

CITATION: Guttin v. Creber et al., 2023 ONSC 2707
COURT FILE NO.: CV-19-82291
DATE: 2023/05/05

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: Kirk Guttin, Applicant

And

Brian W. Creber, B-Con Engineering Inc., Pufferfish Inc. and BCE Realty Ltd.,
Respondents

BEFORE: Justice A. Doyle

COUNSEL: Patrick Snelling, Counsel, for the Applicant

Pierre Champagne, Counsel for the Respondents, B-Con Engineering Inc.,
Pufferfish Inc. and BCE Realty Ltd.

Kevin Caron, Counsel for the Respondent Brian W. Creber

HEARD: April 5, 2023 with final submissions completed on April 28, 2023

ENDORSEMENT

[1] The sole issue in this motion is whether the court should order the production of an audited financial statement for year 2022 of the respondent corporation BCE Realty Ltd. (“BCE”) with the cost to be borne by BCE.

[2] The applicant Kirk Guttin (“Mr. Guttin”) has brought an application for relief from oppression under s. 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.1, (“*OBCA*”). Mr. Guttin alleges that the respondents have engaged in financial impropriety including unauthorized payment of dividends, concealment of the respondent corporations’ financial position and a disregard for the interests of Mr. Guttin, as a minority shareholder.

[3] In his application, Mr. Guttin is seeking a wind-up of the respondent corporations and an appointment of a receiver to oversee the wind-up. As the true financial position of the respondent corporations is unknown including their indebtedness to each other, Mr. Guttin submits that audited financial statements will assist in the determination of the issues before the court.

[4] The parties agree to an order for the appointment of Welch LLP Chartered Accountants (“Welch”) as auditor of the respondent corporation B-Con Engineering Inc. (“B-Con”) for 2022 with costs to be borne by B-Con.

[5] For the reasons that follow, the court orders that the respondents arrange for an audited financial statement for BCE for the year 2022 to be prepared by Welch provided that Mr. Guttin pays for the cost in advance which will occur within 90 days from the date of this endorsement.

Brief Background

[6] Mr. Guttin and the respondent Brian W. Creber (“Mr. Creber”) are the minority shareholders of the respondent corporations through their interest held by their respective numbered companies.

[7] The common share structures of the companies are as follows:

B-Con	100 shares held by 1230320 Ontario Inc. (Mr. Creber’s company)
	70 shares held by 1259086 Ontario Inc. (Mr. Guttin’s company)

BCE	58.8 Common shares held by 2047023 Ontario Inc. (Mr. Creber’s company)
	41.2 Common Shares held by 2047458 Ontario Inc. (Mr. Guttin’s holding company)

Pufferfish	290,000 shares held by Mr. Creber
	210,000 shares held by Mr. Guttin

[8] In December 2019, Mr. Guttin launched this application.

[9] After a dispute arose between Mr. Guttin and Mr. Creber, Mr. Guttin requested audited financial statements from 2019 to 2022 as Welch has been engaged to prepare annual financial statements on a notice to reader.

[10] At the first attendance on the motion on January 31, 2023, the court ordered on consent the production of the respondent corporations' QuickBooks and the accountant's files.

Position of Mr. Guttin

[11] As former director of BCE, Mr. Guttin is seeking BCE's with the provisions of the *OBCA*.

[12] Mr. Guttin submits that he has an interest in protecting his interests and those of the shareholders. Directors have an obligation to the shareholders of BCE. The shareholders have not consented to a waiver of the audited statements and hence in accordance with s. 148 of the *OBCA* they should be produced.

[13] He framed his application around his obligations as a director under s. 154(2) of the *OBCA* and "and any further relief as this court deems just" broadens the scope of the court's powers to grant relief.

[14] As a former director of BCE, Mr. Guttin is aware of the corporations' failure to obtain audited statement and under s. 245(b) has standing to seek a remedial order. In addition, s. 154 of the *OBCA* compels Mr. Guttin and the board to place audited financial statements before the shareholders.

[15] He states that s. 134(2) imposes personal liability on Mr. Guttin for the companies' failure to meet its obligations under s. 15 and his failure to object to improper financial transactions and mismanagement by the board of directors. In this motion, he is seeking to discharge his obligations to the shareholders and corporations pursuant to s. 135(4).

[16] He has standing to seek oppression remedies and as owner of the shares through his numbered company he is entitled to request audited statements.

[17] Mr. Guttin admits that the numbered companies should have been applicants as well and he has commenced an application on behalf of the shareholders.

[18] He indicates that the failure of the corporation to produce an audited financial statement constitutes oppression.

Mr. Creber's Position

[19] Mr. Creber position is that Mr. Guttin has no standing as the shareholders are the numbered companies. S. 148 only applies to shareholders and an indirect interest is not enough.

[20] This was confirmed in *Packall Packaging Inc. v. Ciszewski*, 2016 ONCA 6, where the Court of Appeal found that the appellant did not have a direct interest in the company but rather she was direct shareholder of the numbered company that held a direct interest in the corporation (paras. 31 and 34).

[21] Regarding the lack of standing, Mr. Creber indicated that the notice of application does not plead or request relief pursuant to s. 148 of the *OBCA*.

[22] The mere fact that Mr. Guttin has now issued an application for oppression whereby his numbered company, which is a direct shareholder, is not relevant to this motion as this application is not before the court. It makes no reference to s. 148.

[23] Finally, the transactions for 2022 for BCE span one and half pages and engages a few transactions which are easily reviewable in the QuickBooks files and bank statements that have been produced to Mr. Guttin.

[24] An audit will not determine whether the transactions were authorized as this evidence will be obtained directly from the parties.

[25] Mr. Guttin is attempting to pass off his litigation costs onto the corporate respondents and this is an improper use of s. 148.

[26] In the absence of a positive finding of oppression, there is no basis for Mr. Guttin to obtain an order for the appointment of an auditor; that is, a finding of oppression must be established as a pre-condition to a remedial order. Mr. Creber relies on *Le Maitre Limited v. Segeren*, 2007 CanLII 18735, where the court refused to grant an interim order prohibiting the respondent from proceeding with a proposed purchase transaction without obtaining shareholder approvals and an interim order prohibiting the respondents from continuing to operate the business and

manufacturing facility. In essence, the shareholder asset that they are entitled to vote on whether a certain transaction should proceed.

[27] The court found that to grant interim relief under the oppression remedy should only be exercised with the greatest of caution and the three stages under *RJR Macdonald Inc. v. Canada (Attorney General)* test for interlocutory injunctions is applicable. A strong *prima facie* case must be established.

Respondent Corporations' Position

[28] In addition to supporting Mr. Creber's position, the respondent corporations object to Mr. Guttin's request for an audited financial statement for BCE for the following reasons:

- the relief sought in this motion was not specifically requested in the notice of application;
- the notice of application was issued on December 16, 2019 and relates to allegations that predate that date. A waiver of audited financial statements was signed by the shareholders until the last financial year-end prior to the issuance of the notice of application. Therefore, a request for audited financial statement for 2022 is not part of the proceeding and should be not granted;
- Mr. Guttin has received five years of accounting records, including 2022 BCE financial records and his grounds of the relief sought do not detail allegations that support the need for an audited financial statement;
- Mr. Guttin will need his own expert to review the accounting records and opine whether certain transactions should have been entered into by BCE; and,
- Mr. Guttin has failed to put forward a financial report as to why there was oppression before 2019. Mr. Guttin is asking the respondents to incur the cost so he can prove oppression and his ultimate goal is to force the sale of the corporations which is contrary to the respondents' objectives.

[29] The BCE transactions are less than 2 pages long and the respondents are prepared to answer any queries. Supporting documentation can be provided for expenses.

[30] They submit that there is nothing on the record to justify an audited financial statement apart from s. 148. There is no allegation of misappropriation of monies.

[31] Mr. Guttin can cross-examine regarding concerns regarding engineering costs and reduction of rent. Cross examinations will occur after the B-Con audited financial statements have been prepared.

Analysis

The applicant does not have standing as a shareholder

[32] Firstly, Mr. Guttin cannot demand audited financial statements on the basis that he is a shareholder.

[33] Part XII of the *OBCA* imposes certain audit and financial statement requirements on corporations, including the appointment of an auditor. Shareholders have a right to unaudited financial statements unless there has been a waiver. See Section 148.

[34] As stated in *Pandora Select Partners, L.P. v. Strategy Real Estate Investments Ltd.* (2007) 2007 CanLII 8026, only the corporation's shareholders can exempt a non-offering corporation from this requirement.

[35] However, the shareholders are not before this court. This has been admitted by Mr. Guttin. Although he issued another application on behalf of the shareholders, against the same respondents requesting similar relief as in the application herein, that application is not before me.

The court can order audited financial statements for the period after the issuance of the Application

[36] Mr. Guttin can make a demand for relief for events occurring after the issuance of the application. The purpose of s. 248(2) of the *OBCA*, is remedial. Section 248(2) states:

(2) Where, upon 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 or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be 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 of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248 (2).

[37] In *Maurice v. Alles*, 2016 ONCA 287, the court allowed an appeal from the motion judge who had found that the application was barred by a limitation period. At para. 52, the court confirmed that “this oppression remedy section of the *OBCA* is drafted in the broadest possible terms to respond to the broadest range of corporate malfeasance”.

[38] The Court confirmed the ongoing nature of oppression in para. 54:

[54] The practical effect of the motion judge's reasoning is that where a party is alleged to have acted in an oppressive manner and no oppression remedy application is commenced as a consequence, he or she is free to take additional oppressive steps in furtherance of, or based upon, the initial oppressive conduct. That reasoning is contrary to the broad purposive interpretation that must be afforded this statutory cause of action: see *BCE Inc. v. 1976 Debenture holders*, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, at para. 58; *Rea v. Wildeboer* (2015), 126 O.R. (3d) 178, [2015] O.J. No. 2651, 2015 ONCA 373, at para. 33; and *Unique Broadband Systems, Inc. (Re)* (2014), 121 O.R. (3d) 81, [2014] O.J. No. 3253, 2014 ONCA 538, at para. 107.

[39] This was further discussed in *Zhao v. Li*, 2020 ONCA 121 at para. 29:

[29] Although not expressly stated in *Maurice*, it follows that claims arising from singular discrete acts of oppression (in a series of such acts) that are discoverable more than two years before an action are statute-barred. As a result, a series of singular discrete acts of oppression that stretches over a

period of time may result in some claims for oppression arising from earlier acts in the series being statute-barred while claims arising from later acts in the series are not. [page 361]

[40] The alleged oppressive conduct set out in the Application predates issuance is ongoing and allows Mr. Guttin to request the relief before the court.

Is the request for an audited financial statement properly before this court?

[41] Although Mr. Guttin did not specifically request an audited financial statement in his application, Mr. Guttin is properly before the court as a “complainant” as defined in the section 245(b) *OBCA*.

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

[42] Sections 134 states that directors are obliged to discharge their duties honestly, in good faith and exercise care, diligence and skill, and comply with the legislation.

[43] Section 135 states that directors must comply with their duties to ensure that financial statements of the corporation represented to him or her by an officer of the corporation or in a written report of the auditor of the corporation present fairly the financial position of the corporation in accordance with generally accepted accounting principles.

[44] The issue then remains whether he can do so as director pursuant to s. 154 as he is liable to the shareholders to take steps to compel the companies to fulfil their legal obligations.

[45] The court notes that Mr. Guttin has particularized his claim for an audit at para. (m) of the notice of application which directly references s. 154 which reads:

154 (1) The directors shall place before each annual meeting of shareholders,

(a) in the case of a corporation that is not an offering corporation, financial statements for the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting;

[46] A statutory remedy is available under the section dealing with the oppression remedy under s. 248(3)(i) of the *OBCA* which reads:

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

...

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

[47] Therefore, I find that his request for audited financial statements is properly before the court.

Is there a *prima facie* case?

[48] There is a line of cases that suggest that the court must first find that there is a *prima facie* case for the oppression remedy before the court deal with interim relief.

[49] In *Le Maitre*, Justice Pepall stated that: at para. 30:

[30] It seems to me that generally the principles for the granting of interlocutory injunctive relief should be applicable to section 248(3) interim relief that is in the nature of an injunction. This is in the interests of predictability and certainty in the law. As such, typically, a moving party should not expect to obtain interlocutory injunctive relief unless it is able to successfully address the factors to be considered on such a motion. That said, there may be some circumstances where interim relief pursuant to section 248(3) is merited absent all of the traditional considerations associated with an interlocutory injunction. The dictates of fairness may be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages. In my view, such an approach is consistent with the broad nature of the oppression remedy, the language of section 248(3), and with cases such as *Deluce Holdings Inc. v. Air Canada*, *M. v. H.*, *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, *Ellins v. Coventree* and *RV&S Ltd. v. Aiolos Inc.*

[50] In that case, the applicant was requesting an order prohibiting the respondents from proceeding with a proposed purchase transaction without obtaining shareholder approval. It was submitted that the transaction was oppressive, it would expose assets and other corporation expenditures, and would not be within the reasonable expectations of the shareholders.

[51] The test as to whether an oppression claim will succeed is set out in the Supreme Court of Canada's decision in *BCE Inc. v. 1976 Debenture holders* 2008 SCC 69 where the court stated that the court must find a breach of reasonable expectation of the shareholders and then whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard. Oppression is fact-specific and the court can review various factors as to whether a reasonable expectation existed.

[52] *Le Maitre* is distinguishable. There the court was dealing with a request for injunctive relief alleging that the possible transaction was oppressive and would expose the corporation's assets and expose the corporate respondents.

[53] The request here is not of an injunctive relief nature which would require that Mr. Guttin satisfy the three-part *RJR MacDonald* test of: serious issue to be tried, irreparable harm and balance of convenience.

[54] Rather, I would characterize Mr. Guttin's request as disclosure "with an expert's explanation". Therefore, it is not necessary for me to determine if the oppression remedy has a *prima facie* possibility of succeeding.

Should the court order an audited financial statement?

[55] This request certainly impacts on the resources and financial management of BCE.

[56] BCE is a small business and owner of a property which is rented out to B-Con. There are a limited number of accounting transactions each year and accounting records for the past 5 years have been provided. No fraud or lost money is alleged. The 2022 records consist of 1.5 pages identifying transactions, and the use of the funds is clear.

[57] Mr. Guttin's complaints centre around lack of authorizations: e.g. for expenses, such as engineering services, reduction of rent with approval, issuance of dividends from BCE without Mr. Guttin's approval, unauthorized movement of monies between the two companies and an unauthorized shareholder loan in 2018 from Mr. Creber to BCE that continues to accumulate. In addition, there is a concern regarding outstanding municipal taxes of over \$225,000.

[58] Cross-examinations have not occurred, and presumably there will be questions pertaining to the transactions and whether they were authorized.

[59] I note that Welch is the same accountant for B-Con and BCE and they are external accountants.

[60] An audit is an expensive cost for BCE which is a going concern with 8 employees. The cost of the B-Con audit is \$30,000.

[61] As a former director, Mr. Guttin is entitled to request an audited financial statement.

[62] However, Mr. Guttin is attempting to pass off his litigation costs onto the corporate respondents. If Mr. Guttin wishes to an audited financial statement, then he should be required to pay for it.

[63] Therefore, Mr. Guttin's request for 2022 audited financial statement for BCE is granted provided that Mr. Guttin pays for it in advance no later than 90 days from the date of this endorsement.

[64] Mr. Guttin retains the right to request reimbursement of these costs against the respondents at the end of the litigation.

[65] Costs of this motion is reserved to the judge hearing the application.

Justice A. Doyle

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ENDORSEMENT

Justice A. Doyle

Released: May 5, 2023