CITATION: Gojkovich v. Buhbli Organics Inc., 2023 ONSC 2738
COURT FILE NO.: CV-22-00679459-0000
DATE: 20230509

ONTARIO
SUPERIOR COURT OF JUSTICE

Application under s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 as amended.

BETWEEN:	)	
MICHELLE GOJKOVICH	)	
Applicant	)	*Stephen Schwartz* and *Darren Marr* for the Applicant
- and -	)	
BUHBLI ORGANICS INC., ORGANIC PRODUCTS CONSULTING INC. and JOHN RODY	)	*Shayan Kamalie* and *Karan Khak* for the Respondents
Respondents	)	
	)	**HEARD**: April 18, 2023

PERELL, J.

REASONS FOR DECISION

Contents

A. Introduction – Love's Labours Lost 2
B. Procedural and Evidentiary Background 3
C. Factual Background 5
1. Introduction 5
2. *Dramatis Personae* 5
3. The Story of Buhbli Organics – Love's Labour Lost 6
4. Miscellaneous Facts 14
D. Discussion and Analysis 15
1. Should the Application be Converted into an Action? 15
2. Legal Background 16
3. Has Oppression been Established and What would be the Appropriate Remedy? 22

E. Conclusion 25

A. Introduction – Love's Labours Lost

[1] This is an oppression remedy application pursuant to Ontario's *Business Corporations Act*.[1]

[2] The Applicant, Michelle Gojkovich, and the Respondent, John Rody, are the co-owners of the Respondent, Buhbli Organics Inc. Mr. Rody is the owner of the Respondent Organic Products Consulting Inc., which provides consulting services solely for Buhbli Organics. Ms. Gojkovich and Mr. Rody formerly were lovers and business partners. They now hate each other. They are incompatible.

[3] By a proceeding by application, Ms. Gojkovich sues the Respondents for an oppression remedy pursuant to s. 248 of the Ontario *Business Corporations Act* or, in the alternative, for the winding up of Buhbli Organics pursuant to s. 207 of the Act. More precisely, the remedy Ms. Gojkovich seeks is to force Mr. Rody to purchase her 50% interest of Buhbli Organics with a valuation date of January 31, 2021, when her shares allegedly were worth $831,000 without minority deduction.

[4] The Respondents submit, however, that the application should be converted into an action and that no order should be made until after pleadings, discovery, and a trial. Alternatively, Mr. Rody submits that if the application proceeds, it should be dismissed with costs on a substantial indemnity basis. Or in the further alternative, he submits that Ms. Gojkovich should simply be permitted to sell her shares in the open market by an auction or a tender process. He says he might participate in an open market sales process.

[5] For the reasons that follow, this matter may proceed as an application. The application is granted as follows:

> a. It is declared that Ms. Gojkovich has been treated by the Respondents in a manner that is oppressive, unfairly prejudicial to and which unfairly disregards her rights as a shareholder in Buhbli Organics.
>
> b. It is declared that it is just and equitable for reasons, other than the bankruptcy or insolvency of the corporation, that it should be wound up.
>
> c. It is ordered that Buhbli Organics shall forthwith be wound up in accordance with the provisions of the Ontario *Business Corporations Act*.
>
> d. I shall remain seized of this Application until the completion of the winding up or further Order of this court.
>
> e. It is ordered that Ms. Gojkovich shall within twenty days nominate a liquidator to wind up Buhbli Organics and the motion for the appointment of the liquidator and to settle the terms of the winding up shall be heard on June 20, 2023.
>
> f. It is ordered that pending the appointment of the liquidator that Mr. Rody shall have control of the business and assets of Buhbli Organics and shall carry on business acting

[1] R.S.O. 1990, c. B.16.

in the best interest of the Buhbli Organics and in accordance with his obligations under the Ontario *Business Corporations Act*.

g. The Respondents shall: (a) within twenty days disclose by sworn affidavit the amount of remuneration, compensation, and/or revenue paid to or received by Mr. Rody from Buhbli Organics and Organic Products Consulting by any means, including salaries, dividends, consulting contracts, loan advances, repayment of shareholder's loans, sale of shares, sale of assets, *etc*. for the period from January 2022 to date; and (b) pay the equivalent sum to Ms. Gojkovich within thirty days.

h. If the Respondents fail to make the aforesaid disclosure or pay the aforesaid equivalent remuneration, compensation, and/or revenue paid to Mr. Rody, then the Respondents are jointly and severally liable to pay Ms. Gojkovich $170,000 within forty days and judgement shall issue accordingly.

i. The Respondents shall pay the costs of this application on a substantial indemnity basis.

j. If the parties cannot agree about the matter of costs payable to Ms. Gojkovich for this application, they may make submissions in writing beginning with Ms. Gojkovich's submissions within twenty days of the release of these Reasons for Decision followed by the Respondents' submissions within a further twenty days.

B. Procedural and Evidentiary Background

[6] On **April 6, 2022**, Ms. Gojkovich commenced this application supported by her (428 page) motion record including her affidavit dated March 14, 2022.

[7] On **August 16, 2022**, Justice Sugunasiri directed that the application be heard on April 18, 2023.

[8] Around **September 30, 2022**, the Respondents delivered a Responding Application Record (305 pages) containing: (a) the affidavit of Aamer Butt dated September 30, 2022; (b) the affidavit of Mr. Rody dated September 30, 2022; and (c) the affidavit of Jennifer Van Dine dated September 30, 2022. Mr. Butt and Ms. Van Dine are independent contractors who are the retained administrative staff of Buhbli Organics.

[9] In **October 2022**, Ms. Gojkovich delivered a Reply Application Record (137 pages) with her affidavit dated October 17, 2022.

[10] On **November 11, 2022**, the Respondents served a motion seeking to convert the within application to an action, and they sought to have Ms. Gojkovich's application adjourned pending the outcome of their motion to convert, which was scheduled for September 11, 2023.

[11] Ms. Gojkovich opposed an adjournment, and on **January 4, 2023**, at a case management conference, Justice Koehnen determined that the matter of whether the application should be converted into an action would be a matter for the judge hearing the application.

[12] On **January 26, 2023**: (a) Mr. Butt was cross-examined (62 pages); (b) Mr. Rody was cross-examined (120 pages); and (c) Ms. Van Dine was cross-examined (27 pages).

[13] On **January 27, 2023**, Ms. Gojkovich was cross-examined (124 pages).

[14] In **early April 2023**, the Respondents delivered a Supplementary Responding Application Record (44 pages) with the affidavit of Aamer Butt dated **April 11, 2023**.

[15] Ms. Gojkovich's application record contained a valuation report prepared by Bruce C. Roher, CPA, CA, CBV, CFE, CFF and Matthew Downey CPA, CA, CBV, and CFF, the President and the Senior Manager respectively of Fuller Landau Valuations Inc. There was no affidavit from Messrs. Roher or Downey. The Fuller Landau Report is part of the factual narrative and is admissible for that purpose. The parties do not dispute that the historical financial statement data contained in the report is true. The Fuller Landau Report expresses the opinion that the fair market value of Ms. Gojkovich's interest in Buhbli Organics was $831,000 on January 31, 2021; that opinion evidence is not admissible.

[16] The application was heard on **April 18, 2023**.

[17] Ms. Gojkovich seeks the following relief:

a. a declaration that Ms. Gojkovich has been treated by the Respondents in a manner that is oppressive, unfairly prejudicial to and which unfairly disregards her rights as a complainant;

b. an order that Mr. Rody purchase Ms. Gojkovich's shares in Buhbli Organics based on the value determined in the Fuller Landau Report as of January 31, 2021 without minority discount ($831,000);

c. an order for payment to Ms. Gojkovich of the compensation she was supposed to receive from January 2022 to April 2023 that has not been paid;

d. an order for Buhbli Organics to arrange for the termination of Ms. Gojkovich's personal guarantee of the company's indebtedness with its lenders; and,

e. in the alternative, an order that Buhbli Organics be sold to a third-party purchaser in a tax efficient manner under Court supervision and on such sale an accounting should occur of all corporate expenditures by Buhbli Organics, Organic Products Consulting and other related parties. Upon the sale of the Company the proceeds of such sale be paid into Court in satisfaction of the Applicant's claims on a priority basis.

[18] The Respondents seek the following:

a. an Order converting the application to an action with costs on a substantial indemnity basis;

b. in the alternative, dismissing the application with costs payable to the Respondents on a substantial indemnity basis; and,

c. in the further alternative, if an oppression remedy is granted, then it should be a sale by Ms. Gojkovich of her shares by an auction or tender process in which Mr. Rody may participate.

C. Factual Background

1. Introduction

[19] Despite Mr. Rody's arguments to the contrary, there is no need or cogent reason to convert this application into an action. The essentially factual background is readily apparent, and I shall describe it in this section of my Reasons for Decision.

[20] The essential material facts are uncontestable or demonstrably proven. There are a few factual matters about which the parties differ substantially, but their dispute is largely about how to categorize their conduct as a legal matter in the context of an oppression remedy application. The evidentiary record is more than adequate to make that legal categorization and to determine what relevance or consequences, if any, follow from the legal categorization.

2. *Dramatis Personae*

[21] **Michelle Gojkovich**, who is 55 years old, is the Applicant. In 1991, she graduated from the University of Guelph with a B.Sc. in biology and genetics. In 1996, she obtained a certificate for teaching English as second language from the University of British Columbia. She is a certified yoga instructor. She has studied Ayurveda, a system of medicine from India that employs oils from plants and flowers for skin care and the treatment of headaches, stress, and muscle pain. She has had a multivarious career as a field biologist, property manager, teacher in adult education, ESL teacher, chambermaid, tour guide, and as a certified yoga instructor. She has business experience as a sole proprietor, but she has no meaningful expertise in manufacturing, marketing, business development, management, or administration.

[22] **John Rody**, who is a senior citizen sexagenarian, is a former Ontario resident who now lives in the Commonwealth of The Bahamas. In 1978, he graduated with a B.Sc. degree in economics from Trent University. From 1978 to 1984, he worked at Johnson & Johnson, a pharmaceutical company that manufactures medical devices and consumer health care products. At Johnson & Johnson, he worked first as a very successful sales representative, and then by promotion, he became a product manager. His responsibilities included developing and implementing marketing plans for Johnson & Johnson's baby products. From 1984 to 1986, he worked at Chesebrough Ponds, a manufacturer of cosmetics, perfumes, and personal products for teeth, hair, skin, and nails *etc*. At Chesebrough Ponds, Mr. Rody was the manager of the product management group responsible for sales and product launches. From 1986 to 1988, Mr. Rody became the president of Kingsgrange Canada, a distributor of toiletries in the Canadian market to retailers such as Sears, Eaton's and Hudson's Bay. In 1989, Mr. Rody established Rody and Company Marketing, his own corporation, which he operated until 2010. This business acted as a supplier to retail outlets including Walmart Canada, and it operated its own retail outlets under the banner "Applewoods" selling health and beauty care products including bath and skin care products. Rody and Company Marketing's customers included Walmart Canada, Walmart USA, the Body Shop, and Shoppers Drug Mart. Mr. Rody undertook all of the front room and backroom business operations of Rody and Company Marketing. In 2010, Mr. Rody ceased Rody and Company Marketing and from 2010 until he made his connection with Ms. Gojkovich, he "was working on working" and looking for a new opportunity to develop a business. Mr. Rody has considerable expertise as an entrepreneur and in business development, management or administration.

[23] **Buhbli Organics Inc.** produces and sells skin care oils and Himalayan bath salts through Walmart stores in Canada and the United States and through CVS Drug stores in the U.S. Buhbli purchases raw materials from around the world and hires third-party manufacturers to manufacture the products. At its financial high point to date its gross revenues were approximately $3.0 million.

[24] **Aamer Butt**, who is a resident of Ontario, is an independent contractor retained by Buhbli Organics Inc. Supervised by Mr. Rody, Mr. Butt provides financial, bookkeeping, and administrative services for Buhbli Organics and he has major sales responsibilities with respect to Walmart, which is one of Buhbli Organics' most important customers.

[25] **Jennifer Van Dine**, who is a resident of Ontario, is an independent contractor retained by Buhbli Organics Inc. Supervised by Mr. Rody, Ms. Van Dine provides administrative services for Buhbli Organics.

3. The Story of Buhbli Organics – Love's Labour Lost

[26] In the summer of **2012**, Ms. Gojkovich began a small business selling her handcrafted soaps and other organic products. In **March 2013**, she registered her sole proprietorship as Buhbli Artisan Soapworks.

[27] In **July 2014**, while Ms. Gojkovich was selling her handcrafted soaps at a farmer's market in Collingwood, Ontario, she met Mr. Rody. They began a relationship that became romantic. In the fall of 2014, Ms. Gojkovich moved into Mr. Rody's home in Kingston, Ontario. They lived together until May 2021. During their cohabitation, they resided primarily in Canada but spent winters in the Bahamas.

[28] On **September 8, 2015**, at Mr. Rody's suggestion, Ms. Gojkovich incorporated Buhbli Organics to replace Buhbli Artisan Soapworks. She agreed with his plans to use his business connections to transform her small business in artisan soaps to a much more diverse line of body care products to be sold at major retail outlets such as Walmart. This was a fundamental change in the nature of the business that had been started by Ms. Gojkovich. Although the parties diverge substantially as to whom made the business decisions and to whom should be given the credit for those decisions, Buhbli Organics was a fundamentally different and vastly more successful enterprise than Buhbli Artisan Soapworks. Ms. Gojkovich's role in the business affairs of Buhbli was miniscule compared to Mr. Rody's role.

[29] At the outset of this startup new business, Ms. Gojkovich is registered as the sole owner, sole director, and the president of Buhbli Organics. However, she held 50% of the shares in trust for Mr. Rody, who had invested $300,000 in the capital of the corporation. On **August 16, 2016**, Ms. Gojkovich transferred a 50% ownership interest in Buhbli Organics to Mr. Rody, and he officially became a co-director and an officer of the corporation. On the advice of Mr. Rody's personal lawyers and accountants on **February 1, 2017**, Buhbli Organics is amalgamated with two of Mr. Rody's companies (2020374 Ontario Limited and Village Memories Ltd.). The amalgamated enterprise gains the tax benefit of $700,000 of tax-deductible losses.

[30] There is no shareholders' agreement. The parties never discussed what should happen if either of them did not wish to continue to be a shareholder.

[31] Although Ms. Gojkovich did not contribute monetary capital, she contributed the modest goodwill of her sole proprietorship and, in any event, Ms. Gojkovich and Mr. Rody are equal owners of Buhbli Organics.

[32] Until April 2021, Ms. Gojkovich and Mr. Rody receive equal remuneration from the corporation. The practice with respect to remuneration was that Ms. Gojkovich and Mr. Rody would each use draws from Buhbli Organics' bank accounts to pay their personal and the couple's living expenses, and at the end of the year, the professional accountants retained for the business would attribute the draws as salary or dividends or repayments of shareholder's loans or in whatever way was most beneficial to the shareholders from a tax planning perspective. The result was an equal allocation of the revenues of Buhbli Organics without regard to position or contribution or financial investment in the business.

[33] Under the stewardship of Mr. Rody, between **2017 and 2021**, Buhbli Organics' sales increased from $380,642 to $2,968,947. By 2020, Buhbli Organics was supplying products to about 380 Walmart Canada stores and 7,800 CVS stores in the USA. However, the sales for 2021 as reported as of January 31, 2022 reveal that the 2021 sales revenue for Buhbli Organics had decreased by approximately $1.2 million to $1,799,964. Reflecting several adverse economic developments, including supply chain difficulties, inflation, and the ongoing mixed recovery from the Covid-19 pandemic, Buhbli Organics' performance for fiscal year 2022 has also been poor.

[34] In his affidavit and his cross-examination, Mr. Rody "vehemently", his word, disagrees with Ms. Gojkovich's characterization of their respective roles, responsibilities, and contribution to the growth and success of Buhbli Organics (but not its recent decline, for which he takes no responsibility). To say that Mr. Rody's disagreement was vehement is an understatement of his vitriolic, mean-spirited, dismissive, and chauvinistic evidence that: "Due to her constant displays of a sheer lack of interest in key aspects of [Buhbli Organics], I was single-handedly making the major decisions pertaining to [Buhbli Organics] even before our break-up." The self-aggrandizing and rude Mr. Rody is everything but modest or kind in his affidavit in taking all of the credit for the development and growth of Buhbli Organics. He is dismissive of Ms. Gojkovich's contribution as ignorant, irrational, inconsequential, worthless, and occasionally harmful to Buhbli Organics.

[35] The truth of the matter is that Mr. Rody was the dominant force and predominant contributor to all aspects of Buhbli Organics' business operations, successes, and failures, but that until the personal relationship began to deteriorate, it remained a cooperative enterprise in which Ms. Gojkovich made a modest contribution that Mr. Rody was happy to appropriate. In an interview for a retail trade magazine *"Musings for a better world*", in answer to the question: "Tell us about the inception of Buhbli" he stated:

> Buhbli was created by my partner Michelle Gojkovich in 2014. She was making hand-crafted artisanal soap and selling them at a local farmers market. When I met Michelle, I was impressed and inspired by her passion for all things organic, for her commitment to sustainability, and her minimalist lifestyle. We became partners in life and in business. Our goal is to make a positive difference in the world that supports and enhances our own well-being, the well-being of others and the Earth. […] We share a goal of making organic products that are affordable and accessible to the mass market. […] Our efforts also support thousands of organic agricultural workers around the world and encourage others to follow this growing movement. […] The mechanics of what we do can be attributed to Michelle. Whenever my suggestions for creating a company leaned too much on my past experiences, she would say, "Find another way." It seemed like everyday I would be told to "find another way." So much of my previous experience building a company from the ground up got put on a shelf. I found another way. The Buhbli Way.

[36] The truth of the matter is while they were a compatible and a loving couple in their personal life and while they were from a corporate law perspective being treated equally, Mr. Rody did make and implement all the decisions (major and minor) for Buhbli Organics and Ms. Gojkovich

was aware of those decisions and she was content to adopt them and follow his leadership. She made a valuable contribution but she was not the leader or the commander of the business. Mr. Rody was content to have Ms. Gojkovich play the role of a modest contributor to their business in which they were equal co-owners and in which they shared equally regardless of whom was making the more valuable contribution objectively or subjectively speaking.

[37] During the time of amicable cohabitation as business and life partners, Ms. Gojkovich did not become a "silent partner" to the enterprise or ever abandon her normal rights as a 50% owner of a private corporation to participate fully participate in its affairs. I emphasize that it is only after an acrimonious personal break up that it became an issue between them about who made the more valuable contribution or about whether they both should equally share the remuneration from Buhbli Organics.

[38] The days of cohabitation and business bliss, however, were not to last. There was an irrevocable breakdown in the spring of 2021. However, the deterioration of the personal relationship began earlier. In his affidavit, Mr. Rody states that the relationship had been deteriorating for years. Ms. Gojkovich deposed that the relationship experienced "significant challenges" beginning in 2020.

[39] In **October 2020**, at Mr. Rody's urging, Ms. Gojkovich and Mr. Rody incorporate the Respondent Organic Products Consulting. This is a Bahamian corporation. It was Mr. Rody's idea to use this Bahamian company to charge services to Buhbli Organics as a means to pay less personal income tax. Although Ms. Gojkovich was apprehensive about this plan because she did not regard the Bahamas as a permanent residence, she agreed to it. However, after the breakdown of their personal relationship she changed her mind. On **June 16, 2021**, at a corporate meeting of Buhbli Organics on Zoom, Mr. Rody revealed that he has transferred to Organic Products Consulting some of the services he had been performing for Buhbli Organics and on **June 17, 2021**, Ms. Gojkovich resigned as a director of Organic Products Consulting and her shares in the corporation were transferred to Mr. Rody.

[40] There is a major controversy between the parties about whether Ms. Gojkovich may have decided to reduce her involvement with Buhbli Organics during the latter part of 2020 and leading into 2021. Mr. Rody deposed that in **January** or **February 2021**, there was a discussion between him and Ms. Gojkovich in which "she clearly and unequivocally advised me that she no longer wanted to be actively involved in the Company and wished to be a silent partner. […] I vehemently deny Michelle's allegation that she never agreed to become a silent partner in the Company. I do not dispute that she is a director, officer, and shareholder. However, we made it clear what our roles would be going forward […]."

[41] Pausing here in the narrative, for the purposes of deciding this oppression remedy application, it is not necessary for me to ultimately resolve what I shall call the silent partner controversy. In early 2021, given the deteriorating personal relationship and the emerging hatred, the parties were discussing their respective roles with Buhbli Organics and the possibility of changing Ms. Gojkovich's role, however, there is no evidence that Ms. Gojkovich ever formally agreed to be a silent partner or that she ever agreed to disengage from her role in the business affairs of Buhbli Organics.

[42] But more to the point, there is no evidence that there ever was an agreement to change Ms. Gojkovich's reasonable expectations that she was a co-owner entitled to all the rights of a co-owner and an equal sharing of the revenues of Buhbli Organics. This is conceded by Mr. Rody's

statement: “I do not dispute that she is a director, officer and shareholder.” I shall return to the matter of the silent partner controversy below.

[43] In **April 2021**, according to Ms. Gojkovich, and in **May 2021**, according to Ms. Gojkovich, the intimate personal relationship between them is over. As one of only two factual matters about which they both unequivocally agree, Ms. Gojkovich and Mr. Rody say that the reason for their break up is a private matter that is irrelevant to Ms. Gojkovich’s application. The second matter about which they both agree is that with the break up they could no longer work together. They are incompatible as life and as business partners. They both wish to separate one from the other.

[44] On **May 24, 2021**, Mr. Rody physically separated from Ms. Gojkovich, and he now makes the Bahamas his principal residence. This personal distancing is enhanced by a communications distancing. Beginning in **June 2021**, Mr. Rody’s communications with Ms. Gojkovich were made through the intermediary of Mr. Butt and Mr. Rody did not feel the need to attend Ms. Gojkovich’s meetings with Mr. Butt and Ms. Van Dine.

[45] With the physical and communications distancing and the growing antipathy between the parties, there comes a series of events which Ms. Gojkovich relies on as instances of oppressive conduct. Mr. Rody, however, denies any oppressive conduct, and he justifies or rationalizes the alleged instances of oppressive conduct as being proper business practices. He denies that some incidents occurred as alleged by Ms. Gojkovich, and he justifies or rationalizes other incidents as being proper conduct by the *de facto* chief executive officer (CEO) of Buhbli Organics. He says that his decisions and his conduct implementing those decisions were: (a) within his authority as CEO of Buhbli Organics; (b) within the scope of the business judgment rule, where courts will not intervene in the affairs of a corporation; (c) made in the best interests of Buhbli Organics; and (d) necessary in order to protect Buhbli Organics from the harm being caused by Ms. Gojkovich’s reneging on her agreement to withdraw from the business activities and assume the role of a silent (i.e., keep your mouth shut) partner.

[46] What does clearly emerge from these various alleged incidents of oppressive conduct is that Ms. Gojkovich and Mr. Rody hate each other, they cannot work together, and Ms. Gojkovich’s reasonable expectations were being violated. Ms. Gojkovich had the reasonable expectation that notwithstanding that Mr. Rody would play the predominate controlling role and make the predominate contribution to the success of the business, the earnings of their business enterprise would be shared equally. Further, it was Ms. Gojkovich’s reasonable expectation that Mr. Rody would not make unilateral decisions without consulting her and that he would make business decisions in accordance with his fiduciary obligations to Buhbli Organics and in accordance with his and her rights as shareholders under Ontario’s *Business Corporations Act*. As I shall further describe below, the evidentiary record establishes that Ms. Gojkovich’s reasonable expectations were being violated by Mr. Rody.

[47] Returning to the narrative, around May of 2021, Mr. Butt advised Ms. Gojkovich that Mr. Rody had changed the packaging of Buhbli Organics’ Himalayan bath salts. Ms. Gojkovich objected to the change as contrary to Buhbli Organics’ business ethics about not harming the environment. In the conversations or the exchange of emails that follows about the Himalayan bath salts there is nothing that amounts to oppressive conduct but what emerges is that Mr. Rody is increasingly annoyed at what he regards as Ms. Gojkovich’s reneging on what he understood to be her promise to be a silent partner in the business.

[48] Between **June 23-25**, **2021**, Ms. Gojkovich and Mr. Rody have an email exchange about the Himalayan bath salts that speaks for itself and that for present purposes, I need not recount, save for Mr. Rody's email message to Ms. Gojkovich of June 25, 2021 which stated:

> Michelle, I do believe that we agreed on the concept of you being a "silent partner" and I would assume the role of managing partner responsible for sales and profitability as well as protecting the integrity of the Buhbli brand. It was also agreed that you would have complete access to the sales and financial records 24/7/365. You have asked for bi weekly meetings to be updated on the business, which I did brief Aamer and Jennifer to be totally transparent and thorough with regards to all of the information provided to you. There is no need for me to attend those status update meetings because I keep myself informed on all aspects of the business on a daily basis. Those meetings are for your benefit only. I think it would be prudent for you to embrace the role of a "silent partner" and trust that Jennifer, Aamer and I are competent and that we carefully consider all of our options before decisions are made. Also, we vigilantly use our best efforts to protect the sales, profits and integrity of the brand. Your email below would indicate that you see yourself as a managing director. If so, I can see that becoming a big problem. One thing for sure is that Aamer and Jennifer do not want to be put in the middle of a shareholder conflict. I have been as considerate and as accommodating as humanly possible regarding your wants and needs. That includes agreeing to not returning to my home after going out to stores to prepare for a major meeting with the buyer until I had a negative covid test. Also, agreeing to your very generous $10,000/month allowance. I want a peaceful no drama separation and very clear understanding that I run the company my way. No debates, no ask permission, no consultation required, hence no arguments and no unnecessary stress and we get to be HAPPY for once in a very long time. […]
>
> John Rody, Director BUHBLI ORGANICS

[49] Five days later on **June 30, 2021**, Ms. Gojkovich responded to Mr. Rody's email message of June 25, 2022 as follows:

> Hi John, I'd like to clarify a few important points in response to your letter […]
>
> 1. Though we have had verbal discussions about silent partnership, nothing has been formalized or agreed upon in writing. As I've mentioned in our previous discussions, if we decide to negotiate a silent partner agreement, it would have to be formalized in writing, articles of incorporation would have to be altered accordingly, i.e. I would no longer be President of Buhbli Organics and a formalized release of liability for myself would be established etc.
>
> 2. The $10,000 a month that I now receive is not an allowance. It is not some form of spousal support nor a gift. It is a dividend owed to me as a 50% common shareholder and President of Buhbli Organics Inc.
>
> Best regards, Michelle Gojkovich, President Buhbli Organics Inc.

[50] I find as a fact that Ms. Gojkovich's email message of June 30, 2021 reflects the true state of affairs as at the end of June 2021. I find as a fact that there was no agreement for Ms. Gojkovich to become a silent partner. I also find that apart from the fact that the parties were antagonistic, there was at this juncture no violation of Ms. Gojkovich's reasonable expectations. That state of affairs, however, was to change, when Ms. Gojkovich did take steps - not to formalize being a silent partner – but to divest herself of her interest in Buhbli Organics. Mr. Rody's response was oppressive, unfairly prejudicial, and unfairly disregarded her rights as a shareholder in Buhbli Organics.

[51] Ms. Gojkovich retained legal counsel in an effort to complete the separation from Mr. Rody. On **July 16, 2021**, Darren Marr of Chaitons LLP forwarded by email a letter to Mr. Rody from Stephen Schwartz a partner of the law firm. Mr. Schwartz's letter stated:

> Re: Buhbli Organics Inc. and its related entities (collectively, the "Company")
>
> Dear Sir,
>
> We have been retained by Michelle Gojkovich ("Michelle") to assist her in the negotiation of a purchase of her share interest in the Company. […] We are also advised by Michelle that in addition to your business relationship, the two of you were involved in a personal relationship that has recently ended. Given this dynamic, Michelle believes that it is in the best interests of both of you to now amicably separate your business interests in the Company. You have told Michelle that you wish to continue to manage and own the Company. Michelle is prepared to facilitate this request by selling her shares in the Company to you at fair market value without minority discount. The value will be determined by an appraisal of the shares. We would like to immediately commence a process for the valuation and sale of Michelle's shares in the Company. This will involve retaining an independent business valuator to determine the fair market value for Michelle's shares. Once the valuation is received, the parties can prepare the necessary corporate documents for the sale of the shares and Michelle's resignation as an officer and director of the Company. In the interim, until an agreement for the sale of Michelle's shares is finalized, Michelle will carry on with her management duties for the Company. All communications concerning the sales process should be made directly to our office rather than with Michelle. We suggest that you retain a lawyer to represent you during this process. Once you have retained counsel, please have them contact us as soon as possible.
>
> Yours truly, CHAITONS LLP

[52] On **July 17, 2021**, Mr. Rody sent the following email reply to Mr. Marr:

> Hi Darren, I do believe your client has deceived you. I have NEVER expressed an interest in purchasing her shares in the company. Please do not waste anymore of my time with this matter. Most sincerely, John Rody

[53] Meanwhile also on **July 17, 2021**, Ms. Gojkovich sent the following email message to Mr. Rody:

> Hi John, I'd like to hold weekly staff meetings via zoom audio between yourself, myself and Aamer to improve communication and make sure we're all on the same page [with respect to] to all ongoing Buhbli projects and developments. Please let me know your thoughts and what days/times would work best. I will orchestrate and send out zoom invitation links weekly as required. Best regards, Michelle Gojkovich

[54] On **July 19, 2021**, Mr. Rody responded to Ms. Gojkovich's email message of the 17th of July as follows:

> Michelle, I am not sure you carefully considered my reaction to the legal letter that I received on Friday. Especially when the entire subject of the letter is based on a lie. Both you and I know that at no time did I ever say that I would consider buying your shares. You normally try to evaluate the worst case scenario of most situations as they present themselves, however on this occasion you may have seriously underestimated the worst case scenario and how it will affect you. I am willing to overlook recent events this one last time as I do believe you are getting some bad advice. The following outlines the essence of what has been previously agreed to by you and I verbally.
>
> 1. You will receive $10,000 per month from Buhbli Organics for as long as Buhbli Organics is a viable corporation.
>
> 2. You will be a silent partner with no involvement in the day to day operations of Buhbli Organics. This is not a negotiation, rather a reiteration of previous agreements. Please consider that it is in my best interest that you receive the monthly payment of $10,000 per month for many years to come. Also, that it is in the best interest of the company to eliminate any and all shareholder animosity. Jennifer and Aamer love their jobs do not need to be adversely affected by any of this.

> As a silent partner you will still have access to all of the company files 24/7/365. If you have specific questions they can be addressed to me and you will receive a prompt response. Hopefully you will choose wisely and take the path of least resistance.
>
> John Rody, Director BUHBLI ORGANICS

[55] Mr. Rody's threatening email message of July 19, 2021 is oppressive conduct that violated the reasonable expectations of Ms. Gojkovich. There was no silent partner agreement. If there had been a silent partner agreement, it would have been unenforceable for uncertainty or unconscionability or absence of consideration, or as subject to formal contracting in writing, which never occurred, or it would have been discharged by fundamental breach. Mr. Rody had no unilateral right to change Ms. Gojkovich's reasonable expectations, and he had no legal right to decide what remuneration should be paid to her and to change her reasonable expectations about her role in the business affairs of Buhbli Organics. He had no right to deny her access to the corporation's bank accounts or financial records. He had no right to deny her remuneration.

[56] After July 2021, there are no more direct communications between Ms. Gojkovich and Mr. Rody. There were, however, oppressive and wrongful acts by Mr. Rody. Visualize:

a. Between **July 19, 2021** and **July 23, 2021**, Mr. Rody withdrew approximately $192,060 from Buhbli Organics' bank accounts and transferred the sums to accounts controlled by Mr. Rody personally. On **January 18, 2022**, $150,000 of the transferred money was returned to a new Buhbli Organics' account at the National Bank. On **February 2, 2022**, another $49,985 was restored by Mr. Rody to Buhbli Organics' bank account at the National Bank. These acts were not a misappropriation of funds by Mr. Rody for personal purposes. Rather, he says he was concerned that Ms. Gojkovich would misappropriate funds and he was acting in the best interests of Buhbli Organics by controlling the bank accounts. However, there was no basis for Mr. Rody to have this apprehension and she was entitled to have as much access to Buhbli Organics' bank accounts as he had. This conduct violated Ms. Gojkovich's reasonable expectations.

b. On **July 23, 2021**, without Ms. Gojkovich's permission, Buhbli Organics loaned Mr. Butt $13,500. This act was not a misappropriation of funds by Mr. Rody nor was it oppressive conduct as such.[2] What was oppressive was the manner in which this was done without any consultation or disclosure to Ms. Gojkovich.

c. In **August 2021**, Ms. Gojkovich received a $10,000 payment as remuneration from Buhbli Organics. Mr. Rody would have it that this payment was in furtherance of the silent party agreement. Ms. Gojkovich would have it that the $10,000 payment was how revenues would be shared now that the couple was not living together and taking down draws to pay for their living expenses. Beginning in September when the $10,000 payment was not made, Ms. Gojkovich unilaterally used her access to the business's accounts to pay herself $10,000 for September, October, November, and December 2021. In my opinion, none of this amounts to oppressive conduct until **January 2022**, after which time, Ms. Gojkovich has received no remuneration from Buhbli Organics and after which time she has been unable to access the bank accounts to extract any remuneration,

[2] On **May 15, 2022**, Mr. Butt repaid his $13,500 loan. The repayment was effected by payroll deductions in March, April, and May 2022.

while Mr. Rody has had access and also may have been remunerated for the consulting services being provided by him through Organic Products Consulting.

d. In **October 2021**, Mr. Rody discontinued the distribution of five products that Ms. Gojkovich had designed. Upon discovering the discontinuance of the products, she sent an email to Mr. Rody, Mr. Butt, and Ms. Van Dine stating that key decisions should not be made without her input. Mr. Rody responded by an email to Ms. Gojkovich and to Mr. Butt and Ms. Van Dine stating that Ms. Gojkovich was "just wasting everyone's time." It was not an act of oppression for Mr. Rody to discontinue the distribution of the five products. However, how he went about it was a failure to meet Ms. Gojkovich's reasonable expectations as to being at least consulted in the management of the business and it was a failure of her reasonable expectations to be treated with disrespect and with rudeness and derision.

e. On **January 4, 2022**, Mr. Rody transferred $254,965 from the funds he had removed from Buhbli's former bank account to a new bank account for the corporation at the National Bank of Canada. Once again, this was not a misappropriation of funds. But it was wrongful and oppressive conduct to unilaterally control the banking for Buhbli Organics.

f. On **January 13, 2022**, at Mr. Rody's direction, Buhbli Organics stopped the use of two CIBC Credit Cards, one of which had been used by Ms. Gojkovich for business expenses. She was told that if she used the card, she would not be reimbursed. This conduct violated Ms. Gojkovich's reasonable expectations as a co-owner of Buhbli Organics.

g. Beginning in **2021** and continuing into **2023**, Mr. Rody transferred some of the sales revenue that had been earned by Buhbli Organics to his Bahamian corporation, the co-Respondent. Hundreds of thousands of dollars were transferred, although the precise amount is not presently known. Although some of this transfer or revenues may have been restored, this reallocation of revenues would normally be shared equally between Ms. Gojkovich and Mr. Rody. This transfer of business assets is an egregious breach of Ms. Gojkovich's reasonable expectations as a co-owner of the corporation.

h. Beginning in **2022** and continuing into **2023**, Mr. Rody met with Buhbli Organics' accountants to review the financial statements without Ms. Gojkovich in attendance. Before the break up of their personal relationship, both owners attended the meeting with the accountant. Ms. Gojkovich's exclusion from these meetings is a clear violation of her reasonable expectations as a co-owner of the business.

i. Since **January 2022**, Ms. Gojkovich has not received any remuneration from Buhbli Organics, while Mr. Rody has diverted assets to his consulting corporation in the Bahamas. These are egregious violations of Ms. Gojkovich's reasonable expectations.

[57] Meanwhile, while all of this oppressive conduct was going on, Ms. Gojkovich forged ahead in her rebuffed desire to have Mr. Rody buy her out of the business of Buhbli Organics. She gave instructions to Fuller Landau to make an evaluation of the market value of her interest as of January 31, 2021, which she regarded as the appropriate date having regard to Mr. Rody's oppressive behaviour. The evaluators at Fuller Landau attempted to obtain information from Mr. Rody, but he refused to co-operate.

[58] On **January 10, 2022**, Fuller Landau issued its valuation report. The report valued Ms. Gojkovich's interest in Buhbli Organics as of January 31, 2021 at $831,000. As noted above, while aspects of the Fuller Landau report are admissible as evidence, the valuator's opinion evidence as such is not admissible.

4. Miscellaneous Facts

[59] Since at least the beginning of 2022 until to date, Mr. Rody has been carrying on the business of Buhbli Organics as if it was his sole proprietorship and Ms. Gojkovich has been excluded from its business affairs.

[60] During his cross-examination Mr. Rody refused to answer questions about: (a) details of Buhbli Organics' expenses for professional fees after Ms. Gojkovich's exclusion from the affairs of the business; (b) payments made to Organic Products Consulting after Ms. Gojkovich's exclusion from the affairs of the business; (c) payments made to other companies controlled by Mr. Rody after Ms. Gojkovich's exclusion from the affairs of the business; and (d) payments made to Mr. Rody personally after Ms. Gojkovich's exclusion from the affairs of the business.

[61] Where a party refuses to answer proper questions, the court may draw an adverse inference.[3] In the immediate case, Mr. Rody's refusals were improper, and I draw the adverse inference that during the period in which Ms. Gojkovich was receiving no income directly or indirectly from Buhbli Organics, Mr. Rody was indirectly and directly remunerated by Buhbli Organics. It may be the case that both he and Ms. Gojkovich have not received any salary from Buhbli Organics, but I do not believe Mr. Rody's evidence that he and she have been treated equally since January 2022.

[62] The Fuller Landau valuation report is dated January 10, 2022 referable to the January 31, 2021 year end of Buhbli Organics. The report does not account for Buhbli Organics' recent financial statements. Those statements show a sales decline of over $1.0 million and a loss of over $250,000. A draft of Buhbli Organics' financial statements for the fiscal year of January 31, 2023, shows that the total retained earnings have been reduced from $265,836 to a deficit of $14,694. The Report also does not consider the most recent projections and the operating issues confronting Buhbli Organics including: inflation; reduced consumer confidence; increased costs on inputs; and supply chain problems.

[63] Mr. Rody is not willing or able to purchase Ms. Gojkovich's shares. He does not have the financial resources to do so and he has no intention to take on debt given that he is a senior citizen.

[64] As a remedial measure for Mr. Rody's oppressive conduct, a forced sale or a shotgun buy/sell scheme with or without a fixed price is neither feasible nor fair in the circumstances of the immediate case. The evidence establishes that Ms. Gojkovich has no capability whatsoever to compete with Mr. Rody and that it would be foolish (a financial suicide) for her to buy him out even if she could find a lender who would be prepared to finance the transaction. The business of Buhbli Organics is totally dependent on Mr. Rody's business connections and busy acumen and the business is essentially worthless without him as its steward.

[3] *Central Lumber Limited v. Gentile*, 2019 ONSC 7413; *Bank of Montreal v. Faibish*, 2013 ONSC 2801; *Metcalfe v. Anobile*, 2010 ONSC 5087.

[65] There is no evidence that there would be any market for Ms. Gojkovich's 50% interest or that there could be some sort of partition of the business. Mr. Rody might be able to recruit a new business partner to be a silent partner or to be a new co-owner with him, but the evidence is that Ms. Gojkovich would not have this capability.

[66] The evidence establishes that the personal and business relationship is irreparable and in my opinion it is just and equitable that the business of Buhbli Organics should be wound up. Since Mr. Rody is unable or unwilling to purchase Ms. Gojkovich's 50% ownership interest at a fair value, there is no other remedy available to redress his oppressive conduct in his stewardship of Buhbli Organics.

D. Discussion and Analysis

1. Should the Application be Converted into an Action?

[67] Rule 14.05(2) of the *Rules of Civil Procedure* permits a proceeding to be commenced by an application if authorized by statute. Oppression remedy proceedings may be brought by application or by action.[4] Mr. Rody contends that Ms. Gojkovich's application should be converted into an action. I disagree. The immediate case is appropriate for an application procedure.

[68] Rule 38.10(1)(b) provides that on the hearing of an application, the presiding judge may order that the whole application or any issue proceed to trial and give such directions as are just. Rule 38.10(3) provides that where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge.

[69] Where the Legislature has stipulated that a proceeding may be by application, there is a *prima facie* right to proceed in that way and the matter should not be converted into an action without good reason to do so.[5] In determining whether to convert an application into a trial of an issue, the court will consider such factors as: (a) whether there are material facts in dispute; (b) the presence of complex issues; (c) whether there is a need for the exchange of pleadings and discovery; (d) the importance and the nature of the relief sought by application; and (e) whether the affidavits and the transcript of the cross-examination are sufficient to decide any credibility issues or whether a trial is required.[6] Further, in determining whether to convert an application into a trial of an issue, the court should consider whether if the proceeding had already been commenced as an action and a party had brought a motion for a summary judgment would the court be satisfied that there is no genuine issue requiring a trial.[7] In other words, it makes little sense to convert an application, which is essentially a motion procedure, into an action procedure that could be determined by a motion for a summary judgment.

---

[4] *Castillo v. Xela Enterprises Ltd*., 2016 ONSC 6088.
[5] *Sekhon v. Aerocar Limousine Services Co-Operative Ltd.*, 2013 ONSC 542; *College of Opticians of Ontario v. John Doe 1 (c.o.b. Great Glasses)*, [2006] O.J. No. 5113 at paras. 19-21 (S.C.J.); *Collins v. Canada (Attorney General)*, [2005] O.J. No. 3217 at paras. 29-30 (S.C.J.).
[6] *Metropolitan Toronto Condominium Corp. No. 747 v. Korolekh*, [2010] O.J. No. 3491 at paras. 54-55 (S.C.J.); *Poersch v. Aetna*, [2000] O.J. No. 270 at para. 86 (S.C.J); *McKay Estate v. Love*, [1991] O.J. No. 1972 at para. 6 (S.C.J.), aff'd [1991] O.J. No. 2607 (C.A.).
[7] *A.M. Machining Inc. v. Silverstone Marble & Granite Inc.*, 2010 ONSC 71 at paras. 4-14 (S.C.J.).

[70] Where an application is statutorily authorized, the court should not convert it into an action unless: (a) material facts are in dispute; and (b) the court cannot properly resolve the material facts without the benefit of a trial.[8] Procedural fairness is the critical determinant of whether an application should be converted into a trial. If the application cannot fairly be determined by the summary process of affidavits and cross-examinations, then the application should proceed to trial and a hearing of witnesses.[9] However, if the determination of the issues, including issues of credibility can properly be made on the application record, then the application should not be converted into an action with a trial.[10] In *Castillo v. Xela Enterprises Ltd.*,[11] the Divisional Court held that courts ought to prefer adjudicative mechanisms that permit the most efficient resolution of disputes in oppression remedy cases and thus the use of applications is preferred for oppression remedy disputes when reasonably possible.

[71] In the immediate case, as demonstrated by the above description of the facts, there are no material facts that require the forensic resources of an action including the exchange of pleadings, documentary discovery, examinations for discovery, and a summary judgment motion or a trial. While the matter of the evaluation of a fair value or a fair market value and the determination of the appropriate valuation date might require an exchange of experts' reports and the crucible of a trial, in the immediate case, this issue is moot because as I shall explain further below, there is no need for an evaluation because I am ordering the winding up of Buhbli Organics.

2. Legal Background

[72] Under s. 248 of the Ontario *Business Corporations Act*, an oppression remedy is one of several remedies available to shareholders in a corporation. For present purposes, the other relevant remedy is a winding up order pursuant to s. 207 of the Act.

[73] Sections 248 and 207 are set out below.

> *Oppression remedy*
>
> 248 (1) A complainant […] may apply to the court for an order under this section.
>
> *Idem*
>
> (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,

[8] *Collins v. Canada (Attorney General)*, [2005] O.J. No. 3217 at para. 29 (S.C.J.); *SeaworldParks & Entertainment LLC. v. Marineland of Canada Inc.*, [2001] O.J. No. 3105 at paras. 28-29 (S.C.J).
[9] *Poersch v. Aetna* [2000] O.J. No. 270 at para. 8 (S.C.J.).
[10] *Cunningham v. Front of Yonge (Township)* (2004), 73 O.R. (3d) 721 at para. 20 (C.A.); *Gordon Glaves Holdings Ltd. v. Care Corp. of Canada Ltd.* (2000), 48 O.R. (3d) 737 at para. 30 (C.A.).
[11] 2016 ONSC 6088 (Div. Ct.).

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.

Court order

(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,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(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;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

[…]

Where corporation prohibited from paying shareholder

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

*****

Winding up by court

207 (1) A corporation may be wound up by order of the court,

(a) where the court is satisfied that in respect of the corporation or any of its affiliates,

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) 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; or

(b) where the court is satisfied that,

(i) a unanimous shareholder agreement entitled a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred,

(ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,

(iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue its business and it is advisable to wind it up, or

(iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

(c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation.

Court order

(2) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit.

[74] In assessing a claim for oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[12]

[75] In determining whether a reasonable expectation exists, the court may consider, among other things: (a) general commercial practice; (b) the nature of the corporation; (c) the relationship between the parties; (d) past practice; (e) steps the claimant could have taken to protect itself; (f) representations and agreements; and (g) the fair resolution of conflicting interests between

[12] *Abbasbayli v Fiera Foods Company*, 2021 ONCA 95; *Brekelmans v. Brekelmans,* 2020 ONSC 150 (Div. Ct.); *Wilson v. Alharayeri*, 2017 SCC 39; *1658586 Ontario Inc. v. Can-Am Lubricants Inc.*, 2014 ONSC 2673 at para. 61 (Div. Ct.); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 68.

corporate stakeholders. Formal shareholder agreements may be viewed as reflecting the reasonable expectations of the parties.[13]

[76] The concept of reasonable expectations is fact-specific, objective and contextual, including the context that there may be competing reasonable expectations.[14] The existence of reasonable expectations is a question of fact that may be proved by direct evidence or by drawing reasonable inferences from circumstantial evidence.[15] The complainant's reasonable expectations are viewed objectively not subjectively, and the actual expectation of a particular stakeholder is relevant but not conclusive; the question is whether the complainant's expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.[16]

[77] "Oppressive conduct" is that which is burdensome, harsh and wrongful and is a fact-specific inquiry. Conduct is "unfairly prejudicial" if the conduct prejudices rights or disregards or ignores interests unfairly and it is not necessary that the conduct include an element of *mala fides* or intent to harm.[17]

[78] Rather than employing a prescriptive definition of what counts for oppressive conduct, courts look for badges or indicia of oppression, including: (a) an absence of a valid corporate purpose for the conduct; (b) lack of good faith on the part of the corporation's directors; (c) the corporation's failure to simulate an arm's-length transaction; (d) discrimination between shareholders with the effect of benefitting the majority shareholder to the exclusion or detriment of the minority shareholder; (e) a plan or design to squeeze out the minority shareholders; and (f) lack of adequate and appropriate disclosure of material information to the minority shareholders.[18]

[79] The oppression remedy is appropriate only where, as a result of corporate activity, there is some discrimination or unfair dealing among corporate stakeholders, a breach of a legal or equitable right, or appropriation of corporate property, and the remedy must be reconciled with the business judgment rule and the reasonable expectations of the oppressed party.[19] At its heart, the business judgment rule aims to avoid hindsight bias and recognizes that it is unfair to evaluate past business decisions with the perfect vision of hindsight and thus absent bad faith or some other improper motive, business judgment that in hindsight has proven to be mistaken, misguided or

---

[13] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69; *Gold v. Rose*, [2001] O.J. No.12 (S.C.J.); *Main v. Delcan Group Inc.*, [1999] O.J. No. 1961 (S.C.J.)*; Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C.C.A.).
[14] *Rooney v. ArcelorMittal S.A.*, 2018 ONSC 1878 at paras. 62–63; *Western Larch Limited v. Di Poce Management Limited* (2010), 102 O.R. (3d) 624 (Div. Ct.); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 62–64.
[15] *Brekelmans v. Brekelmans*, 2020 ONSC 150 (Div. Ct.); *Ford Motor Co. of Canada v. OMERS*, [2006] O.J. No. 27 at para. 65 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 77; *Arthur v. Signum Communications Ltd.*, [1993] O.J. No. 1928 at para. 7 (Div. Ct.).
[16] *Spacebridge Inc. v. Baylin Technologies Inc*., 2021 ONCA 45; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.
[17] *Abbasbayli v Fiera Foods Company*, 2021 ONCA 95; *Brekelmans v. Brekelmans*, 2020 ONSC 150 (Div. Ct.); *Wilson v. Alharayeri*, 2017 SCC 39; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69; *Fiorillo v. Krispy Kreme Doughnuts, Inc*. (2009), 98 O.R. (3d) 103 at para. 156 (S.C.J.); *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563 (C.A.); *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.); *Mason v. Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 (C.A.).
[18] *Rooney v. ArcelorMittal S.A.*, 2018 ONSC 1878 at paras. 62–63; *Ford Motor Co. of Canada v. OMERS*, [2006] O.J. No. 27 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 77. *Arthur v. Signum Communications Ltd.*, [1991] O.J. No. 86 at para. 132 (Gen. Div.), aff'd [1993] O.J. No. 1928 (Div. Ct.).
[19] *Ford Motor Co. of Canada v. OMERS*, [2006] O.J. No. 27 at paras. 93–94 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 77; *Budd v. Gentra Inc.*, [1998] O.J. No. 3109 at para. 34 (C.A.).

imperfect will not give rise to liability through the oppression remedy.[20] The business judgment may be rebutted and there are preconditions to rule; the court will only defer to business decisions that are made honestly, prudently, in good faith and on reasonable grounds.[21]

[80] To impose personal liability on a director or officer of a corporation, there must: (1) be oppressive conduct that is properly attributable to the director's or officer's implication of the oppression; and, (2) the imposition of personal liability must be fit in all the circumstances.[22] When a corporate officer depletes the assets of the corporation to render it judgment-proof or diverts assets for his or her own benefit that could be used to pay a judgment, the court may use the oppression remedy to make the officer personally liable for the debt owed to the creditor.[23]

[81] The oppression remedy is an equitable remedy, and the court may consider the conduct of both parties and when claims in equity are made, the court will not reward those who come to court with unclean hands.[24] Further, the oppression remedy is not a tool to rescue parties from the consequences of their commercial bargains on the basis of a court's after-the-fact assessment of what would be just and equitable in the circumstances.[25]

[82] If oppression is found, the court has a wide discretion to fashion such remedy as it thinks fit, on an interim or final basis, to achieve rectification of oppressive or unfairly prejudicial conduct in connection with a corporation or any of its affiliates.[26] The purpose of the oppression remedy is to rectify oppressive conduct and the remedy should go no further than necessary to rectify the oppression.[27] The parties' reasonable expectations are important when determining the just remedy, and the remedy for oppression should rectify the oppression and interfere as little as possible with the affairs of the corporation.[28]

[83] The oppression remedy is corrective justice designed to rectify oppressive conduct with respect to the complainant's interest in the corporation and cannot be used to advance the complainant's personal interests or to punish the oppressor.[29] The remedy must be related to the

---

[20] *Brekelmans v. Brekelmans*, 2020 ONSC 150 (Div. Ct.); *Ford Motor Co. of Canada v. OMERS*, [2006] O.J. No. 27 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 77.

[21] *Unique Broadband Systems, Inc. (Re),* 2014 ONCA 538 at paras. 71-72; *Corporacion Americana de Equipamientos Urbanos S.L. v. Olifas Marketing Group Inc.* (2003), 66 O.R. (3d) 352 (S.C.J.); *Main v. Delcan Group Inc.*, [1999] O.J. No. 1961 (S.C.J.); *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Gen. Div.).

[22] *FNF Enterprises Inc. v. Wag and Train Inc*., 2023 ONCA 92; *Wilson v. Alharayeri*, 2017 SCC 39 at paras. 47-48.

[23] *FNF Enterprises Inc. v. Wag and Train Inc*., 2023 ONCA 92; *Churchill v. Aero Auction Sales Inc.*, 2019 ONSC 4766; *Unique Lighting & Control Corp. v. Green Services Canada Ltd.*, 2019 ONSC 4438 (S.C.J.); *Piller Sausages & Delicatessens Ltd. v. Cobb International Corp*., [2003] O.J. No. 2647 (S.C.J.), aff'd [2003] O.J. No. 5128 (C.A.); *Tropxe Investments Inc. v. Ursus Securities Corp*., [1993] O.J. No. 1736 (Gen. Div.).

[24] *790668 Ontario Inc. v. D'Andrea Management Inc.*, 2017 ONCA 1019 at paras. 13-14.

[25] *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.

[26] *Murray v. Pier 21 Asset Management Inc.*, 2021 ONCA 424; *Falcon Motor Express Ltd. v. Grewal*, 2019 ONSC 1529 (S.C.J.) (interim interlocutory relief); *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288 (C.A.); *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*, [2006] O.J. No. 27 (C.A.); *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 266 (Gen. Div.), aff'd [1991] O.J. No. 1082 (Div. Ct.).

[27] *Georgakakos v. Georgakakos*, 2020 ONSC 2256 (Div. Ct.); *Radford v. MacMillan*, 2018 BCCA 335 at para. 87; *Wilson v. Alharayeri*, 2017 SCC 39 at para. 53; *1658586 Ontario Inc. v. Can-Am Lubricants Inc.*, 2014 ONSC 2673 at para. 60 (Div. Ct.); *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 at p. 488 (C.A.).

[28] *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.).

[29] *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.).

matter complained of and must be in respect of the complainant's status as a shareholder, officer, director or creditor.[30] The remedy cannot give a complainant something that even he or she never could have reasonably expected.[31] Where relief is justified for oppressive conduct, "the surgery should be done with a scalpel, and not a battle axe".[32] Winding up and liquidation are considered only as a last resort when other less drastic remedies will not suffice.

[84] The case law demonstrates a wide variety of oppression remedy orders, some of which are listed in s. 248 of the Ontario *Business Corporations Act*, including orders winding up the corporation, directing the defendants to purchase shares, and/or directing the defendants to pay compensation. For examples:

a. In *Naneff v. Con-Crete Holdings Ltd.*,[33] reversing the trial judge who had ordered a public sale of the family's incorporated business, the Court of Appeal ordered that the defendants purchase the plaintiff's shares in the corporation at fair market value without minority discount.

b. In *Strauss v. Wright,*[34] the defendant was removed as director and officer of the corporation and his preference shares were ordered to be redeemed at a redemption value to be determined by the court with respect to evidence to be provided by the parties engaging an independent accounting professional.

c. *Gambin Estate v. Di Battista Gambin Developments Ltd*.,[35] the defendant was ordered to disgorge an appropriated corporate opportunity and then the corporation was to be wound up with the appointment of a liquidator subject to the defendant having a reasonable opportunity to elect to purchase the applicant's interests at fair market value following an objective valuation process if the defendant desired to keep the business and its assets intact.[36]

d. In *König v. Hobza*,[37] the defendants were found liable for oppression because they deliberately did not disclose to their business partner who was not involved in the management of the business what they were paying themselves and they overcompensated themselves from what would be a fair remuneration for a twenty-two year period. The court ordered the defendants to pay damages equal to the overpayments plus punitive damages.

e. In *Booth v. Alliance Windsor Insurance Brokers*,[38] where the defendants excluded the plaintiff from management, failed to call formal shareholders meetings, did not

---

[30] *Chiaramonte v. World Wide Importing Inc.* (1996), 28 O.R. (3d) 641 (Gen. Div.); *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 at p. 489 (C.A.); *Re Westbourne Galleries Ltd.* (1972), [1973] A.C. 360 at p. 379 (H.L.).
[31] *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.).
[32] *Gambin Estate v. Di Battista Gambin Developments Ltd*., 2019 ONSC 5789 (Div. Ct.); *1658586 Ontario Inc. v. Can-Am Lubricants Inc*., 2014 ONSC 2673 (Div. Ct.); *Stapleton v. Fleming Feed Mill Ltd.*, [2001] O.J. No. 4170 (S.C.J.); *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd*., [1991] O.J. No. 266, (Gen. Div.) aff'd [1991] O.J. No. 1082 (Div. Ct.).
[33] (1995), 23 O.R. (3d) 481 (C.A.).
[34] 2017 ONSC 5789 (Div. Ct.).
[35] *Gambin Estate v. Di Battista Gambin Developments Ltd*., 2019 ONSC 1376 (Div. Ct.).
[36] See also *Basegmez v. Akman*, 2018 ONSC 812 (Div. Ct.).
[37] 2014 ONCA 691.
[38] 2007 ONCA 805.

declare dividends and paid salaries and bonuses to themselves, the court ordered that the defendants purchase the plaintiff's shares.

[85] Where the appropriate remedy is that the oppressor purchase the shares of the oppressed party, there is no rigid rule or formula for determining the valuation date for the price of the shares and the valuation date should be determined by considering all of the circumstances of the particular case.[39] The valuation date for a required buyout will be influenced by whether the oppressive conduct has affected the value of the corporation and where it has, the application date is often employed as the valuation date.[40]

[86] Turning to s. 207 of the *Business Corporations Act*, which empowers the court to order the winding up of a corporation, the words "just and equitable" in s. 207 are words of the "widest significance and must be given a broad interpretation."[41] A deadlock between shareholders or a state of animosity that precludes all reasonable hope of reconciliation and friendly co-operation in the carrying out the corporation's business affairs is sufficient to trigger the just and equitable jurisdiction in corporations that are analogous to partnerships.[42] Where a corporation resembles a partnership, if the relationship of trust and confidence between the shareholders has broken down and the continuation of the business between them operating as partners is not possible, it may be appropriate to wind up the corporation.[43]

3. Has Oppression been Established and What would be the Appropriate Remedy?

[87] Buhbli Organics is and was an incorporated business partnership of Ms. Gojkovich and Mr. Rody who had a relationship that turned from love to hate. When they were in love, they incorporated Buhbli Organics as the successor of Ms. Gojkovich's sole proprietorship, and it was Ms. Gojkovich's reasonable expectation that notwithstanding that Mr. Rody would play the predominate controlling role and make the predominate contribution to the success of the business, the earnings of their business enterprise would be shared equally.

[88] Further, it was Ms. Gojkovich's reasonable expectation that Mr. Rody would not make unilateral business decisions without consulting her and that he would make business decisions in accordance with his fiduciary obligations to Buhbli Organics and in accordance with their mutual rights as shareholders and co-owners under Ontario's *Business Corporations Act*. Although the predominate contribution and control of the business of Buhbli Organics would be made by Mr. Rody, it was Ms. Gojkovich's reasonable expectation that the earnings of their business enterprise would be shared equally.

[89] Further, it was Ms. Gojkovich's reasonable expectation that: (a) Mr. Rody would not make unilateral decisions without consulting Ms. Gojkovich; and (b) he would make business decisions

---

[39] *Booth v. Alliance Windsor Insurance Brokers*, 2007 ONCA 805; *Chiaramonte v. World Wide Importing Ltd.* (1996), 28 O.R. (3d) 641 (Gen. Div.).
[40] *Chiaramonte v. World Wide Importing Ltd.* (1996), 28 O.R. (3d) 641 at para. 30. (Gen. Div.).
[41] *Gold v. Rose*, [2001] O.J. No.12 (S.C.J.); *Rogers v. Agincourt Holdings Ltd.* (1976), 74 D.L.R. (3d) 152 at p. 156 (Ont. C.A.).
[42] *Di Felice v. 1095195 Ontario Limited*, 2013 ONSC 1; *Falus v. Martap Developments 87 Limited*, 2012 ONSC 2301; *Gold v. Rose*, [2001] O.J. No.12 (S.C.J.); *Wittlin v. Bergman* (1995), 25 O.R. (3d) 761 (C.A.); *Rogers v. Agincourt Holdings Ltd.* (1976), 74 D.L.R. (3d) 152 at p. 159 (Ont. C.A.); *Ebrahimi v. Westbourne Galleries Ltd*., [1973] A.C. 360 (H.L.); *Bondi Better Bananas Ltd., Re*, [1951] O.R. 845 at p. 855 (C.A.).
[43] *Di Felice v. 1095195 Ontario Limited*, 2013 ONSC 1.

in accordance with his fiduciary obligations to Buhbli Organics and in accordance with his and her rights as shareholders under Ontario's *Business Corporations Act*.

[90] These reasonable expectations were not formalized by any shareholders' agreement, and Ms. Gojkovich had no reasonable expectations of what would or should happen to their labour of love should their love turn to hate. Neither party had any reasonable expectations about the disintegration of their romantic and business relationship and neither party prepared for the circumstances of animosity that has actually occurred. There was no reasonable expectation that there would be a buyout or a sale in the open market in the event that the parties no longer could or would work together in a business which was dependent upon Mr. Rody's stewardship.

[91] Unexpectedly, the personal and business relationship between Ms. Gojkovich and Mr. Rody irreparably broke down. Mr. Rody's corporate conduct became oppressive. In a variety of ways, as described above, Mr. Rody violated Ms. Gojkovich's reasonable expectations. As described in the factual part of these Reasons for Decision, Mr. Rody's violations of Ms. Gojkovich's reasonable expectations were egregious.

[92] However, Ms. Gojkovich's reasonable expectations did not include the expectation that should there be a relationship breakdown that Mr. Rody would be forced to purchase her 50% ownership interest at a fair value around the time of their relationship break up, which is the remedy that she seeks in this application for an oppression remedy.

[93] In the circumstances of the immediate case, the remedy sought by Ms. Gojkovich would not be curative of her reasonable expectations, which did not include a forced purchase by Mr. Rody of her 50% interest in Buhbli Organics, and, in any event, the remedy sought by Ms. Gojkovich is not feasible nor fair to either party in the circumstances of the immediate case.

[94] Ms. Gojkovich had a reasonable expectation that the parties would be treated equally in earning a living from Buhbli Organics and Mr. Rody's conduct has violated her reasonable expectations. There is an obvious remedy for that act of oppression, which is to award Ms. Gojkovich damages equivalent to the remuneration that Mr. Rody and Organic Products Consulting have extracted directly or indirectly from Buhbli Organics since January 2022.

[95] The appropriate remedial order in the immediate case is: (a) to have Mr. Rody and Buhbli Organics be liable for damages for Mr. Rody's oppressive conduct; and (b) simultaneously to wind up Buhbli Organics. The quantum of the damages is equal to what Mr. Rody appropriated for himself directly or indirectly from his oppressive conduct while in control of the business of Buhbli Organics during the period in which Ms. Gojkovich was cut off from any income from the business.

[96] Because of Mr. Rody's wrongful refusal to answer questions about the income he was receiving from Buhbli Organics, I order that the Respondents shall: (a) within twenty days disclose by sworn affidavit the amount of remuneration, compensation, and/or revenue paid to or received by Mr. Rody from Buhbli Organics and Organic Products Consulting by any means, including salaries, dividends, consulting contracts, loan advances, repayment of shareholder's loans, sale of shares, sale of assets, *etc.* for the period from January 2022 to date; and (b) pay the equivalent sum to Ms. Gojkovich within thirty days. If the Respondents fail to make the aforesaid disclosure or fail to pay the aforesaid equivalent remuneration, compensation, and/or revenue paid to Mr. Rody, then the Respondents shall be jointly and severally liable to pay Ms. Gojkovich $170,000 within forty days.

[97] I arrive at the sum of $170,000 as being $10,000 per month for the seventeen months between January 2022 to May 2023. The sum of $10,000, of course, is the sum that Mr. Rody was prepared to have Ms. Gojkovich receive as a so-called silent partner.

[98] The winding up of Buhbli Organics is necessary and inevitable. Ms. Gojkovich could not have reasonably expected to have her shares purchased should the relationship between the co-owners deteriorate. Ms. Gojkovich did not have any expectation that she would be spared the risks of the disintegration of her business and personal relationship with Mr. Rody, which was simply not envisioned.

[99] In any event, a forced sale of Ms. Gojkovich's shareholding to Mr. Rody at a fixed price would not work, because Mr. Rody is not willing and may not be able to pay the $831,000 sought by Ms. Gojkovich, and there is no admissible evidence as to what was or is the fair market value for a 50% interest in Buhbli Organics. Moreover, the proposed valuation date of January 31, 2022 is not appropriate because the oppressive conduct of excluding Ms. Gojkovich from the affairs of the company of which she was a co-owner and of denying her any remuneration would not influence the fair value of the shares and Ms. Gojkovich had no reasonable expectation to be protected from the tides of the world of commerce.

[100] A buy-sell agreement without a fixed price would not be fair or just because Ms. Gojkovich has no capability whatsoever to compete with Mr. Rody, and it is highly unlikely that she would be able to obtain financing without recruiting a new business partner with the acumen to replace Mr. Rody, and thus she would be forced to accept whatever little sum Mr. Rody was prepared to pay.

[101] A court ordered corporate buy-sell shotgun agreement to set the terms and conditions for buying or selling the shares in Buhbli Organics at $831,000 would not work or be fair or just for similar reasons. Buy-sell arrangements where a shareholder offers to purchase shares at a price that if refused requires the offeree to purchase the offeror's shares at the same price, a so-called shotgun sale agreement, work reasonably well when the parties have the same competitive capacity. But when the offeror has the competitive advantage that the offeree does not have the economic resources to compete, then the offeror runs no risk if he or she "low balls" the price of the shares. That would be the situation in the case at bar, where Ms. Gojkovich is unable to compete with Mr. Rody.

[102] In the immediate case, a court ordered corporate buy-sell agreement with a fair value to be determined by an evaluation procedure would also not work or be fair or just for similar reasons and because neither party has the resources to pay for the evaluation process and, in any event, neither party appears willing or able to pay fair value for Buhbli Organics.

[103] While a winding up order is regarded as the remedy of last resort in oppression remedy proceedings, the immediate case is one of those cases where in addition to the payment of damages by the corporate oppressor, it is the only fit order for the court to make. A winding up order is also appropriate because of the total deterioration of the business partnership of Ms. Gojkovich and Mr. Rody.

[104] A finding of oppression may but does not always attract substantial indemnity costs,[44] but they are warranted in the immediate case because of the egregious conduct of Mr. Rody in violating Ms. Gojkovich's rights as a co-owner of Buhbli Organics.

E. Conclusion

[105] For the above reasons, I make the Order set out in the Introduction to these Reasons for Decision.

Perell, J.

Released: May 9, 2023

[44] *König v. Hobza*, 2014 ONCA 691.

CITATION: Gojkovich v. Buhbli Organics Inc., 2023 ONSC 2738
COURT FILE NO.: CV-22-00679459-0000
DATE: 20230509

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHELLE GOJKOVICH

Applicant

- and -

BUHBLI ORGANICS INC., ORGANIC PRODUCTS CONSULTING INC. and JOHN RODY

Respondents

REASONS FOR DECISION

PERELL J.

Released: May 9, 2023