analysis

[28] HCC's argument is founded on the wording of s. 14-21(13):

> **14-21** …
>
> (13) On sending a notice in accordance with subsection (9), a dissenting shareholder ceases to have any rights as a shareholder other than the right to be paid the fair value of the dissenting shareholder's shares as determined pursuant to this section except if:
>
> (a) the dissenting shareholder withdraws the dissenting shareholder's notice before the corporation makes an offer in accordance with subsection (16); (emphasis mine)
>
> …

[29] HCC argues that this section:

> … implicitly prohibits shareholders from withdrawing their election to have the corporation purchase their shares after the corporation makes an offer. If shareholders could revoke their offer to purchase their shares after the corporation makes an offer, it would permit shareholders to reinstate their shareholder rights contrary to subsection 14-21(13). Shareholders cannot indirectly revoke their offer and reinstate their rights by seeking an order under the oppression remedy to set aside the transaction giving rise to their election and rights under the appraisal remedy.

[30] In essence, HCC contends that once a shareholder invokes the dissent provisions of the *BCA* the shareholder loses status as a shareholder and is precluded from commencing oppression proceedings.

[31] The same argument was advanced by the respondent in *Brant Investments Ltd. v Keeprite Inc.*, 1983 CanLII 1941 (ONSC), 44 OR (2d) 661 [*Brant*], and rejected.

[32] The circumstances in *Brant* are remarkably similar to those in this case. Brant held a minority interest in Keeprite and dissented from a shareholder's resolution

authorizing Keeprite to amend its Articles of Incorporation to permit the creation of a new class of shares. Relying on the dissenter rights provision in s. 184 of the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*], which is almost identical to s. 14-21 of the *BCA*, Keeprite offered to purchase Brant's shares. Brant refused the offer. Keeprite then applied to have the value of Brant's shares determined by the court. Before Keeprite's application was heard Brant launched an oppression application against Keeprite under s. 234 of the *CBCA*. Section 234 is also almost identical to s. 18-4 of the *BCA*. Keeprite's application to strike the oppression application was the subject of Justice Callaghan's decision in *Brant*.

[33] As HCC argues in this case, Keeprite argued that by exercising the right to dissent, Brant ceased to have any rights as a shareholder of the corporation. Keeprite further argued that s. 184 of the *CBCA* "… constitutes a complete code of substantive rights and procedures which, upon invocation, terminates any rights which might accrue to [Brant] under s. 234." The court rejected this argument stating,

> I see nothing inconsistent with permitting a dissenting shareholder to exercise his appraisal remedy under s. 184 and at the same time permitting such shareholder to proceed as a complainant under s. 234. Section 184 of the CBCA requires a dissenting shareholder within 20 days of receipt of notice of the fundamental change proposed by way of special resolution to send a notice of demand for payment of the fair value of shares (s. 184(7)). That is a very short period of time in which a shareholder could reasonably be expected to make an intelligent choice between two available remedies. Particularly is this so if the shareholder is neither a director nor officer of the corporation. Furthermore, it would seem that if the dissenting shareholder is a director or officer of the corporation, his right to judicial review for substantive fairness under the oppression provision is specifically preserved (s. 234(2)) thereby placing him in a better position than an ordinary dissenting shareholder.
>
> I am of the view that Parliament has clearly indicated that the existence of the rights under s. 184 are in addition to the rights conferred under s. 234 to test the substantive fairness of a

> qualifying transaction. If a dissenting shareholder qualifies as a "complainant" under s. 231 as a former registered holder of a security, then such shareholder may resort to both remedies where appropriate.

[34] Keeprite's application pursuant to s. 184 for valuation of Brant's shares and Brant's oppression application were subsequently heard on their merits by Anderson J. whose decision is reported as *Brant Investments Ltd. v Keeprite Inc.*, 1987 CanLII 4366, 42 DLR (4th) 15 (ONSC) [*Brant 2*]. Justice Anderson dismissed Brant's oppression application but felt compelled to address again the question of whether an aggrieved shareholder is precluded from pursuing an oppression remedy after having exercised the right to dissent under s. 184 of the *CBCA*. Anderson J. found himself in agreement with the earlier decision on the point by Callaghan J. in *Brant*, stating:

> 46 I find myself in respectful agreement with Callaghan J. and have nothing to add to his reasons for concluding that the plaintiffs in the oppression action have the status to bring that action notwithstanding the concurrent proceedings under s. 184 of the Act. I reach and express that conclusion fully conscious that there is a measure of anomaly involved. Assertion of the right to dissent, which is granted by s. 184, logically implies a decision on the part of the shareholder to sever his connection with the company, recover the amount of his investment and be gone. Assertion of a claim under s. 234 on the other hand implies a continued interest in and concern for the affairs of the corporation. The result in this case makes the anomaly most apparent. The dissenting shareholders have pursued a remedy under s. 234, have failed, and are now in a position to fall back on their right to be paid as dissenting shareholders. The oppression action has been a fruitless proceeding. Even had my view of its merits been different it is not easy to see what practical result would have followed.
>
> 47 Notwithstanding the anomaly to which I have referred I think it would be wrong to hold that a remedy under s. 234 was closed when the right to dissent under s. 184 was exercised. The variety of circumstances which might give rise to a remedy under s. 234, and the wide range of such remedies, would render such a decision unwise, even if the Act could be construed to give alternative remedies only.

[35] The reasoning in *Brant* and *Brant 2* was considered by the Saskatchewan Court of Appeal in *Wind Ridge Farms Ltd. v Quadra Group Investments Ltd.*, 1999 CanLII 12310, 178 DLR (4th) 603 (SKCA) [*Wind Ridge*]. In *Wind Ridge* that applicants opposed a resolution by the majority shareholders in the respondent corporations to amend the Articles of Incorporation to change the rights and restrictions with respect to the Class A shares of the respondent corporations. The applicants brought an oppression application seeking to set aside the actions of the majority. The trial judge considered the applicant's failure to exercise the right of dissent as relevant to determining whether oppression had occurred and dismissed the application. As the Court of Appeal noted, "[w]ithout stating so expressly, the clear implication of [the trial judge's] judgment is that the failure to exercise the right of dissent somehow legitimized the acts of the majority and disentitled the minority to the oppression remedy" (para 20).

[36] On appeal, Wind Ridge argued that the right to dissent is subordinate to its rights under the oppression provisions of the *BCA*. The Court of Appeal agreed, stating at paragraph 22:

> … The right of dissent in s. 184 is clearly "governed by" or "subordinate to" the remedy provided for under s. 234 of the *Act*. The oppression remedy is available to the minority shareholder if the minority shareholder satisfies the conditions and requirements of s. 234 notwithstanding that the right to dissent under the *Act* is not exercised. It is worth mentioning that the right to dissent under s. 184 is available only to "shareholders" while the remedy under s. 234 is available to a "complainant". Thus, the s. 234 remedy is broader than the s. 184 remedy and the two are not mutually exclusive.

[37] The court then went on to consider the decisions on this point in *Brant* and *Brant 2* noting that in both cases the Ontario court concluded that the aggrieved shareholder had the right to bring oppression proceedings notwithstanding concurrent proceedings under s. 184 of the *CBCA*. Writing for the majority, Vancise J.A. concluded at paragraph 25:

> … In my opinion, the views expressed by Callaghan J. and Anderson J are correct. The shareholder has concurrent remedies under ss. 184 and 234. Both remedies are available to minority shareholders provided the shareholder is able to bring itself within the requirements of the relevant sections of the *Act*. In effect the shareholder has options. The shareholder may pursue the oppression remedy under s. 234 and the right of dissent under s. 184 or the shareholder may pursue the right to dissent under s. 184 alone or the oppression remedy under s. 234 alone. There is absolutely no reason to require a shareholder to dissent before it can bring an application for an oppression remedy pursuant to s. 234.

[38] HCC argues that *Wind Ridge* is distinguishable from the current case on the basis that the aggrieved shareholders in *Wind Ridge* did not exercise the right to dissent, whereas the Hamilton Parties have exercised that right. In my respectful view this is a distinction without a difference. At paragraph 25 of *Wind Ridge*, Vancise J.A. clearly considered the precise scenario now before the court and concluded that the aggrieved shareholder would be entitled to pursue both avenues of relief concurrently. The fact that the applicant in *Wind Ridge* had not exercised the right to dissent did not impact Justice Vancise's conclusion on this issue. However, this conclusion does not entirely dispose of HCC's argument.

[39] HCC also argues that while the aggrieved shareholder who exercises the right to dissent may retain status to bring an oppression application, the shareholder may not ground the oppression claim on the same circumstances that led to the exercise of the right to dissent. In support of this contention HCC relies on the decision of the Alberta Court of Appeal in *Alberta Treasury Branches v SevenWay Capital Corporation*, 2000 ABCA 194 at para 36 [*SevenWay*], where the court stated:

> [36] In this case, moreover, unlike the facts of *Brant* mentioned earlier, it appears that the actions which ATB claims to have been oppressive (the continuance and the Plan of Arrangement) were essentially the same ones from which ATB had dissented. One of the remedies ATB sought (restraining the conduct

> complained of) was directly related to the exercise of its dissent. In other words, by dissenting it had attempted to accomplish the same result that it later attempted to accomplish by seeking an oppression remedy. It would be a rare case indeed where the very same conduct that creates a right to dissent (which is exercised) will be found to be oppressive and requiring remedy.

[40] In *SevenWay* the applicant was a minority shareholder of SevenWay Capital Corporation [SevenWay CC] having taken a shareholder position as part of a debt re-financing transaction. A majority of SevenWay CC's shareholders voted in favour of an amalgamation that would change the nature of the corporation's business. The applicant exercised its right to dissent and commenced an action alleging oppression. The application was dismissed in the first instance on two bases: 1) having dissented to the transaction the applicant was disentitled from bringing an oppression action, and 2) in any event, the applicant had failed to prove oppression.

[41] On appeal, Justice Hunt writing for a unanimous court, followed the reasoning in *Brandt* and concluded that the applicant's exercise of a right to dissent did not preclude the applicant from applying for relief under the oppression provisions of the *CBCA*. Having concluded that the hearing judge erred on this point, the court then addressed whether the applicant had demonstrated oppressive conduct by SevenWay CC. Justice Hunt noted that the hearing judge had applied the appropriate test on this issue and agreed with the hearing judge's conclusion that oppression had not been demonstrated.

[42] Justice Hunt then went on to discuss *Brant*, observing that "[i]t would be a rare case indeed where the very same conduct that creates a right to dissent (which is exercised) will be found to be oppressive and requiring remedy." Justice Hunt explained the result in *Brant* by noting that, "[i]n addition to asserting oppression arising from corporate actions prior to their dissent, the dissenting shareholders also claimed oppression resulting from actions taken that related directly to the special resolution

from which they had dissented." She then contrasted those circumstances with the matter before the court, stating at paragraph 36:

> [36] … it appears that the actions which ATB claims to have been oppressive (the continuance and the Plan of Arrangement) were essentially the same ones from which ATB had dissented. One of the remedies ATB sought (restraining the conduct complained of) was directly related to the exercise of its dissent. In other words, by dissenting it had attempted to accomplish the same result that it later attempted to accomplish by seeking an oppression remedy. …

[43] Having made this point Justice Hunt concluded at paragraph 39, "[o]n the facts here, it cannot be said that there has been 'a visible departure from the standards of fair dealing and a violation of the conditions of fair play' that would justify the granting of an oppression remedy."

[44] I disagree with HCC's contention that *SevenWay* stands as authority for the proposition that the right to dissent, once exercised, is the only remedy available to a dissenting shareholder. In my view, Justice Hunt's conclusion, that it is a rare case where the same circumstance can ground a claim of oppression and a right of dissent is *obiter*. Furthermore, in making that statement Justice Hunt was concerned only with whether oppression was demonstrated on the facts of the case, not whether the oppression application was predicated on circumstances different from those that led to the exercise of the right of dissent. This is demonstrated at paragraph 40 of *SevenWay* wherein the court states, "Once it dissented under s. 184, ATB could not apply under s. 207 to have SevenWay liquidated. Although it was entitled to apply under s. 234, there is no oppression in this case."

[45] HCC cites the decision in *LSI Logic Corporation of Canada, Inc. v Logani*, 2001 ABQB 710 [*LSI Logic*], as further support for its argument on this point.

[46] In that case, *LSI Logic* undertook a “going private” transaction. By special resolution common shares owned by minority shareholders, represented by Logani, were purchased at $4 a share. The respondent shareholders all dissented and applied to have the court set a different value for the shares. This application was pursued for three years and then adjourned two weeks before trial. The dissenting shareholders then commenced oppression proceedings. In the procedural wrangling that followed, LSI Logic applied to strike the oppression application.

[47] HCC relies on the following passage in *LSI Logic* as authority for its argument:

> [113] A fair value proceeding does not automatically preclude an oppression action: *Alberta Treasury Branches v. SevenWay Capital Corp*. (2000), 261 A.R. 278 (Alta. C.A.). Section 190 of the *CBCA*, the dissent section, is made subject to s. 241, the oppression section. An application under s. 241 must be made by a "complainant", which is defined to include a former registered shareholder (s. 238). While a fair value proceeding arises from a particular fundamental change to which a shareholder dissents, an oppression remedy can result from corporate conduct that predates the fundamental change. Therefore, a former shareholder's right to complain about prior oppressive conduct is not necessarily extinguished because the shareholder dissented to a fundamental change, provided the change is not related to the oppression. *SevenWay* at 287 points out that "[i]t would be a rare case indeed where the very same conduct that creates a right to dissent (which is exercised) will be found to be oppressive and requiring remedy."
>
> [114] As the mere existence of LSI Canada's fair value proceedings is not a sufficient basis on which to strike the Shareholders' oppression action in its entirety, the individual allegations in the statement of claim must be examined.

[48] Paragraph 114 of the *LSI Logic* decision once again reiterates the principle that the mere exercise of a right to dissent even if it leads to an application to value the minority shares, does not preclude an oppression action.

[49] In my view, neither *SevenWay* nor *LSI Logic* conclude that an oppression action cannot co-exist with the exercise of the right to dissent where they are both predicated on the same circumstance. At best these decisions conclude only that success in such cases may be rare.

[50] More importantly, if *SevenWay* and *LSI Logic* purport to find that an oppression action cannot be advanced on the same circumstances as ground a right to dissent, they cannot be reconciled with the decision in *Wind Ridge*. The clear implication of the conclusion expressed at paragraph 25 of *Wind Ridge* is that there is no restriction on the entitlement to pursue both remedies simultaneously even if grounded on the same conduct. This is made all the more apparent in Justice Vancise's adoption of the reasoning in *Brant* where Callaghan J. stated, "I am of the view that Parliament has clearly indicated that the existence of the rights under s. 184 are in addition to the rights conferred under s. 234 to test the substantive fairness of a qualifying transaction." (emphasis mine). The clear implication of this statement is that both remedies may be pursued with respect to a single qualifying transaction.

Conclusion on this issue

[51] I am satisfied that the Hamilton Parties are entitled to pursue an oppression application pursuant to s. 18-4 notwithstanding that they have also exercised a right to dissent pursuant to s. 14-21.

Have the Hamilton Parties demonstrated oppression of their interests?

[52] Section 18-4 of the *BCA* provides as follows:

> 18-4(1) A complainant may apply to a court for an order pursuant to this section.
>
> (2) On an application pursuant to subsection (1), a court may make an order to rectify the matters complained of if the court is

> satisfied that, respecting a corporation or its affiliates, its business or affairs have been carried on or conducted in a manner, its directors have exercised their power in a manner, or its actions or omissions have effected a result, that:
>
> (a) is oppressive or unfairly prejudicial to the interests of any security holder, creditor, director or officer; or
>
> (b) unfairly disregards the interests of any security holder, creditor, director or officer.

[53] Determining whether the Hamilton Parties have established entitlement to oppression relief under this section requires the court to make two distinct but related inquiries: 1) are the Hamilton Parties' expectations reasonable, and 2) does the impugned conduct violate those expectations in a way that is oppressive, unfairly prejudicial, or that unfairly disregards the Hamilton Parties' interests?

[54] Both questions must be assessed in the entire context of the dispute bringing into play a myriad of factors including; "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders." See *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 72.

[55] The Hamilton Parties assert they have two expectations as shareholders of HCC: 1) that they would receive fair market value for their shares, and 2) that they would be permitted to participate in the growth of HCC. HCC contends that those of the Hamilton Parties who are Class "H" shareholders cannot reasonably expect to receive fair market value for their shares given the express provisions of the Articles of Incorporation. Furthermore, so HCC argues, Class "H" shares are by definition non-participatory. Class "H" shareholders therefore cannot reasonably expect to participate in the growth of HCC.

[56] Regarding Ken Holdco's expectations as a common shareholder of HCC, HCC does not dispute that common shareholders may reasonably expect to receive fair market value for their shares upon sale. However, HCC argues that Ken Holdco had no interest in the growth of HCC as witnessed by the fact that it was offering its shares for sale before the Share Sale and thus does not hold the expectation it asserts.

[57] The parties rely on many affidavits sworn in this and other actions involving these parties. Many of those affidavits were sworn well before the Share Sale and address disputes among the shareholders related to control of HCC. Of the affidavits sworn since the Share Sale none address the circumstances of that transaction, other than in a cursory fashion, nor its effects on the future viability of HCC.

[58] In defence of the oppression application HCC relies heavily on Mr. Hamilton's alleged mismanagement of HCC and obstruction of its operations in the years leading up to the Share Sale. HCC's take on events is disputed by Mr. Hamilton. Separating truth from fiction cannot be accomplished by comparing affidavits. The court will need to hear the witnesses and assess credibility to resolve the controversy.

[59] HCC also raises the spectre of its lender withdrawing financial backing if Ken Holdco continues to hold a minority interest in HCC. The evidence offered in support of this proposition appears to be largely hearsay and is disputed by Mr. Hamilton. The court will need to hear directly from the witnesses on this issue.

[60] The Share Sale is the transaction that is the genesis for the Hamilton Parties' oppression application. Mr. Hamilton alleges that the Share Sale had the effect of freezing the value of HCC at a point in time and essentially terminated any prospect of growth in HCC. HCC has not responded to this allegation, which, if true, may have

implications for HCC's argument that the directors were acting in HCC's best interests when the Share Sale was approved.

[61] In addition to these difficulties with the evidence offered, there is much about the Share Sale that is not addressed including; the impact the Share Sale has on the value of HCC's common shares, HCC's ability to carry on business after the Share Sale, the structure of the Share Sale, HCC's entitlement to redemption of the NewCo shares, and NewCo's ability to meet its obligation to redeem HCC's preferred shares.

[62] These questions and many others need to be addressed before the court can assess whether the Hamilton Parties' stated expectations are reasonable and whether those expectations were thwarted due to oppressive conduct by HCC's directors and/or shareholders.

CONCLUSION

[63] The Hamilton Parties are entitled to pursue an oppression application pursuant to s. 18-4 notwithstanding that they have also exercised a right to dissent pursuant to s. 14-21

[64] The court is unable to resolve the oppression application on the evidence filed without hearing from and observing the witnesses. The parties are therefore directed to a *viva voce* hearing before me to resolve the liability aspect of the Hamilton Parties' oppression application.

[65] The parties are directed to consult with the registrar of the court to arrange a mutually convenient date for a case management conference call with me to discuss the staging of the *viva voce* hearing.

J.
C.D. CLACKSON